

The opinion in support of the decision being entered today was ***not*** written for publication in a law journal and is ***not*** binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAUL J. BURAS

Appeal No. 2006-2119
Application No. 10/357,977

ON BRIEF

Before GARRIS, TIMM, and JEFFREY T. SMITH, *Administrative Patent Judges*.

JEFFREY T. SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Applicant appeals the Examiner's final rejection of claims 2 to 6, 8, 9, 16, and 21 to 26, all the of the pending claims. We have jurisdiction under 35 U.S.C. § 134.

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CITATION OF REFERENCES

The Examiner relies upon the following references in rejecting the claims on appeal:

Defoor et al. (Defoor)	6,025,418	Feb. 15, 2000
Liang	6,429,241 B1	Aug. 6, 2002
Rached et al. (Rached)	6,713,540 B2	Mar. 30, 2004 filed Mar. 8, 2002)

GROUNDS OF REJECTION

The Examiner has rejected the subject matter of claim 8 under 35 U.S.C. § 112, first and second paragraphs (Answer, page 3). The Examiner has also rejected the subject matter of claims 2 to 4, 8, 9, and 21 to 26 under 35 U.S.C. § 102(e) as anticipated by Liang; and claims 2 to 6, 8, 9, 16, and 21 to 26 under 35 U.S.C. § 103(a) as obvious over the combination of Liang and either of Defoor or Rached (Answer, pages 4 and 5).

Upon careful consideration of the claims, specification, and applied prior art, including all of the arguments advanced by both the Examiner and Appellant in support of their respective positions, we affirm all of the above-stated rejections.

Appellant's invention relates to polymer modified asphalt compositions and methods of preparing the same. Appellant asserts that improvements in rubber/asphalt compatibility may be obtained by cross-linking with certain cross-linkers at temperatures higher than those normally employed (Brief, page 2). Representative claim 22, as presented in the Appendix to the Brief, appears below:

22. A polymer modified asphalt compositions formed from the method comprising:
mixing asphalt and an elastomeric polymer to form a mixture:

adding a crosslinker to the mixture at a crosslinking temperature of between 185°C and 190°C to form the polymer modified asphalt composition, wherein the crosslinker is selected from the group consisting of a sulfur-containing derivative, elemental sulfur and mixtures thereof; and

determining a top and bottom softening point of the polymer modified asphalt composition and wherein the crosslinking temperature is adapted to control the compatibility of the polymer modified asphalt composition, resulting in a difference between the top and bottom softening points of 20°C or less.

Appellant has failed to respond to the Examiner's rejections under 35 U.S.C. § 112, first paragraph or second paragraph (see Briefs, generally). Since Appellant has failed to address the Examiner's rejections, we summarily sustain the afore-stated rejections (see the Manual of Patent Examining Procedure (MPEP) § 1205.02 (8th ed., October 2005)).

Upon careful review of the respective positions advanced by the Appellant and the Examiner regarding the rejections under §§ 102 and 103, we find that the Examiner's rejections are well founded inasmuch as they are supported by the prior art evidence relied upon and in accordance with the current patent jurisprudence. Accordingly, we will sustain the Examiner's rejections for essentially those reasons expressed in the Answer.

Concerning the rejection under § 102 over Liang, Appellant's principal argument is that Liang does not recognize controlling the compatibility of the composition via cross-linking temperature. (Brief, page 3). However, we agree with the Examiner that Liang teaches the addition of the cross-linker at a temperature of 185°C. (See Examples 3 to 6). Thus, the invention of Liang produces a bituminous composition that is formed under the same conditions as specified by the appealed claims.¹ We note that a person of ordinary skill in the art repeating

¹ Appellant has not presented separate arguments for the claims on appeal. Thus, we select claim 21 as representative of the rejected claims.

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Examples 3 to 6 of Liang adding a cross-linker at a temperature of 185°C as specified in the examples would have been practicing the claimed invention. *See Mehi/Biophile Int'l Corp. v. Milgraum*, 192 F.3d 1362, 1366, 52 USPQ2d 1303, 1307 (Fed. Cir. 1999) ("Where, as here, the result is a necessary consequence of what was deliberately intended, it is of no importance that the article's authors did not appreciate the results."); *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990) ("It is a general rule that merely discovering and claiming a new benefit of an *old* process cannot render the process again patentable."); *accord In re Spada*, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990). As such, Appellant's description of the cross-linking temperature as "adapted to control the compatibility of the modified polymer asphalt composition" does not serve to distinguish the claimed invention from Liang.

Regarding the rejection under 35 U.S.C. § 103(a), Appellant presents the same argument discussed above. As stated above, Liang's disclosure of adding the cross-linker at a temperature of 185°C renders the claimed subject matter unpatentable. The examiner presented the secondary references to Defoor and Rached as evidence of cross-linkers known in the art. Appellant has not specifically addressed the Examiner's motivation for including the cited references. Rather, Appellant argues that the additional references do not supply the missing limitation of a narrow cross-linking temperature range to control the compatibility of the composition. This argument is not persuasive for the reasons set forth above and in the Answer.

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Appellant asserts (Reply Brief, page 2) that the examples in the specification demonstrate unexpected results are achieved at temperatures of between 185°C to 190°C. This argument and evidence is not persuasive to overcome the Examiner's rejection under § 102.²

Based on consideration of the entire record, we affirm the Examiner's rejections under §§ 102 and 103.

CONCLUSION

The examiner's rejection under 35 U.S.C. § 112, first and second paragraphs, and the prior art rejections under 35 U.S.C. §§ 102 and 103 are affirmed.

² Anticipation under § 102 is a question of fact which is not rebuttable by evidence of unexpected superior properties. *See, for example, In re Malagari*, 499 F.2d 1297, 1302, 182 USPQ 549, 553 (CCPA 1974), wherein the Court stated that anticipation cannot be overcome by evidence of unexpected results or teaching away in the art.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (2004).

AFFIRMED

BRADLEY R. GARRIS)
Administrative Patent Judge)
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CATHERINE TIMM) BOARD OF PATENT
Administrative Patent Judge) APPEALS AND
) INTERFERENCES
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JEFFREY T. SMITH)
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