

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte ALLAN E. HOKANSON, CHRISTOPHER S. WILLIAMS
and DEREK WILLIAMS

Appeal No. 2007-0282
Application No. 10/852,493

ON BRIEF

Before ADAMS, MILLS, and LEOVITZ, Administrative Patent Judges.

LEOVITZ, Administrative Patent Judge.

DECISION ON APPEAL AND REMAND TO EXAMINER

This appeal involves claims to methods of treating animal waste. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 134.

Claims 1-9 and 12-36 are pending. Claim 36 has been withdrawn from consideration. Brief, page 2. Claims 1-9 and 12-35 stand rejected over prior art. Id. We affirm the prior art rejections of claims 28-35, but include a new ground of rejection for certain claims. However, we vacate the prior art rejections as applied to claims 1-9 and 12-27 and remand the application to the Examiner to consider the issues set forth in the discussion below and take appropriate action.

Discussion

Obviousness under 35 U.S.C. § 103

Claims 28-31, 34, and 35

Claims 28-31, 34, and 35 stand rejected under 35 U.S.C. § 103(a) as obvious over Sower¹ in view of Seckler.²

The claims stand or fall together because Appellants did not provide separate arguments for the patentability of any individual claims. We select claim 28 as representative.

28. A method of recycling hog waste, comprising:
removing solid waste from a hog confinement area;
treating said solid waste;
separating digested feed from undigested feed in the solid waste; and
creating feedstock from said undigested feed.

Seckler teaches recovering raw manure from an animal feedlot. Seckler, column 3, lines 35-36; Final Office Action, page 5. This meets the limitation of claim 28 in which solid waste is removed from an animal confinement area. The manure is processed by adding water (column 3, lines 53-58), chlorine (column 3, lines 66-67), and detergent (column 4, lines 5-7) to form a slurry. The slurry can also be heated. Id., column 4, lines 10-12. These steps satisfy the claim limitation of “treating said solid waste.” The manure is separated, using mesh screens, into digested and undigested food. Id., column 1, lines 3-19; column 4, lines 20-66; Final Office Action, page 5. This step meets the requirement of claim 28 of “separating digested feed from undigested feed in the solid waste.” Finally, Seckler teaches that feedstock is created from undigested

¹ Sower, U.S. Patent 6,409,788 B1, Jun. 25, 2002.

² Seckler, U.S. Patent 3,875,319, Apr. 1, 1975.

feed, as required by the last step of claim 28. Id., column 2, lines 65-67 (“The solid fraction of the last separator may be washed and pressed to provide a feed product consisting essentially of undigested grains and fibers.”). Thus, Seckler teaches all the limitations recited in claim 28, but does not describe the waste as being from a hog as required by the claim.

“When patentability turns on the question of obviousness, the search for and analysis of the prior art includes evidence relevant to the finding of whether there is a teaching, motivation, or suggestion to select and combine the references relied on as evidence of obviousness.” In re Lee, 277 F.3d 1338, 1343, 61 USPQ2d 1430, 1433 (Fed. Cir. 2002). A suggestion, teaching, or motivation to combine the relevant prior art teachings does not have to be found explicitly in the prior art. “[T]he teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references. The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art.” In re Kahn, 441 F.3d 977, 987-988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006).

Seckler teaches the desirability of recycling manure “both for the purpose of recovering valuable nutrients and to overcome environmental and other problems encountered in attempting to dispose of the manure.” Column 1, lines 50-53. Like Seckler, Sower also teaches that organic waste from animals, including pigs (i.e., “hogs”), can cause “serious pollution” and environmental problems. Sower, column 1, lines 28-38; column 14, lines 33-39. In view of Sower’s teaching that disposal of pig waste is associated with the same environmental problems identified generally by

Seckler for all animal waste, the skilled worker would have been motivated to have applied Secker's method to Sower's pig waste for the purpose of solving the same problem. Moreover, Seckler states that its process can be used for "recycling animal manure." Column 1, lines 3-4. We understand this to be a general teaching that any animal manure can be mined for undigested food. Accordingly, we concur with the Examiner that claim 28 is obvious over Seckler in view of Sower.

Appellants argue that "if the Seckler teachings were incorporated into Sower, Sower's fertilizer manufacturing process would be substantially and adversely impacted." Brief, page 15, lines 6-7. This argument fails to recognize that Seckler teaches all the limitations of claim 28, albeit not using hog waste.

Appellants provide a declaration by Mr. Derek Williams, a co-inventor of the claimed subject matter, to support their position that a person of ordinary skill in the art would be dissuaded from removing undigested food prior to applying Sower's process. See, Declaration of Derek Williams, ¶ 15. Mr. Williams asserts that "[o]ne of main purposes of Mr. Sower's patent is to make fertilizer." Id. He argues that removing the undigested food would "reduce the production of methane gas, which is the source of energy for drying the fertilizer." Id.

"While objective factual evidence going towards a §103 determination is preferable to statements of opinion on the issue, the nature of the matter sought to be established, as well as the strength of the opposing evidence, must be taken into consideration in assessing the probative value of expert opinion." Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 294, 227 USPQ 657, 665 (Fed. Cir. 1985), cert. denied, 475 U.S. 1017 (1986). In this case, we find stronger evidence of

record which is contrary to Mr. William's opinion. Sower states that the fuel supplied to the dryer can be supplemented by additional non-biogas (i.e., methane gas) fuel.

Column 24, lines 29-36. Thus, Sower does not teach that its drying process depends solely on the production of methane gas as presumed in the Williams declaration.

Although the cited references are the same as those relied upon by the Examiner, our rationale for combining them is different. We designate this as a new ground of rejection in order to provide Appellants with the opportunity to respond to it. See 37 C.F.R. § 41.50(b); In re Kumar, 418 F.3d 1361, 1367, 76 USPQ2d 1048, 1051 (Fed. Cir. 2005).

For the foregoing reasons, we affirm the rejection of claim 28. Because claims 29, 30, 31, 34, and 35 were not separately argued, they fall together with claim 28.

Claims 32 and 33

Claims 32 and 33 stand rejected under 35 U.S.C. § 103(a) as obvious over Sower in view of Seckler, and further in view of Lloyd.³

Claim 32 depends on claim 28 and further requires "removing solid waste from the hog confinement area" by "flushing" it. Claim 33 also depends on claim 28 and further requires "reusing water flushed from the hog confinement area to flush waste" from it. Final Office Action, page 5. Both these steps are taught by Sower (e.g., Fig. 1; column 16, lines 25-28) and Lloyd (e.g., Fig. 1; column 1, lines 18-22; column 3, line 66- column 4, lines 2 and 44-45). However, neither Sower nor Lloyd teaches removing undigested feed from the solid waste as required by the claims.

³ Lloyd, U.S. Patent 6,083,386, Jul. 4, 2000.

As discussed above, Seckler teaches the desirability of recycling manure “both for the purpose of recovering valuable nutrients and to overcome environmental and other problems encountered in attempting to dispose of manure.” Column 1, lines 49-53. Consequently, it would have been obvious to the skilled worker to have applied Seckler’s method of recovering undigested food to the waste treatment methods of Sower or Lloyd for the purpose of recovering “valuable nutrients” as taught by Seckler.

Appellants argue that that “[t]here is no reason to combine Lloyd in order to reduce the amount of water required because Sower already achieves that by recycling liquid for the purposes of flushing.” Brief, page 15 (emphasis removed). However, this argument is moot because our rationale for combining the references differs from the explanation provided by the Examiner. We designate this as a new ground of rejection in order to provide Appellants with the opportunity to respond to it.

Remand and vacate rejection of claims 1-9 and 12-27

Claims 1-3, 5-9, 13-15, and 20 stand rejected as obvious under 35 U.S.C. § 103(a) over Sower in view of Lloyd. Claims 4, 16, 21-25, and 27 stand rejected as obvious under 35 U.S.C. § 103(a) over Sower in view of Lloyd, and further in view of Seckler. Claim 12 stands rejected as obvious under 35 U.S.C. § 103(a) over Sower in view of Lloyd, and further in view of Lamy.⁴ Claims 17-19 stand rejected as obvious under 35 U.S.C. § 103(a) over Sower in view of Lloyd, and further in view of Schwoyer.⁵

⁴ Lamy, U.S. Patent 6,245,121 B1, Jun. 12, 2001.

⁵ Schwoyer, U.S. Patent 4,735,900, Aug. 23, 1988.

Claim 26 stands rejected as obvious under 35 U.S.C. § 103(a) over Sower in view of Lloyd and Seckler, and further in view of Lamy.

For discussion purposes, we select claim 1 as representative and reproduce it below:

1. A method of treating animal waste, comprising:
removing animal waste from an animal confinement area;
passing the animal waste to a holding tank;
mixing an alkaline composition with the animal waste in the holding tank to create a waste mixture;
removing ammonia from the holding tank or the waste mixture;
transferring the waste mixture to a solids separator;
separating the waste mixture into solids and a liquid;
after separating the solids, returning the liquid to the animal confinement area for reuse; and
continuously flushing the animal confinement area by directing the returned liquid through the animal confinement area.

On consideration of the record before us, we find that these rejections are not in condition for a decision on appeal. Accordingly, we vacate the rejections of claims 1-9 and 12-27 and remand the application to the Examiner to consider the issues discussed below and take appropriate action not inconsistent with the views expressed herein. Lest there be any misunderstanding, the term “vacate” in this context means to set aside or void. When the Board vacates an examiner’s rejection, the rejection is set aside and no longer exists. Cf. Ex parte Zambrano, 58 USPQ2d 1312, 1313 (Bd. Pat. App. & Int. 2001).

All of the rejections involve Sower and Lloyd. Sower describes an organic waste treatment and disposal system that converts organic waste from animals into fertilizer and feed supplements. Sower, column 9, lines 30-40. Lloyd is also an animal waste treatment system. “The process yields solids that can be captured and processed as

fertilizer as well as wash water for the animal pens, water for other purposes such as irrigation, and, optionally, potable drinking water for the animals.” Lloyd, column 1, lines 18-22. The Examiner states that “[t]he claims differ from Sower by reciting that the separated liquid is returned to the confinement area for reuse, or hog barn for further flushing waste.” Final Rejection, page 2. The Examiner asserts that it would have been obvious to have combined Lloyd’s teaching of recycling water for reuse in flushing an animal house with Sower. Id., pages 2-3.

Appellants correctly point out that Sower, in fact, teaches that the separated water “can be recycled as treated pit recharge 110 which is used for flushing.” Sower, column 16, lines 25-28. See Brief, pages 5-6. Thus, the Examiner incorrectly characterized the difference between the prior art and the claimed subject matter. Because the Examiner did not respond to Appellants’ argument identifying this apparent error in the rejection, we do not have the benefit of his reasoning for maintaining the ground of rejection.

While clarifying that Sower describes the claimed limitation of returning the separated water to the animal confinement area, Appellants do not identify any other basis upon which to distinguish the claimed subject matter from Sower’s method of treating animal waste. If the Examiner is otherwise correct that all other limitations in the claimed method are described by Sower, and absent Appellants’ arguments to the contrary, we are left with the possibility (and even admission by Appellants), that Sower more properly should be regarded as anticipating claim 1. Upon return of the application to the technology center, the Examiner should make specific findings, including identifying column and line number, where each element of the claimed

subject matter can be found in the Sower patent and whether there is sufficient evidence to establish a prima facie case of anticipation.

We further direct the Examiner's attention to the requirement in claim 1 of "removing ammonia from the holding tank or the waste mixture." Appellants state that "[i]t is undisputed that Sower includes a system for removing ammonia from animal waste. This is described in Sower at column 29, lines 3-61 and illustrated in Figure 6 of Sower." Brief, page 12. Fig. 6, however, does not disclose "returning the liquid to the animal confinement area for reuse; and continuously flushing the animal confinement area by directing the returned liquid through the animal confinement area" as required by claim 1. The Examiner should determine whether the ammonia removal system shown in Fig. 6 is properly combined or used in conjunction with the preferred embodiment of Fig. 1 or any other waste treatment method described in Sower that also recycles water.

As an alternative, the Examiner should consider in the context of 35 U.S.C. § 103 whether there is motivation to have removed ammonia from the organic waste as described in both Sower and Lloyd, but at a different point than disclosed in these prior art waste treatment methods. For example, Schwoyer teaches de-ammoniating, preferably by ammonia stripping, waste liquid to recover the ammonia compounds for use as a fertilizer which could provide motivation to have removed ammonia from Sower's clarifier. Schwoyer, column 2, lines 20-27.

In view of the above, we vacate the rejection and remand the application to the Examiner.

TIME PERIOD

Regarding the affirmed rejection(s), 37 C.F.R. § 41.52(a)(1) provides “Appellant may file a single request for rehearing within two months from the date of the original decision of the Board.”

In addition to affirming the examiner’s rejection(s) of one or more claims, this decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should the appellant elect to prosecute further before the examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

The application is also remanded to the examiner pursuant to 37 C.F.R.

§ 41.50(a)(1) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)) is made for further consideration of a rejection(s). The application will be remanded to the examiner at the end of the two month period provided under 37 C.F.R. § 41.50(b) as indicated above, unless:

(1) Appellants elect to further prosecute claims before the examiner pursuant to 37 C.F.R. § 41.50(b)(1), which election shall serve as the remand pursuant to 37 C.F.R. § 41.50(a)(1); or (2) Appellants request a rehearing under 37 C.F.R. § 41.52 by the Board upon the same record, in which event the remand will take effect upon a decision by the Board on any such rehearing. This application, by virtue of its “special” status, requires an immediate action. Manual of Patent Examining Procedure § 708.01 (8th ed., rev. 4, October 2005). It is important that the Board be informed promptly of any action affecting the appeal in this case. No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART/§ 41.50(b)/VACATED-AND-REMANDED-IN-PART

Donald E. Adams)
Administrative Patent Judge)
)
)
) BOARD OF PATENT
Demetra J. Mills)
Administrative Patent Judge) APPEALS AND
)
) INTERFERENCES
)
Richard M. Lebovitz)
Administrative Patent Judge)

Appeal No. 2007-0282
Application No. 10/852,493

Page 12

COATS & BENNETT, PLLC
P O BOX 5
RALEIGH NC 27602