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

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte SUSAN R. SANTOS, STEPHEN D. SIMON, and KAREN COX

Appeal 2007-1595
Application 09/751,858
Technology Center 3600

Decided: June 13, 2007

Before STUART S. LEVY, LINDA E. HORNER, and ANTON W. FETTING, *Administrative Patent Judges.*

FETTING, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF CASE

This appeal from the Examiner's rejection of claims 1-21 and 27, the only claims pending in this application, arises under 35 U.S.C. § 134. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6.

We REVERSE and ENTER A NEW GROUND OF REJECTION UNDER 37 C.F.R. § 41.50(b).

The Appellants invented a way to overcome problems experienced in the art of identifying, monitoring, and analyzing trends and patterns of interest within an organization. More specifically, the invention performs date gap analysis to avoid aggregation on calendar or other artificial boundaries; and presents the analysis as a control chart to facilitate understanding of the data; it adds workload adjustments to avoid false indicators; it presents its results in tabular and graphical data displays to identify anomalous data and monitor data quality; and it provides a drill down mechanism for investigating trends and anomalous data points in detail (Specification 7). An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below.

> 1. A system for facilitating statistical analysis of events, the system comprising:
>
> a first input device operable to receive raw data regarding the events, including the nature, place, time, and date of each event, and convert the raw data into formatted data having a suitable electronic format;
>
> a memory storage device operable to store the formatted data;
>
> a computer-readable medium encoded with a code segment operable to enable a computer to perform date gap analysis and control chart analysis on the formatted data and make workload adjustments thereto to produce an analysis output, wherein the date gap analysis includes determining an elapsed time between consecutive events and an average elapsed time, and wherein the output indicates a value for each elapsed time and a value for the average elapsed time;
>
> a display device operable to display the analysis output; and
>
> a second input device operable to allow a user to request a more specific analysis of at least one identified event, with the identified event being user-selected from the display.

This appeal arises from the Examiner's Final Rejection, mailed November 22, 2005. The Appellants filed an Appeal Brief in support of the appeal on July 20,

2006, and the Examiner mailed an Examiner's Answer to the Appeal Brief on August 29, 2006. A Reply Brief was filed on October 24, 2006.

PRIOR ART

The prior art references of record relied upon by the Examiner in rejecting the appealed claims are:

Jensen US 6,065,000 May 16, 2000

Donald W. Pfeiffer, *Safety Plan Nets Results At Teksid*, Foundry Management & Technology, vol. 126, no. 7, p. 28, July 1998

REJECTION

Claims 1-21 and 27 stand rejected under 35 U.S.C. § 103(a) as obvious over Jensen and Pfeiffer.

ISSUES

The Examiner found that Jensen discloses a system for facilitating statistical analysis of events, including a first input device operable to receive raw data regarding the events, including the nature, place, time, and date of each event, and convert the raw data into formatted data having a suitable electronic format; a memory storage device operable to store the formatted data; a code segment operable to perform date gap analysis and control chart analysis on the formatted data to produce an analysis output; a display device operable to display the analysis output; and a second input device operable to allow a user to request a more specific analysis of at least one identified event, with the identified event being

user-selected from the display. (Answer 3-4).

The Examiner further found that Jensen provides various examples of date gap analysis and control chart analysis and also allows information regarding corrective actions responsive to workplace incidents to be recorded and displayed. The Examiner found, however, that Jensen does not expressly teach that a code segment makes workload adjustments based on these analyses (Answer 5).

To overcome this deficiency, the Examiner took Official Notice of the notoriety to adjust workloads accordingly in response to dangerous working conditions. The Examiner argued that since Jensen is directed toward analysis of workplace-related injury and accident statistics that it would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to modify Jensen to generate corrective actions involving workload adjustments in order to extend the usefulness of Jensen's invention to industries where many workers are negatively affected by poor workload conditions (Answer 5). Furthermore, the Examiner contends that automation of a well-known manual process would have been obvious to one of ordinary skill in the art at the time of Applicant's invention (Answer 5-6).

The Examiner further found that Jensen does not expressly disclose that its computer-executed date gap analysis includes determining an elapsed time between consecutive events and an average elapsed time, wherein the output includes a value for each elapsed time and a value for each average elapsed time. To overcome this deficiency, the Examiner first notes that in Jensen, accidents may be graphed or charted based on frequency by day of week, time of day, and over a given period of time, such as a month, year, or specified date range (Answer 6).

The Examiner then found that Pfeiffer discusses Teksid Aluminum Foundry

Inc.'s Safety and Health Program that has been implemented to reduce incident rates, and, as part of this program, Teksid Aluminum Foundry Inc. "displays recordable incidents per month and days since the last lost time incident throughout the plant" (Answer 6-7). The Examiner contends that since both Jensen and Pfeiffer are directed toward improving workplace safety, and that Jensen automates the collection of data needed to calculate lapse of time between specific events, it would have been obvious to one of ordinary skill in the art to modify Jensen to determine an elapsed time between consecutive events, wherein the output includes a value for each elapsed time in order to facilitate implementation of a safety program that alerts workers to the days that have passed since the last incident in order to provide these workers with a concrete goal to surpass in an effort to improve workplace safety, as suggested by Pfeiffer (Answer 7-8).

The Appellants contend that neither reference shows performing date gap analysis, control chart analysis or making workload adjustments, that Jensen's posting of a sign with the number of days since the last accident does not suggest a date gap analysis with comparison to the average date gap, and that the official notice regarding adjusting actual workload in contrast with workload data does not make up for this deficiency (Br. 9-14).

Thus, the issue pertinent to this appeal is whether the rejection of claims 1-21 and 27 under 35 U.S.C. § 103(a) as obvious over Jensen and Pfeiffer is proper. In particular, the issue is whether the combined teachings of Jensen and Pfeiffer would have led one having ordinary skill in the art to perform date gap analysis, perform control chart analysis, or make workload adjustments.

FACTS PERTINENT TO THE ISSUES

The following facts, supported by a preponderance of evidence, are pertinent to the issue at hand.

Specification and Claim Terms

01. A date gap is the number of days or more generally the amount of time between an event and a previous event (Specification 7:17-21).

02. Date gap analysis is the analysis of events according to the time between the event and the previous event relative to the average time between events (Specification 7:21-23).

03. Control chart analysis is an analysis displayed in tabular or graphical form (Specification 7:24-25).

04. The terms "workload" and "workload adjustment" are not lexicographically defined in the Specification. One exemplary embodiment of a workload adjustment is an adjustment that determines whether workload was a factor in signaling of a special cause in variation portrayed in the date gap analysis (Specification 11:2-8).

Jensen

05. Jensen shows several examples of analyses displayed in tabular or graphical form, which are therefore control charts, and these tabular and graphical displays show separating data based upon labeled criteria, in Jensen, Figs. 5-8.

06. Jensen does not show any analysis of events according to the time between the event and the previous event relative to the average time between events.

07. Jensen does not show any adjustment that determines whether workload was a factor in signaling of a special cause in variation portrayed in a date gap analysis.

Pfeiffer

08. Pfeiffer does show that Teksid Aluminum Foundry (TAF) displayed the number of days since the last lost time incident throughout the plant (Pfeiffer, paragraph 12), but does not show any analysis of events according to the time between the event and the previous event relative to the average time between events.

09. Pfeiffer does not show any adjustment that determines whether workload was a factor in signaling of a special cause in variation portrayed in a date gap analysis.

10. The Examiner takes official notice of the notoriety of adjusting workloads in response to dangerous working conditions. (Answer 5).

PRINCIPLES OF LAW

Claim Construction

The general rule is that terms in the claim are to be given their ordinary and accustomed meaning. *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999). In the USPTO, claims are construed giving their broadest reasonable interpretation.

> [T]he Board is required to use a different standard for construing claims than that used by district courts. We have held that it is erroneous for the Board to "appl[y] the mode of claim interpretation that is used by courts in litigation, when interpreting the claims of

> issued patents in connection with determinations of infringement and validity." In re Zletz, 893 F.2d 319, 321, 13 USPQ2d 1320 (Fed. Cir. 1989); accord In re Morris, 127 F.3d 1048, 1054, 44 USPQ2d 1023 (Fed. Cir. 1997) ("It would be inconsistent with the role assigned to the PTO in issuing a patent to require it to interpret claims in the same manner as judges who, post-issuance, operate under the assumption the patent is valid."). Instead, as we explained above, the PTO is obligated to give claims their broadest reasonable interpretation during examination.

In re Am. Acad. of Sci. Tech Ctr., 367 F.3d 1359, 1364, 70 U.S.P.Q.2d 1827, 1830 (Fed. Cir. 2004).

Obviousness

These claims are under rejection for obviousness. A claimed invention is unpatentable if the differences between it and the prior art are "such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." 35 U.S.C. § 103(a) (2000); *In re Kahn*, 441 F.3d 977, 985 (Fed. Cir. 2006) (citing *Graham v. John Deere Co.*, 383 U.S. 1, 13-14, (1966)). In *Graham*, the Court held that that the obviousness analysis begins with several basic factual inquiries: "[(1)] the scope and content of the prior art are to be determined; [(2)] differences between the prior art and the claims at issue are to be ascertained; and [(3)] the level of ordinary skill in the pertinent art resolved." 383 U.S. at 17. After ascertaining these facts, the obviousness of the invention is then determined "against th[e] background" of the *Graham* factors. *Id*. at 17-18.

The Supreme Court has provided guidelines for determining obviousness based on the *Graham* factors. *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385 (2007). "A combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. *Id* at 1731,

82 USPQ2d at 1396. "When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, §103 likely bars its patentability." *Id*. For the same reason, "if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond that person's skill." *Id.* "Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed." *Id* at 1732, 82 USPQ2d at 1397.

ANALYSIS

Claims 1-21 and 27 rejected under 35 U.S.C. § 103(a) as obvious over Jensen and Pfeiffer.

The Examiner finds that Jensen shows control chart analysis, but not date gap analysis or workload adjustments, *supra*. We concur in these findings (FF05, 06, & 07). The Examiner is unable to show either date gap analysis or workload adjustments in Pfeiffer, *supra*, and we also find none in Pfeiffer (FF08 & 09). The Examiner contends that the date gap analysis deficiency is resolved by Pfeiffer's statement regarding a posting of the number of days since the last event throughout a plant, further contending that this would have suggested a safety program alerting workers to the days that have elapsed to provide a concrete goal (Answer 7).

While such a safety program might be suggested, we are at a loss to discern the relevance to performing a date gap analysis of all events that are under analysis

according to the time between the event and the previous event relative to the average time between those events.

The posting referred to by the Examiner excludes all events but the most recent in its message. The Examiner has not contended that excluding all events but the most recent event and its predecessor is sufficient to read on the claimed subject matter, and we find that the claimed subject matter, being aimed at facilitating statistical analysis of plural events, would not embrace such an exclusion among plural such events. Therefore posting only the gap between the two most recent events, as done by Pfeiffer, does not meet the claimed subject matter.

The Examiner goes on to contend that computer automation is obvious, but is unable to show a manual embodiment of the claimed subject matter against which to apply this argument. Therefore, we must conclude that the Examiner erred in finding the obviousness of incorporating date gap analysis to the combined teachings of Jensen and Pfeiffer.

The Appellants contend that the Examiner's official notice of the notoriety of adjusting workloads according to safety concerns (FF10) is not relevant to making workload adjustments to data (Reply Br. 3). We agree that these two actions are different and that the Examiner has not provided any showing of how such notoriety would suggest making the data adjustments of the claimed subject matter. Therefore, we must conclude that the Examiner erred in finding the obviousness of incorporating workload adjustments to the combined teachings of Jensen and Pfeiffer.

NEW GROUND OF REJECTION

We make the following evidence of record:

Susan S. Baum and Cheryl M. O'Donnell, *An Approach to Modeling Labor and Machine Down Time in Semiconductor Fabrication*, Proceedings Of The 23rd Conference On Winter Simulation, Phoenix, Arizona, ISBN:0-7803-0181-1, Pp. 448 - 54 , 1991 (Baum)

Alan Dix and Geoffrey Ellis, *Starting Simple – Adding Value to Static Visualisation Through Simple Interaction*, Proceedings Of The Working Conference On Advanced Visual Interfaces, L'Aquila, Italy, Pp. 124 - 34 , 1998 (Dix)

We enter a new ground of rejection of claims 1-21 and 27 under 35 U.S.C. § 103(a) as obvious over Baum, Jensen, and Dix.

ADDITIONAL FINDINGS OF FACT (FF)

We make the following additional enumerated findings of fact, which are supported by at least a preponderance of the evidence.

Baum

11. Baum describes an approach to modeling labor resources, and emphasizes techniques for modeling equipment breakdowns (Baum, p. 448).

12. Baum portrays a chart that analyzes machine uptime against the frequency of that uptime (Baum, Fig. 6, p. 452).

13. Baum's analysis regards scheduled and unscheduled downtime and relates the analysis to mean-time-between-failures and mean-time-to-repair (Baum 449).

14. Time between failures is the time gap between the events of a machine beginning operation and its subsequent failure. Mean-time-between-

failures is the average of this time gap (Baum 451).

15. Time to repair is the time gap between the events of a machine failing and its subsequent repair. Mean-time-to-repair is the average of this time gap (Baum 451).

16. A time gap is a generalized form of a date gap (FF01).

17. Thus, Baum describes date gap analysis of events related to machine uptime and time to repair as exemplified by a histogram chart to present such analysis.

18. Baum describes applying a Kolmogorov-Smirnov (K-S) goodness of fit test to the time gap data to test its distribution. This is a statistical analysis based on the difference between the hypothesized distribution and the actual data (Baum 452-453).

19. Baum applies the K-S test to machine uptimes (Baum, 452, Statistical Analysis). Machine uptime is itself a measure of workload, because it is the amount of time a machine works. The distribution function is calculated for each individual data point in the sample (Baum, 453). The number of data points equals the number of machines times the number of data points per machine. The number of machines working is a measure of the amount of work performed, and is also a measure of workload. The K-S test then measures the greatest difference between the distribution function and the data points in the sample. Like the previous computation of the distribution function, this computation relies on the number of machines and hence the workload. These differences are themselves data that are modified during the computation, hence data is being created and adjusted during the course of the computation based

on workload. The result of the K-S test is itself an analysis that is applied to the date gap analysis to determine whether the hypothesized distribution is correct. Thus, applying the K-S test to the time gap data makes workload adjustments to the data pertaining to the date gap analysis to produce a goodness of fit analysis output.

20. The modeling performed by Baum is performed by subroutines within an automated process (Baum p. 451, Methodology).

Jensen

21. Jensen shows a mouse and a keyboard as an input device and shows two computers (one is the computer inherently within a video display terminal to operate graphic display) connected to operate Jensen's software in communication with each other (Jensen, Fig. 1:18, 20, 22 and 24a).

22. Jensen describes analysis of workplace incidents, such as accidents and injury (Jensen, col. 1, ll. 13-15).

23. Jensen collects, formats, and stores data regarding the nature, place, time and date of each event (Jensen, col. 7-8, Table 4).

Dix

24. Dix describes interactive visualisation as one of the most exciting areas in human-computer interaction (HCI) over recent years. It asserts that virtually any static representation can become more powerful by the addition of simple interactive elements. This is demonstrated by adding interactivity to standard representations including stacked histograms, pie charts and scatter plots. Dix shows how adding interactivity can help

resolve many of the trade-offs inherent in static visualisations by allowing multiple options to be available and most importantly for them to be interactively related. (Dix, p. 124, left col., ABSTRACT).

25. Dix describes requesting more specific analysis of charts to reveal detailed data and to dynamically make selections from larger data sets, conventionally referred to as drilling down. (Dix, p. 126, right col., Interaction).

26. Dix portrays the applicability of its teachings toward distributions of the number of hotels by star ratings for each of different geographic locations, hence a frequency distribution[1] of hotels with various star ratings by location, in data visualizations (Dix, Fig. 5a, p. 127). The disclosed embodiment of the claimed date gap analysis is itself portrayed as a line graph of a frequency distribution (Specification: Fig. 4).

27. Dix shows several examples of analyses displayed in tabular or graphical form, which are therefore control charts, in Dix, Figs. 5a & 5b and 6a & 6b (Dix, p. 127-28).

[1] A set of intervals, usually adjacent and of equal width, into which the range of a statistical distribution is divided, each associated with a frequency indicating the number of measurements in that interval. The American Heritage Dictionary of the English Language: Fourth Ed. (2000).

ANALYSIS

As illustrated above, the claimed subject matter is directed toward automated date gap analysis. Such analysis, as applied toward measurement of how long machines operate and take to repair, is notoriously old and well known, particularly in the field of quality measurement, and Baum is only one example of many references that speak to its embodiment in portraying the gaps in times between failure and times to repair. Any search of the terms of art "mean time between failure" and "mean time to repair" in the pertinent databases will return voluminous references. With such a rich vein of prior art, we find it curious that neither reference applied by the Examiner portrayed such an analysis. Thus, we make a new ground of rejection relying on a reference in an art relevant to date gap analysis.

Baum is an exemplary reference within the art of measuring machine operation by date gap analysis, and it has the added virtue that it relates the date gap analysis of machines to its effect on labor (FF11), which, to any manufacturer employing substantial amounts of labor, would immediately suggest a similar analysis toward the analogous statistics in labor due to accidents.

Jensen, applied by the Examiner, is directed toward automated analysis of labor accidents, and describes the data that ought to be collected for such analysis, and examples of interactive user interfaces and the types of analysis that would be needed for analyzing labor accidents.

Dix is directed toward the making charts, such as the automated charts of Jensen, interactive to facilitate further analysis, and describes the process of automating user selected additional analysis colloquially known as drilling down.

As to applying these references to the specific claim limitations, independent

claims 1, 7, 12, and 17 each require date gap analysis shown by Baum (FF17). Claim 1 and 7 require the ability to make workload adjustments and claims 12 and 17 require the actual steps, contrasted with just the ability, of making workload adjustments. The ability to make any adjustments satisfies the requirements for claims 1 and 7, because in these claims workload adjustment is a field of use limitation, and were one to desire to make adjustments concerning workload, the capacity would exist as required in the claims. As to actually making such adjustments in claims 12 and 17, this begs the question of what a workload adjustment is. The Specification has provided an exemplary embodiment, but no lexicographic definition (FF04). Absent a lexicographic definition, claim terms are given their broadest reasonable interpretation to a person of ordinary skill, which would be an adjustment bearing some relation to something that is characterized by the load related to some form of work related to the data under analysis. However, Baum describes a statistical adjustment related to the number of machines that reasonably meets even the exemplary embodiment construction (FF19), and readily meets the broadest reasonable interpretation standard. Both Jensen and Dix show the independent claims' control chart analysis (FF05 & 27).

Independent claim 1 and dependent claim 14 also require obtaining, formatting, and storing data regarding nature, place, time and date for the analysis, which is shown by Jensen (FF23).

The independent claims also require displaying the analysis. The display of the control chart analysis of both Jensen and Dix show that display of analysis is generally met, and the time gap analysis of Baum shows specific date gap analysis. Although Baum's chart does not show actual numbers along its X-axis, a person of ordinary skill would see that the actual time gaps are the implied values along that

axis and, in a larger display, would provide the actual numbers. Although Baum's Fig. 6 does not explicitly show the average, Baum clearly teaches the importance of the average and a person of ordinary skill would have been led to display the average given the importance ascribed by Baum.

Finally, the independent claims require drilling down in responding to a request for more specific analysis of an event by displaying information regarding that event. Dix teaches drilling down to request more specific analysis of the chart portion selected (FF27). Dix shows that the types of charts this might apply to include frequency distribution charts such as that shown as an embodiment of the claimed invention (FF26).

From Baum's application toward labor analysis, one of ordinary skill would have been drawn to Jensen to find the actual data that ought to be collected, and Jensen would have provided examples of the types of user interface and analysis that would be appropriate. The combination of Jensen's two dimensional charts of accidents against frequency for a given time period and Baum's teaching of time gap analysis would have led a person of ordinary skill to Dix for techniques to create Baum's time gap analysis from Jensen's two dimensional charts. Thus, it would have been obvious to a person of ordinary skill in the art to have applied Jensen's taught application of charting worker accidents to Baum's date gap analysis and improving the analytical capability of the resulting chart with Dix's drill down facility.

Dependent claims 2, 13, and 18 further require that data be received on a daily basis. Certainly Baum's collection of data regarding time between failures suggests at least daily data collection, if not hourly or continuous, to provide sufficient precision of the results. In any event, collection of data at a frequency

sufficient to achieve the level of required output precision would have been understood and well within the ability of one of ordinary skill.

Dependent claims 3, 10, 15, and 19 further require that the events involve employee illness and injury. Jensen specifically collects data involving employee injury (FF 22). Illness, being another common reason for employee absence, that might be the result of accidents in certain (e.g. biological and chemical) industries, would have been immediately envisaged from Jensen's teachings.

Dependent claims 4 and 5 require chart and tabular outputs that are shown in Jensen and Dix (FF05 & 27).

Dependent claim 6 requires an input device such as a mouse and dependent claim 8 requires parts of the software be on two separate computers in communication with each other shown by Jensen (FF21).

Dependent claim 9 requires separating data according to predefined separation criteria shown by Jensen (FF05).

Dependent claims 11, 16 and 20 require more specific analysis resulting in date gap analysis, control chart analysis and workload adjustment. Since Dix describes drilling down as providing more detail of the underlying analysis, such drilling down would therefore result in any further analysis of the types, *viz*. data gap, control chart and workload adjustment, performed in the underlying analysis according to the preference of the person directing the analysis. The same process of drilling down would result in the requirement of dependent claim 21 on different data sets. Displaying multiple analyses simultaneously in any operating system since the advent of windowing systems is certainly immediately envisaged by one of ordinary skill in the art.

Dependent claim 27 requires that drilling down result in correlating a number of events with a number of employees. Baum describes correlating the number of events with the number of data points (FF 19), which is related to the number of machines. This would correspond to the number of employees in a similar employee accident analysis. The use to which such an analysis might be applied would be entirely a matter of the intent of the person directing the analysis, and the claim limitation directing the analysis toward determining if the number of events is proportional to the number of employees is no more than a field of use limitation, which will not define the claim over the prior art.

Thus, all of the claimed subject matter in claims 1-21 and 27 are found within the combined teachings of Baum, Jensen and Dix and one or ordinary skill in the art would have been led by each to combine them together to form the claimed subject matter.

CONCLUSIONS OF LAW

The Examiner has failed to show that the combined teachings of Jensen and Pfeiffer describe all of the claimed subject matter. Accordingly we do not sustain the Examiner's rejection of claims 1-21 and 27 under 35 U.S.C. § 103(a) as obvious over Jensen and Pfeiffer.

We enter a new ground of rejection under 37 C.F.R. § 41.50(b) of claims 1-21 and 27 under 35 U.S.C. § 103(a) as obvious over Baum, Jensen and Dix.

DECISION

To summarize, our decision is as follows:

- The rejection of claims 1-21 and 27 under 35 U.S.C. § 103(a) as obvious over Jensen and Pfeiffer is not sustained.
- A new ground of rejection of claims 1-21 and 27 under 35 U.S.C. § 103(a) as obvious over Baum, Jensen and Dix is made pursuant to 37 C.F.R. § 41.50(b).

This decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b) (2006). 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 Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds 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. . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2006).

REVERSED
NEW GROUND OF REJECTION UNDER 37 C.F.R. § 41.50(b)

JRG

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