

The opinion in support of the decision being entered today
is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ZHU ZHAO CHONG

Appeal 2007-1685
Application 10/106,402
Technology Center 1700

Decided: June 29, 2007

Before PETER F. KRATZ, JEFFREY T. SMITH and
LINDA M. GAUDETTE, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the Examiner's rejection of claims 1-20 and 25-33.¹ Although the action appealed from was a non-final rejection, we have jurisdiction pursuant to 35 U.S.C. §§ 6 and 134 since these claims have been twice presented and rejected. *See Ex parte Lemoine*, 46 USPQ2d 1420, 1423 (Bd. Pat. App. & Int. 1994).

We affirm.

¹ An oral hearing was conducted on June 6, 2007.

Appellant's invention relates to a method for processing porkhide dog chews. Independent claim 1 is illustrative:

1. A method of processing porkhide dog chews, comprising the following steps:

subjecting pigskin rawhide to defatting and depilation treatment;

splitting the rawhide into a plurality of layers of split rawhide material;

subjecting the split rawhide material to shaping and drying to produce a shaped hide product; and

smoking the shaped hide product with gaseous smoke to dye and flavor the shaped hide product, resulting in a finished porkhide dog chew.

The Examiner relies on the following prior art references to show unpatentability:

Meyer US 4,163,804 Aug. 7, 1979

Lynch US 6,033,715 Mar. 7, 2000

Wenzhou Huaheng Plastics & Leather Co. Standard Q/NHH 01-2001
(2/6/01)

A.D. Livingston, *Cold-Smoking & Salt-Curing Meat, Fish, & Game*, 43-47 & 83-112, (1995)

Appellant's Admitted Prior Art ("AAPA"), Specification 1-2

The Examiner made the following rejections:

1. Claims 1, 6, 11-20, and 25-33 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Wenzhou and as evidenced by Lynch;

2. Claims 1, 6, 11-20, and 25-33 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Meyer and as evidenced by Lynch;

3. Claims 2-5 and 7-10 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Wenzhou and further in view of Lynch; and

4. Claims 2-5 and 7-10 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Meyer and further in view of Lynch.

ISSUES

I. The Examiner and Appellant disagree over whether Wenzhou is a printed publication under 35 U.S.C. § 102(a). The issues for us to decide are: Has the Examiner provided a reasonable basis to conclude that Wenzhou was disseminated or otherwise made available to the public prior to the date of invention? If yes, then has Appellant provided sufficient evidence to overcome the Examiner's showing?

For the reasons discussed below, we answer the first question in the affirmative and the second question in the negative.

II. The Examiner contends that it would have been obvious to one of ordinary skill in the art to use smoking as the drying method in AAPA based on Meyer's teaching that smoking was an effective means for drying rawhide. Appellant contends that the Examiner's rejection is improperly based on hindsight reasoning. The issue for us to decide is: Has the Examiner identified a teaching, motivation or suggestion in the prior art for combining AAPA and Meyer in the manner claimed?

For the reasons discussed below, we answer this question in the negative.

RELEVANT FINDINGS OF FACT

- 1) AAPA discloses a process of making dog chews which includes the steps of subjecting rawhide to a defatting and depilation treatment; splitting the rawhide into a plurality of layers of rawhide material; and shaping, drying, dyeing and flavoring the split layers of rawhide to form animal-hide dog chews. AAPA also discloses shredding the finished-product hide and mixing with adhesive, mould-pressing and forming, and drying, dying, and flavoring to produce an adhesive product dog chew. (Specification 1:20-2:3).
- 2) AAPA discloses that the process of dyeing and flavoring consists of using food dyes and flavor essences on the surface of the finished product. (Specification 2:10-12).
- 3) Page 1 of Wenzhou includes the following: "Published 02.06.2001" and "Implemented 02.06.2001".
- 4) Friendog Xie Huaien testified that the Wenzhou document is a statement of Wenzhou's Dog-Chewing Bones Manufacturing Standards (Q/NHH 01-2001). According to Mr. Huaien, the date which appears on the first page of the Wenzhou document, i.e., February 6, 2001, is the date on which Wenzhou updated its manufacturing standards to include the smoking method developed by Zhu Zhao Chong. Statement of Friendog Xie Huaien (Feb. 25, 2005).

- 5) Meyer discloses a puffable, thermoplastic composition derived from animal parts. (Abstract).
- 6) In Meyer's method, pork skins are first dried to reduce moisture content to between 10 and 25%. (Meyer 5:24-25). Meyer teaches that "conventional flavorings may be added during the drying step, i.e., the drying may be in combination with wood smoke which adds a smoked flavor. Conventional amounts of salt, pepper and other spices may also be added at this time." (Meyer 5:41-45).

ANALYSIS AND CONCLUSIONS

I. Has the Examiner provided a reasonable basis to conclude that Wenzhou was disseminated or otherwise made available to the public prior to the date of invention? If yes, then has Appellant provided sufficient evidence to overcome the Examiner's showing?

Appellant contends that the Examiner's reliance on the publication date which appears on Wenzhou is not sufficient to establish that the document is a printed publication under 35 U.S.C. § 102(a). We disagree. *See Cooper Cameron Corp. v. Kvaerner Oilfield Products, Inc.*, 291 F.3d 1317, 1324, 62 USPQ2d 1846, 1851 (Fed. Cir. 2002) (finding that "[t]he presence of the earlier date on the report indicates that it may have been available as of that date and would thus qualify as prior art under § 102(a)."). In our view, the phrase "Published 02.06.2001" provides a reasonable basis to conclude that Wenzhou was disseminated or otherwise made available to the public as of February 6, 2001. Thus, the burden was properly shifted to Appellant to demonstrate that Wenzhou Huaheng Plastics

& Leather Co. retained its manufacturing specifications as confidential, internal documents which were unavailable to the public.

Appellant has attempted to show that Wenzhou is not a printed publication under 35 U.S.C. § 102(a) through an unsworn Statement of Friendog Xie Huaian. Mr. Huaian's statement suggests that the smoking method described in Wenzhou was invented by Mr. Chong. However, Mr. Huaian's statement does not establish invention of the *claimed subject matter* prior to February 6, 2001. *See* 37 C.F.R. §1.131. Likewise, Mr. Huaian's statement that Wenzhou discloses a manufacturing standard does not establish that the document was not available to the public, e.g., outside contractors. Accordingly, we find that Appellant has failed to show that the Examiner improperly relied on Wenzhou as a printed publication under 35 U.S.C. § 102(a).²

Appellant has not addressed the merits of the Examiner's rejections based on Wenzhou. Therefore, the rejection of claims 1, 6, 11-20, and 25-33 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Wenzhou and as evidenced by Lynch is affirmed and the rejection of Claims 2-5 and 7-10 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Wenzhou and further in view of Lynch is affirmed.

II. Has the Examiner identified a teaching, motivation or suggestion in the prior art for combining AAPA and Meyer in the manner claimed?

² Moreover, the reported February 06, 2001 publication date is more than one year prior to the U.S. filing date of this application. Thus, the reported publication date indicates Wenzhou to be available as prior art under 35 U.S.C. § 102(b). Thus, Wenzhou cannot be antedated with a showing under 37 C.F.R. §1.131 or a showing pursuant to M.P.E.P. 715.01(c).

The Examiner relies on AAPA for a teaching of a method of making dog chews by defatting and depilation, splitting, shredding and mixing with adhesive, shaping and drying, and flavoring (Specification 1 and 2). The Examiner acknowledges that AAPA does not teach the use of pigskin and smoking. However, the Examiner maintains that it would have been obvious to one of ordinary skill in the art to incorporate the pigskin and smoking of Meyer into the generic drying method of AAPA since, *inter alia*, Meyer teaches that smoking was an effective means for drying rawhide. (Answer 13-14).

Appellant contends that the applied prior art fails to teach or suggest the claimed step of "smoking the *shaped hide product* with gaseous smoke to dye and flavor the *shaped hide product*, resulting in a finished porkhide dog chew." (Reply Br. 10 (emphasis added)). Appellant argues that Meyer's use of an air or smoke oven is for the limited purpose of reducing the moisture content of skins or comminuted particles at an intermediate stage of production. (Reply Br. 11). Appellant contends that, at best, Meyer discloses shaping a smoked and partially dehydrated product, not smoking a shaped hide product as required by the claims. (Reply Br. 11).

As correctly pointed out by the Examiner, the test for determining obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. (Answer 12). In this case, however, we are persuaded by Appellant's arguments that the combined teachings of the references simply do not disclose or suggest the claimed invention. Meyer discloses an intermediate processing step of smoke-drying to reduce moisture content of pork skins to a suitable range, i.e., 10-25%, for conducting additional processing steps, including grinding, followed by

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extrusion, shaping and frying. Like Appellant, we fail to see how one of ordinary skill in the art would somehow conclude that Meyer's technique of smoke drying to reduce moisture in an intermediate product would impart dye and flavor to the final, shaped hide product in the manner required by the claimed subject matter. *See KSR Int'l. Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007) *See also, In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992) ("The mere fact that the prior art may be modified in the manner suggested by the Examiner [is not sufficient to show obviousness.]").

Accordingly, the rejection of claims 1, 6, 11-20, and 25-33 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Meyer and as evidenced by Lynch and the rejection of claims 2-5 and 7-10 under 35 U.S.C. § 103(a) as unpatentable over AAPA in view of Meyer and further in view of Lynch are reversed.

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

AFFIRMED

tf/lr

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