

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 JOHN C. COLVIN,
CHARLES VIGNAL,
PHILIPPE EDOUARD TISSOT, and
LARRY RAYMOND CROWE

Appeal 2007-3388
Application 11/095,901
Technology Center 1700

Decided: August 31, 2007

Before THOMAS A. WALTZ, CATHERINE Q. TIMM, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Statement of the Case

This is an appeal under 35 U.S.C. § 134 from a final rejection
of claims 1-4, 15-22, and 33-48. We have jurisdiction under
35 U.S.C. § 6.

Appellants' invention relates to an article having a preformed lignocellulosic material impregnated with a polyisocyanate material. Claim 1 is illustrative:

1. A building article having a smooth, low-gloss surface prepared by
 - (1) impregnating a preformed substrate of lignocellulosic material with an isocyanate resin material;
 - (2) removing excess isocyanate resin from the impregnated substrate of lignocellulosic material by impinging air at a high flow rate upon the impregnated substrate of lignocellulosic material;
 - (3) polymerizing the resin by applying water to the impregnated substrate of lignocellulosic material, the water being at a temperature sufficient for polymerization; and
 - (4) removing the water from the polymerized resin-impregnated substrate of lignocellulosic material.

The Examiner relies on the following reference in rejecting the appealed subject matter:

Diehr US 3,870,665 Mar. 11, 1975

Claims 1-3, 15-21, 33-43, and 45-48 stand rejected under 35 U.S.C. § 102(b) as unpatentable over Diehr. Claims 4, 22, and 44 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Diehr.

We REVERSE.

Independent claims 1, 16, and 33 are written in product-by-process format. Therefore, the Examiner can satisfy his or her burden under § 102/§ 103 if the prior art reasonably appears to disclose a product that is identical with or only slightly different

from the product claimed. *See In re Fitzgerald*, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980); *In re Fessmann*, 489 F.2d 742, 744, 180 USPQ 324, 325-26 (CCPA 1974).¹ The Examiner has not met the burden in this case.

Appellants contend that the subject matter of the independent claims 1, 16, and 33 describe an article comprising a preformed substrate of lignocellulosic material that has been subject to impregnating with a polyisocyanate material after formation (Br. 11, 17, and 20). Appellants argue that Diehr does not teach or suggest impregnating a preformed substrate of lignocellulosic material that has an initial structure with an isocyanate resin material (Br. 12).

Diehr describes a process for compression molding lignocellulosic materials into articles, such as plywood and fiberboard. The process comprises placing lignocellulose materials, such as wood chips, straw or hemp, with an organic polyisocyanate binder in a molding press to produce boards or other molded articles (Diehr, col. 4, l. 43- col. 5, l. 5).

The product resulting from Diehr's process is a "preformed" lignocellulosic material. This product is equivalent to the starting material used in forming the articles of the claimed invention. The Examiner does not specifically address the Appellants' repeated arguments regarding the structural differences that arise from additional steps of processing used by Appellants over and above the

¹ Product by process claims are normally rejected under 35 U.S.C. § 102 as anticipated or in the alternative under 35 U.S.C. § 103 as obvious over the cited prior art.

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steps used by Diehr, i.e., the use of a preformed lignocellulosic material (Diehr's end product) in the production of the claimed article. The Examiner has not adequately explained why the product of Diehr reasonably appears to be the same as the claimed invention. Accordingly, we reverse the Examiner's rejections of claims 1-4, 15-22, and 33-48.

ORDER

The Examiner's decision rejecting claims 1-4, 15-22, and 33-48 is reversed.

REVERSED

sld/LS

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