

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

*Ex parte* GERALD J. McNERNEY and  
GARRY ROBIN MARTY

---

Appeal 2008-0795  
Application 10/386,267  
Technology Center 3700

---

Decided: April 7, 2008

---

Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and  
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

O'NEILL, *Administrative Patent Judge*.

ORDER REMANDING TO THE EXAMINER

McNerney, et al. (Appellants) seek our review under 35 U.S.C. § 134 of the final rejection of claims 1-7, 11, 15, and 23-25. We have jurisdiction under 35 U.S.C. § 6(b) (2002). This appeal includes a record that is not ripe for review and pursuant to 37 C.F.R. § 41.50(a)(1) (2007), we remand this

Appeal 2008-0795  
Application 10/386,267

application to the Examiner to take appropriate action consistent with our comments below. 37 C.F.R. §§ 41.35(b) and 41.50(a)(1) (2007).

The record is not ripe for review for the following reason.

The Appellants have presented an argument in the Reply Brief on pages 2 and 3 that the Examiner has not commented thereon. The contention raised by the Appellants is identified below.

[T]he Examiner argues that Barbour includes two outlets and saving time would be the motivation to combine Barbour et al. with Winders. However, this fails to take into consideration the purpose and automatic operation of the Winders et al. device.

Automatic operation in Winders is provided by an automatic valve 38 and a stop element device 60. Once the one tank is filled, the stop element 60 is retracted and moved to the next stop (Winders, Col 3, lines 55-68). If multiple tanks were filled at the same time as proposed by the Examiner, this part of Winders could no longer be operated as intended.

These two issues raised by the Appellants must be addressed by the Examiner because without these issues being addressed, this panel is precluded from a practical point of view from reviewing the rejection.

This panel needs the Examiner's perspective on whether the purpose and automatic operation of the Winders' device could no longer operate as intended when the teachings of Barbour were applied to Winders. The Examiner found Barbour to teach, in the art of rotary type fluid distribution valves, the distribution of fluid to two outlets concurrently which are not adjacent to each other. (Answer 8.) The Examiner found when this teaching was incorporated into Winders such would be a mere duplication of the single outlet structure of the Winders' rotor, located 180 degrees from the

disclosed outlet structure. (Answer 8.) However, the Examiner has not commented on whether placing this second outlet structure 180 degrees from the disclosed outlet structure would effect the operation of Winders as intended which appears to be to fill tanks that have float. The float causes retraction of a protractile member 64 to permit Winders tank selector 2 to rotate to the next stop. (Winders, col. 3, ll. 55-68.)

## ORDER

Accordingly, it is ORDERED that the application is remanded to the Examiner:

- 1) for the Examiner to provide the Examiner's perspective on whether the purpose and automatic operation of the Winders device could no longer operate as intended when the teachings of Barbour were applied to Winders. If the Winders device could operate as intended, then explain how the device could operate as intended with the included Barbour's teachings that the Examiner has found.
- 2) for such further action as may be appropriate.

Appeal 2008-0795  
Application 10/386,267

This remand to the Examiner pursuant to 37 C.F.R. § 41.50(a)(1) is made for further consideration of a rejection. Accordingly, 37 C.F.R. § 41.50(a)(2) applies if a Supplemental Examiner's Answer is written in response to this remand by the board.

**REMANDED**

jlb

Carlson, Gaskey & Olds, P.C.  
400 West Maple Road  
Suite 350  
Birmingham, MI 48009