

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JEFFREY W. PALESE

Appeal 2008-1118
Application 11/244,377
Technology Center 1700

Decided: February 29, 2008

Before EDWARD C. KIMLIN, PETER F. KRATZ, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 14-18.

Claim 14 is illustrative:

14. A patty forming apparatus comprising:

a base comprising a base wall;

a cover connected with the base for pivotal movement relative to the base, the cover comprising a top wall and a side wall that extends from the

top wall, the cover having a closed condition in which the side wall engages the base wall to define a closed patty forming chamber;

a plate member supported by a shaft having a threaded connection with the top wall, the shaft being rotatable to adjust the axial position of the plate member relative to the side wall to thereby adjust the volume of the patty forming chamber;

the shaft comprising a flattened surface and indicia spaced axially along the flattened surface;

a locking member on the shaft, the locking member having a locking position fixing the shaft at a selected axial position which fixes the axial position of the plate member relative to the side wall and thereby fixes the volume of the patty forming chamber;

the locking member comprising an indicator that identifies the indicia associated with the selected axial position when in the locking position the indicia being indicative of the approximate weight of a patty having a volume equal to the fixed volume of the patty forming chamber.

The Examiner relies upon the following references as evidence of obviousness:

Grieco 6,242,027 B1 Jun. 5, 2001

Pragotrade USA, Inc., *The Ultimate Patty Maker... Makes Perfect Patties Everytime*, Brochure Distributed Mar. 2003 (Admitted Prior Art).

Appellant's claimed invention is directed to an apparatus for forming a patty of meat. The apparatus comprises, inter alia, a plate member supported by a threaded shaft that is rotatable to adjust the axial position of the plate. The volume of the patty forming chamber is adjusted by adjusting the axial position of the plate. A locking member fixes the shaft at a selected axial position and the shaft has a flattened surface that has spaced indicia thereon. The locking member comprises an indicator which identifies the indicia

Appeal 2008-1118
Application 11/244,377

associated with the selected axial position which indicates the volume of the patty forming chamber.

Appealed claims 14-18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pragotrade in view of Grieco.

We have thoroughly reviewed each of Appellant's arguments for patentability. However, we are in complete agreement with the Examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejection for the reasons set forth in the Answer and we add the following primarily for emphasis.

There is no dispute that Pragotrade, like Appellant, discloses a patty forming apparatus comprising the claimed features with the exception of a flattened surface on the threaded shaft with indicia that indicates the volume of the patty forming chamber. However, Grieco evidences that it was known in the art to place a graded scale or indicia on a flat surface of a food forming apparatus which indicates the thickness or weight of the food substance. Consequently, we are in full agreement with the Examiner that it would have been obvious for one of ordinary skill in the art to modify the apparatus of Pragotrade by placing indicia on a surface of the apparatus which serves to indicate the volume of the patty forming chamber. Since the patty forming chamber of Pragotrade's apparatus is adjustable by rotating the shaft, we are persuaded that one of ordinary skill in the art would have found it obvious to include the indicia of a graded scale on the shaft of Pragotrade in order to allow the user to measure the amount of adjustment.

Appellant submits that "Pragotrade and Grieco do not teach or suggest a shaft with a flattened portion that includes weight indicia, and a locking

member that comprises an indicator for indicating the indicia" (Principal Br. 4, second para.). However, it is not necessary for a finding of obviousness that the references explicitly disclose a claimed feature inasmuch as one may consider the inferences and creative steps a person of ordinary skill in the art would employ. *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1740 (2007). It is proper to consider the common sense of one of ordinary skill in the art in determining the obviousness of a claimed invention. In the present case, we are confident that one of ordinary skill in the art would have found it obvious to employ graduated indicia on any viable surface of Pragotrade's apparatus which allows for measuring the adjustable volume of the patty forming chamber. Since the threaded shaft of Pragotrade's apparatus functions to control the volume of the patty forming chamber, it stands to reason that it would be a logical place to add the indicia.

Appellant contends that "[t]he truth of the matter is that a threaded shaft with a flat including indicia and a locking member for indicating the indicia is not the logical choice – it is the choice made in hindsight with knowledge of the teachings of the present invention" (Reply Br. 4, second para.). Appellant then poses the question if other surfaces not disclosed by Pragotrade would be considered the logical choice by the Examiner for the indicia, such as "a slot or window in the sidewall so that the actual position of the adjustable plate can be viewed used as the indicator for indicia on the side wall" (*id.*).

However, the flaw in Appellant's premise is that it presumes that there would have been only one logical place to locate the indicia on the apparatus of Pragotrade. Also, it stands to reason that simply because there may be more than one logical place to locate indicia does not mean that the selection

Appeal 2008-1118
Application 11/244,377

of one such place that is not explicitly disclosed in the prior art would have been nonobvious to one of ordinary skill in the art. In our view, impermissible hindsight is not required to arrive at the legal conclusion that it would have been obvious for one of ordinary skill in the art to place indicia of a graduated scale on a member of Pragotrade's apparatus that moves to adjust the volume of the patty forming chamber.

As a final point, we note that Appellant bases no argument upon objective evidence of nonobviousness, such as unexpected results, which would serve to rebut the *prima facie* case of obviousness established by the Examiner.

In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims is affirmed.

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).

AFFIRMED

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