

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LAWRENCE KITTERMAN and MERVYN FARIS

Appeal 2008-2277
Application 10/293,803
Technology Center 3700

Decided: November 28, 2008

Before CHUNG K. PAK, THOMAS A. WALTZ, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

WALTZ, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

This is a decision on Appellants' Request for Rehearing (hereafter "Req.") under 37 C.F.R. § 41.52, timely filed on July 25, 2008, requesting a rehearing of our Decision (hereafter "Dec.") dated June 30, 2008, where this merits panel affirmed the Examiner's rejection of claims 1-20 and 26-47

under 35 U.S.C. § 103(a) as unpatentable over Dutt (US 4,637,519) in view of Keller (US 4,778,069) (Dec. 4-5).¹

Appellants request rehearing based on three points believed to be misapprehended or overlooked by the Board in its Decision. We will discuss these points in the order presented in the Request for Rehearing.

First, Appellants allege that the Decision fails to explain where in the prior art is there any teaching or suggestion of Appellants' claimed "means for sealing a plastic container with *contents* at an elevated temperature" (Req. 1; emphasis in original). Appellants assert that the Board's Decision acknowledges that the claimed "means for sealing" includes apparatus that heats the container *contents* to an elevated temperature including a temperature that can kill bacteria (Req. 2). Appellants contend that nothing in Dutt teaches or suggests apparatus for heating container contents, while Keller is not cited for and does not disclose any means for sealing (Req. 2-3). Appellants also dispute the admission in the Specification, as discussed on page 8 of the Decision (Req. 3-4).

We do not find Appellants' arguments persuasive. The claims, in general, are directed to a closure system including a "means for sealing a plastic container" (e.g., *see* claim 1 on appeal). Contrary to Appellants' assertion (Req. 2), the Decision does *not* acknowledge that the claims include apparatus for heating the container contents. The claims merely state that the means for sealing must be capable of sealing a plastic container that has contents at an elevated temperature (Dec. 5, where the claim was

¹ The Examiner's rejection of claims 1-20 and 26-47 under the first paragraph of 35 U.S.C. § 112 for failing to comply with the written description requirement was not sustained (Dec. 4).

construed as part of the Decision regarding the § 112 rejection). As stated in our Decision, Dutt discloses means for sealing the plastic container, specifically induction heating means (Dec. 6 and 8; *see* FF (1)). Appellants teach the *same* sealing means for sealing the plastic container filled with contents at an elevated temperature (i.e., induction sealing; Spec. 7:29-30). Appellants have not established that the induction sealing means taught by Dutt would not be capable of sealing a plastic container with contents at an elevated temperature. *See In re Schreiber*, 128 F.3d 1473, 1477-78 (Fed. Cir. 1997) (Choosing to define an element functionally, i.e., by what it does, carries with it a risk; where the PTO has reason to believe that the functional limitation may be an inherent characteristic of the prior art, the burden shifts to applicant to show that it does not). Finally, we again determine that Appellants have admitted that “[m]eans for sealing [with contents] at an elevated temperature were well within the purview of one of ordinary skill in the art at the time of the invention.” App. Br. 4; Dec. 8. Indeed, Appellants’ Specification discloses that the “hot filling” process was well known in the art, including the filling of a container with contents at an elevated temperature, and subsequent capping or sealing (Spec. 1:8-26; 7:24-30).

Appellants’ second point is that the conclusion that Dutt discloses every limitation of claims 1 and 11 except for pressure rings is incorrect since the “means for sealing a plastic container with *contents* at an elevated temperature” has not been disclosed by Dutt (Req. 4-5). Since this is the same premise Appellants presented in the first point of this Request, we do not find this argument persuasive for the reasons expressed above.

Appellants' third point is that the Decision does not address the specific arguments regarding dependent claims 6, 16, 31, and 42 (Req. 5). This argument is not persuasive since dependent claims 6, 16, 31, and 42 each require, *inter alia*, that the "elevated temperature" of the independent claims on appeal is "high enough to kill bacteria" (e.g., *see* claim 6; Req. 5). Merely specifying the temperature of the contents does not further distinguish the "sealing means" of the claims over the same sealing means disclosed by the prior art (Dutt). Furthermore, as stated above and in the Decision, we determine that using contents at a temperature sufficient to kill bacteria was well known in the art (App. Br. 4; Dec. 8; Spec. 1:8-26; 7: 24-30). Accordingly, for the reasons discussed above, we find this argument unpersuasive.

For the foregoing reasons and those set forth in the Decision, we have considered Appellants' Request for Rehearing but find no points that we have misapprehended or overlooked. Accordingly, the Request for Rehearing is DENIED.

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).

DENIED

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