

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN SIMMONS and DOMENIC JOSEPH BARSOTTI

Appeal No. 2002-0173
Application 09/273,040

ON BRIEF

Before TIMM, DELMENDO, and PAWLIKOWSKI, Administrative Patent Judges.

PAWLIKOWSKI, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 through 15, the remaining claims on appeal. The subject matter on appeal is represented by claim 1, set forth below.

1. A grouting composition comprising a first component and a second component wherein said first component comprises a peroxide, a liquid which comprises water, a sugar, and a solid particulate; and said second component comprises a polymer, a crosslinking agent, and a solid particulate.

We note that a related case, 09/500,561 corresponding to appeal no. 2002-0054 exists in connection with this appeal.

The references relied upon by the examiner as evidence of unpatentability are:

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Bivens et al. (Bivens)	4,280,943	Jul. 28, 1981
Talbot	4,350,783	Sep. 21, 1982
Ceska	4,722,976	Feb. 02, 1988
Gebauer et al. (Gebauer) (German Patent)	DE 3,226,602	Jan. 19, 1984

Claims 1 through 15 stand rejected under 35 U.S.C. § 103 as being unpatentable over Bivens or Talbot in view of Ceska or Gebauer.

OPINION

For the reasons set forth in the brief, the reply brief and below, we reverse the above-noted rejection.

Critical to the issue in present case is rather the secondary reference Ceska is properly combinable with Bivens or Talbot (hence, we do discuss the other secondary reference of Gebauer). On page 3 of the answer the examiner states that Ceska teaches the use of sugars as catalyst or accelerators with a peroxide initiator. On page 4 of the answer, the examiner proposes that it would have been obvious to one of ordinary skill in the art to add a sugar to the composition of Bivens or Talbot in order to cure the crosslinking reaction of the crosslinking agent initiated by the peroxide.

On page 8 of the brief, appellants argue that Ceska teaches that the catalyst is the copolymerizing components (2) (a) and (2) (b). Appellants state that therefore it is apparent that the catalyst disclosed in Ceska catalyzes the copolymerization of two monomers. The polymer that is formed, not the catalyst or the accelerator of the catalyst, improves the curing of the polymer

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concrete. Appellants state that the accelerator in Ceska merely improves the copolymerization and not the final curing of the polymer concrete. On pages 4 through 5 of the answer, the examiner responds to appellants' other arguments presented in the brief, but does not specifically respond to the aforementioned argument regarding the function of the catalyst disclosed in Ceska. Hence, we provide a response below.

We agree with appellants' interpretation of the function of the catalyst set forth in Ceska. Ceska discloses that one aspect of the invention is a composition for preparing a polymer concrete comprising a substantial non aqueous slurry of (1) an aggregate material and (2) a amount of a monomer binder system wherein the binder comprises (a) a liquid comonomer component, (b) a macromonomer component and (c) a polymerization catalyst. See column 2, lines 30 through 41 of Ceska. The catalyst system (c) is described in column 7 beginning at line 36 of Ceska. Here, Ceska discloses that for a copolymerization of macromonomers and comonomers, free radical catalyst systems are commonly employed. Preferably, the free radical catalyst comprises an oil-soluble organic azo or peroxide primary catalyst (initiator), often in combination with a co-catalyst, also known as an accelerator or promoter. Ceska discloses that useful accelerators are reducing agents such as tertiary amines, absorbic acid including isomers, reducing sugars, or transition metal organic compounds.

Bivens is concerned with a grouting composition comprising (a) a first component containing a resin formulation comprising an unsaturated polymerizable polyester resin mixed with a

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monomeric polymerizable ethylenic cross-linking agent therefor, a polymerization inhibitor and a promoter for a peroxide catalyst, (b) a second component containing a peroxide catalyst, and (c) a particulate solid filler. (See column 2, lines 53 through 68). The examiner has not explained the addition of the accelerator (reducing sugars) of Ceska would function in the system of Bivens. On the one hand, the accelerator disclosed in Ceska operates to copolymerize a macromonomer and comonomer. Given this teaching, the examiner has not explained how this teaching applies to Bivens. Bivens in fact, discloses a first component (a) which contains a resin formulation comprised of an unsaturated polymerizable polyester resin mixed with a monomeric polymerizable ethylenic cross-linking agent therefore, a promoter for a peroxide catalyst, and a polymerization inhibitor or stabilizer to give that composition the required shelf life. See column 4, lines 3 through 8. Hence, Bivens in fact, teaches away from promoting polymerization in view of the fact that a polymerization inhibitor is utilized to provide the required shelf life. The examiner has not explained then why an accelerator would make sense to add to the system in Bivens.

With regard to Talbot, Talbot is directed to a resin composition comprising (a) an unsaturated resin composition, (b) a major portion of a calcium carbonate, (c) an effective carbon dioxide generating amount of relatively weak acid, and (d) a small effective amount of water. See column 2, lines 8 through 15. Talbot discloses that component (a) the liquid curable resin is readily made and available commercially. Talbot states that the unsaturated resins are commonly used and they are prepared by

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esterfication of a mixture of ingredients including a polyhydric alcohol and a an unsaturated polycarboxylic acid wherein the polycarboxylic acid is reacted into the unsaturated polyester resin almost completely, resulting in a product with a low acid number. This mixture is combined and desired with crosslinking monomers typified by vinyl monomers, such as styrene and vinyl toluene, along with flow modifiers, thixotropic agents, flame retardant materials, plasticizers, initiators or curing agents, usually of the peroxide type, and various fillers. The examiner has not explained why the catalyst in Ceska would be added to the resin system in Talbot in view of his functions according to Bivens. The examiner has not explained why one of ordinary skill in the art, knowing that a reducing sugar can be used as an accelerator in combination with a primary catalyst for the copolymerization of macromonomers and comonomers as described in column 7 at lines 36 through 57.

It therefore appears to us that the examiner has fallen into the insidious use of impermissible hindsight in combining these desperate teachings in an unsuccessful attempt to arrive at appellants' presently claimed invention. See In re W. L. Gore & Assoc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983) cert. denied, 469 U.S. 851 (1984).

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In view of the above, we therefore reverse the rejection.

CONCLUSION

The rejection of claims 1 through 15 is reversed.

REVERSED

CATHERINE TIMM)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
ROMULO H. DELMENDO)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
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