

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte MARK PENLERICK and ROBERT RAGER

Appeal No. 2003-0881
Application No. 09/658,561

ON BRIEF

Before FRANKFORT, STAAB, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection (Paper No. 6, mailed March 26, 2002) of claims 1 to 21 and 23 to 26, which are all of the claims pending in this application. In the brief (Paper No. 13, filed September 19, 2002), the appellants withdrew claims 16 and 23 from consideration in the appeal. Accordingly, the appeal with respect to claims 16 and 23 is dismissed. Claims 1 to 15, 17 to 21 and 24 to 26 remain on appeal.

We REVERSE.

BACKGROUND

The appellants' invention relates to base plates for mounting a tow bar to tow hooks of a towed vehicle (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

Claims 1 to 3, 5 to 15, 17 to 21 and 24 to 26 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,755,454¹ to Peterson.

Claim 4 stand rejected under 35 U.S.C. § 103 as being unpatentable over Peterson.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer (Paper No. 14, mailed December 3, 2002) for the examiner's complete reasoning in support of the rejections, and to the brief for the appellants' arguments thereagainst.²

¹ Issued May 26, 1998.

² The appellants' reply brief (Paper No. 18, filed March 3, 2003) was not timely filed (see Paper No. 20, mailed April 28, 2003) and will not be considered.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art reference, to the declaration of Mark Penlerick, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

The main issue presented in this appeal is if the "tow hook means" of claim 1³, the "tow hook members" of claims 24 and 25, and the "tow hook" of claim 26 are readable on⁴ Peterson's brackets 106 with apertures 110 therein. In our view, the answer is no for the reasons adequately set forth in the declaration of Mark Penlerick and the brief. Contrary to the position of the examiner, Peterson does disclose either a

³ In our view, the tow hook means, the base plate means and the connector means of claim 1 are means-plus-function limitations that must be interpreted in accordance with 35 U.S.C. § 112, paragraph 6. The use of the term means raises a presumption that the recitation of a means-plus-function element is intended. See Sage Prods. v. Devon Indus., 126 F.2d 1420, 1427, 44 USPQ2d 1103, 1109 (Fed. Cir. 1997). In addition, the manner in which a means-plus-function element is expressed, either by a function followed by the term means or by the term means for followed by a function, is unimportant so long as the modifier of that term specifies a function to be performed. See Ex parte Klumb, 159 USPQ 694, 695 (Bd. App. 1967).

⁴ The inquiry as to whether a reference anticipates a claim must focus on what subject matter is encompassed by the claim and what subject matter is described by the reference. As set forth by the court in Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984), it is only necessary for the claims to "'read on' something disclosed in the reference, i.e., all limitations of the claim are found in the reference, or 'fully met' by it."

tow hook, a tow hook member or a tow hook means. In our view, a tow hook has an art-recognized meaning which is distinct from the structure taught by Peterson.

Since the subject matter of independent claims 1 and 24 to 26 are not disclosed in Peterson for the reasons set forth above, the decision of the examiner to reject claims 1 and 24 to 26, and claims 2, 3, 5 to 15 and 17 to 21 dependent thereon, under 35 U.S.C. § 102(b) is reversed.

The decision of the examiner to reject dependent claim 4 under 35 U.S.C. § 103 is reversed for the reason set forth above with respect to parent claim 1. Moreover, the examiner has not set forth any evidence in the obviousness rejection before us in this appeal establishing that the claimed "bread slice configuration" would have been obvious at the time the invention was made to a person of ordinary skill in the art. In that regard, we note that the claimed "bread slice configuration" prevents rotation while a circular configuration such as taught by Peterson does not prevent rotation.

CONCLUSION

To summarize, the appeal with respect to claims 16 and 23 is dismissed; the decision of the examiner to reject claims 1 to 3, 5 to 15, 17 to 21 and 24 to 26 under 35 U.S.C. § 102(b) is reversed; and the decision of the examiner to reject claim 4 under 35 U.S.C. § 103 is reversed.

REVERSED

CHARLES E. FRANKFORT)	
Administrative Patent Judge)	
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Appeal No. 2003-0881
Application No. 09/658,561

Page 6

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