

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 SHIRLEY POLLACK

---

Appeal No. 2004-0160  
Application No. 09/939,993

---

HEARD: March 4, 2004

---

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

DECISION ON APPEAL

Shirley Pollack appeals from the examiner's final rejection of claims 1-7 and 13-15. Claims 8-12, the only other claims pending in the application, have been withdrawn from consideration pursuant to 37 CFR § 1.142(b) as not being readable on the elected invention.

Appeal No. 2004-0160  
Application No. 09/939,993

Appellant's invention "relates generally to forced air dryers and, more specifically, to a forced air dryer designed to dry an infant's bottom during the diaper changing process" (specification, page 1). A further understanding of the invention can be derived from a reading of exemplary claim 1, which appears in the appendix to appellant's main brief.

The references relied upon by the examiner in the final rejection as evidence of obviousness are:

|  |           |                |
|--|-----------|----------------|
| Martin   | 1,660,802 | Feb. 28, 1928  |
| Caruso   | 3,836,750 | Sept. 17, 1974 |
| Chimera  | 5,394,620 | Mar. 07, 1995  |
| Mintgen <sup>1</sup> (DE'484)<br>(German Patent) | 2,637,484 | April 20, 1978 |

The following rejections under 35 U.S.C. § 103(a) are before us for review:

(1) claims 1-3, 5-7, 13 and 15, rejected as being unpatentable over DE 2,637,484 (hereinafter, DE '484) in view of Caruso;

---

<sup>1</sup> Our understanding of this German language reference is derived in part from a translation thereof prepared on behalf of the Patent and Trademark Office. It is our understanding that the examiner is relying not only on the German reference, but also on an English language abstract thereof prepared by Derwent. Copies of both the translation and the Derwent abstract are attached to this opinion.

Appeal No. 2004-0160  
Application No. 09/939,993

(2) claim 4, rejected as being unpatentable over DE '484 in view of Caruso, and further in view of Martin; and

(3) claim 14, rejected as being unpatentable over DE '484 in view of Caruso, and further in view of Chimera.

Reference is made to appellant's main and reply briefs (Paper Nos. 10 and 12) and to the examiner's final rejection and answer (Paper Nos. 8 and 11) for the respective positions of appellant and the examiner regarding the merits of these rejections.

#### Discussion

At the outset, appellant contends (main brief, pages 3-6; reply brief, pages 1-2) that DE '484 is nonanalogous art. In an obviousness determination under 35 U.S.C. § 103(a), the question of whether an applied reference constitutes analogous art is normally considered to be a threshold issue. However, in the view we take in this appeal, even if we assume that DE '484 is analogous art, the obviousness rejections made by the examiner in the final rejection and maintained in the answer are not well founded.

As noted above, appellant's invention is directed to a forced air dryer designed to dry an infant's bottom. Using representative claim 1 as a guide, the claimed subject matter on appeal is a device for drying a moist region of a person's body comprising a housing having an air inlet and an air outlet, an electric fan

mounting within the housing, an electric power source connected to the electric fan, an end piece having an outermost end protruding from the air inlet, and "means for venting air to the atmosphere, bypassing the air outlet if the outermost end of the air outlet is blocked, such that overheating of the fan is avoided."<sup>2</sup>

The DE '484 reference pertains to a small hand-held device for producing currents of warm air for thawing frozen vehicle door locks. The DE '484 device comprises a housing enclosing an electric motor driven fan 16 and an electric heating element 13. The fan motor and heating element are powered by batteries 12. A switch 19, 20, 24 is provided at the upper end of the housing for simultaneously controlling the fan motor and the heating element. The housing is provided with a rubber nozzle 1 at the lower end of the housing from which warm air emerges.

Caruso, the secondary reference in each of the examiner's rejections, is directed to a hair dryer having a mobile housing 12 containing a pump 40 and a source of radiant heat 60, 64. A

---

<sup>2</sup>On page 10 of the specification, appellant discloses a number of means for venting air to avoid air flow blockage. One such means is illustrated in Figure 7, the elected species, where an end piece 86 includes lateral holes 88 to allow air to flow out if the outermost end 102 of the end piece is blocked. As shown in Figure 7 and described in the specification, holes 88 are normally closed by flaps 90, which are opened by air pressure if the outermost end of the end piece is blocked.

Appeal No. 2004-0160  
Application No. 09/939,993

flexible conduit 80 is connected to an outlet of the housing and directs heat and air to a desired location. The end of the conduit terminates in a nozzle 82 having a central discharge port 84 at the end of an elongated projection, and a ring of ports 86 radially disposed around the projection. Because ports 86 are closer to the end of conduit 80 than port 84, ports 86 "prevent the development of substantial back pressure in conduit 80 if port 84 is closed due to contact with a person's scalp" (column 3, lines 45-47).

In support of the standing rejection of the appealed claims under 35 U.S.C. § 103(a), the examiner considers that DE '484 discloses all elements called for in independent claims 1, 6 and 13, except for the "means for venting" of claims 1 and 6, and the corresponding "opening in the housing of the air outlet for venting air . . ." of claim 13. To account for this difference, the examiner turns to Caruso, contending (final rejection, page 3) that the port arrangement of Caruso's nozzle demonstrates that it is conventional and well known in the art to provide means for venting air from a forced air drier if the main outlet is blocked in order to prevent the development of substantial back pressure. The examiner posits that it would have been obvious to provide a similar venting means in DE' 484 since, in the examiner's view, "DE

Appeal No. 2004-0160  
Application No. 09/939,993

'484 is equally susceptible to the same outlet blockage problem contemplated by Caruso" (answer, page 12).

We appreciate that Caruso teaches a forced air dryer having venting means adjacent the main air outlet for venting air if the main air outlet is blocked in order to prevent the development of substantial back pressure. Our difficulty with the examiner's rejection lies in the examiner's determination that outlet blockage and resulting back pressure is a cause of concern in DE '484. The examiner has pointed to nothing in DE '484, and we are aware of nothing, that supports this position. Accordingly, the examiner's determination (answer, paragraph bridging pages 12-13) that one of ordinary skill in the art would look to Caruso to fashion a remedy for the alleged back pressure buildup problem in DE '484 is not well founded. In this regard, the Derwent abstract of DE '484 states that the rubber nozzle at the lower end of the housing from which warm air emerges is interchangeable to suit different vehicles. Based on this disclosure, it is reasonable to assume that the rubber nozzle of DE '484 is intended to be in close proximity and/or contact with the lock and its surrounding door structure in order to direct the entirety of the hot air flow toward and into the frozen lock, which mode of operation would cast

Appeal No. 2004-0160  
Application No. 09/939,993

doubt on the examiner's position that DE '484 is susceptible to the same outlet blockage and back pressure problem as Caruso.

The mere fact that the prior art could be modified does not make such a modification obvious absent suggestion of the desirability of doing so. See *In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984). Moreover, where the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, the proposed modification would not have been obvious. *Id.* In the present case, we fail to perceive any clear teaching, suggestion or incentive in the combined teachings of DE '484 and Caruso that would have led one of ordinary skill in the art to modify the heater device of DE '484 in the manner proposed by the examiner. It appears to us that the only suggestion for doing so is found in the hindsight accorded one who first viewed appellant's disclosure. This, of course, is not a proper basis for a rejection under 35 U.S.C. § 103. See *In re Fritch*, 972 F.2d 1260, 1264, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992).

In light of the foregoing, we cannot sustain the standing rejection of claims 1-3, 5-7, 13 and 15 as being unpatentable over DE '484 in view of Caruso.

Appeal No. 2004-0160  
Application No. 09/939,993

We have also reviewed the Martin and Chimera references additionally replied upon by the examiner in the rejections of claims 4 and 14, respectively, but find nothing in these additional references that makes up for the deficiencies of DE '484 and Caruso discussed above. Accordingly, we also cannot sustain the standing rejections of claims 4 and 14.

Remand

This case is remanded to the examiner for consideration of the following matters.

Caruso discloses a device that responds to many limitations of the appealed claims. Using claim 1 as a guide, Caruso discloses a device for drying a moist region of a person's body (the hair and scalp) comprising, a housing 12 having an air inlet 54 and an air outlet 80, 84, an electric fan 40 mounted within the housing, so as to blow air toward the air outlet, an electric power source 56 connected to the electric fan, an end piece (nozzle 82) protruding from the air outlet, and a means (radially disposed ports 86) for venting air to the atmosphere, bypassing the air outlet, if the outermost end 84 of the air outlet is blocked. Thus, Caruso would appear to meet all the limitations of at least claim 1, with the possible exception of the requirement that the end piece has a "resilient" outermost end.

Chimera likewise discloses a device that responds to many limitations of the appealed claims. Again using claim 1 as a guide, Chimera discloses a device for drying a moist region of a person's body comprising, a housing 10 having an air inlet 14 and an air outlet 16, an electric fan 22 mounted within the housing, so as to blow air toward the air outlet, an electric power source 20 connected to the electric fan, and an end nozzle protruding from the air outlet. Chimera discloses a variety of end nozzles for use with the dryer device thereof, including the Figure 2 end nozzle that includes a brush 33 at the end thereof. It reasonably appears that in the event the outermost end of the air outlet is blocked air would vent to the atmosphere, at least to some degree, from between the bristles of the brush of Chimera's Figure 2 end nozzle. In light of appellant's disclosure on page 10 of the specification regarding various nozzle structures that correspond to the claimed "means for venting," the examiner should consider whether the Figure 2 end nozzle of Chimera is the same as or an equivalent of any of appellant's nozzle structures.

The examiner should also consider whether it would have been obvious to incorporate an end nozzle structure like that disclosed in Caruso at elements 82-86 in the dryer of Chimera for the purpose of preventing excessive back pressure, it being noted in this

Appeal No. 2004-0160  
Application No. 09/939,993

regard that Chimera discloses at column 4, lines 63-68, a concern for preventing excessive heat in the tube 14.

The examiner should reevaluate the patentability of the appealed claims in light of Caruso and Chimera, either alone or in combination with any other prior art of which the examiner may be aware.

Summary

The decision of the examiner is finally rejecting the appealed claims reversed.

This application is remanded to the examiner for consideration of the matters discussed above.

Appeal No. 2004-0160  
Application No. 09/939,993

REVERSED; REMANDED

|                             |   |                 |
|-----------------------------|---|-----------------|
| CHARLES E. FRANKFORT        | ) |                 |
| Administrative Patent Judge | ) |                 |
|                             | ) |                 |
|                             | ) |                 |
|                             | ) |                 |
|                             | ) | BOARD OF PATENT |
| LAWRENCE J. STAAB           | ) | APPEALS         |
| Administrative Patent Judge | ) | AND             |
|                             | ) | INTERFERENCES   |
|                             | ) |                 |
|                             | ) |                 |
|                             | ) |                 |
| JENNIFER D. BAHR            | ) |                 |
| Administrative Patent Judge | ) |                 |

LJS/lp

Appeal No. 2004-0160  
Application No. 09/939,993

ALLEN M. KRASS  
GIFFORD, KRASS  
280 N. OLD WOODWARD, SUITE 400  
BIRMINGHAM, MI 48009