

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 27

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHARLES T. KRESGE, MICHAEL E. LEONOWICZ,
WIESLAW J. ROTH and JAMES C. VARTULI

Appeal No. 95-1437
Application 07/734,998¹

HEARD: October 14, 1997

Before JOHN D. SMITH, GARRIS and WEIFFENBACH, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

¹ Application for patent filed July 24, 1991. According to appellants, this application is a continuation-in-part of Application 07/625,245 filed December 10, 1990, now U.S. Patent No. 5,098,684 issued March 24, 1992, which is a continuation-in-part of Application 07/470,008 filed January 25, 1990, now U.S. Patent No. 5,102,643 issued April 17, 1992.

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DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 31 through 35. The only other claims in the application, which are claims 1 through 30, have been allowed.

The subject matter on appeal relates to a method of making a catalytic composition which includes a particular support material. This appealed subject matter is adequately illustrated by independent claim 31 which reads as follows:

31. A method of making a catalytic composition comprising a metal having hydrogenation-dehydrogenation functionality supported on a support material, the method comprising incorporating a metal having hydrogenation-dehydrogenation functionality with a support material comprising a non-layered, inorganic, porous crystalline phase material exhibiting, after calcination, an X-ray diffraction pattern with at least one peak having a relative intensity of 100 at a d-spacing greater than about 18 D and having a benzene sorption capacity greater than about 15 grams benzene per 100 grams of the material at 50 torr and 25EC.

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

Orkin	3,755,145	Aug. 28, 1973
Kennedy et al. (Kennedy)	4,983,273	Jan. 8, 1991

Claims 31 through 35 stand rejected under 35 U.S.C. § 103 as being unpatentable over Orkin or Kennedy. On page 3 of the answer, the examiner expresses his basic position as follows:

The process of Orkin and Kennedy differ from the claimed invention in that they do not teach the support as recited in the appealed claims. However, it would

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have been obvious touse [sic, to use] the support of claims 31-35 in the conventonal [sic, conventional] process of Orkin and Kennedy because it would have been expected that said process would also function to add a hydrogenation-dehydrogenation functionality to the claimed support. The use of a novel support in the process does not render an otherwise conventional process unobvious. See Ex parte Ochiai, 24 USPQ 2d 1265 (Bd.App [sic, Bd. App.] 1992) and In re Durden, 226 USPQ 359 (Fed. Cir. 1985).

For the reasons detailed by the appellants in their brief and reply brief, the above noted rejection is improper, and the examiner's reliance on In re Durden and Ex parte Ochiai in support of this rejection is inappropriate. The validity of this last mentioned point is best evinced by the fact that the decision in Ex parte Ochiai was overturned on appeal subsequent to the mail date of the examiner's answer; In re Ochiai, 71 F.3d 1565, 37 USPQ2d 1127 (Fed. Cir. 1995).

In short, the factual circumstances before us on this appeal are such that we cannot sustain the examiner's rejection in light of the governing precedence enunciated by In re Ochiai particularly at 37 USPQ2d 1131. Also see In re Pleuddemann, 910 F.2d 823, 827-28, 15 USPQ2d 1738, 1741-42 (Fed. Cir. 1990).

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The decision of the examiner is reversed.

REVERSED

JOHN D. SMITH)	
Administrative Patent Judge))	
)	
)	
BRADLEY R. GARRIS)	BOARD OF PATENT
Administrative Patent Judge))	APPEALS AND
)	INTERFERENCES
)	
CAMERON WEIFFENBACH)	
Administrative Patent Judge))	

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