

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte BOBBY L. GIBSON

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Appeal No. 1998-1188  
Application No. 08/628,556

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ON BRIEF

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Before ABRAMS, McQUADE and GONZALES, Administrative Patent Judges.

GONZALES, Administrative Patent Judge.

DECISION ON APPEAL

Appeal No. 1998-1188  
Application No. 08/628,556

This is an appeal from the examiner's final rejection of claims 1 through 11 and 13 through 21.<sup>1</sup> Claims 12, 22 and 23, the only other claims remaining in the application, have been indicated as allowable, subject to being rewritten in independent form.

We AFFIRM-IN-PART.

The subject matter on appeal is directed to a support structure and method for anchoring a covering member, such as an umbrella or the like (specification, page 4). A copy of the appealed claims appears in an appendix to the main brief (Paper No. 12).

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Hall et al. (Hall)	5,293,889	Mar. 15, 1994
Rodriguez et al. (Rodriguez)	5,535,978	Jul. 16, 1996
Edwards	2,020,967	Nov. 28, 1979

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<sup>1</sup> Claims 1 and 7 were amended subsequent to the final rejection. See Paper No. 9.

(UK '967)		(United Kingdom)
Carbone	0,312,675	Apr. 26, 1989
(EP '675)		(European Patent Office)

The following rejections are before us for review:

(I) claims 1 through 8, 10, 11 and 18 through 21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hall in view of UK '967;

(II) claims 9, 13 and 15 through 17 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hall in view of UK '967 in combination with EP '675; and

(III) claim 14 stands rejected under 35 U.S.C. § 103 as being unpatentable over Hall in view of UK '967 in combination with EP '675 and Rodriguez.

The full text of the examiner's rejections and the responses to the arguments presented by the appellant appear in the final rejection (Paper No. 5) and the answer (Paper No. 13), while the complete statement of the appellant's arguments can be found in the main and reply briefs (Paper Nos. 12 and 14, respectively).

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we have made the determinations which follow.

Rejection (I)

We turn first to the examiner's rejection of independent claims 1 and 8 based on 35 U.S.C. § 103 as being unpatentable over Hall in view of UK '967. After considering the collective teachings of the applied prior art, we agree with the appellant that the examiner has failed to establish a prima facie case of obviousness.

The examiner describes Hall as showing: a pole 12 having, at one end thereof, an elongated spike and a single blade 16; a pivot member 14a; and a handle 14. The examiner acknowledges that Hall does not show a handle configured to conform to the outer surface of the elongated pole when the

handle is in a closed or inward position as recited in claim 1 or the handle engaging the pole along the length of the handle when the handle is in a closed or unextended position as called for in claim 8. To remedy the deficiencies in Hall, the examiner cites UK '967 for a teaching of what the examiner describes as a "handle" 4 conforming to the outer surface of an elongated pole. The examiner then concludes that it would have been obvious to replace the handles in Hall with the "handles" of UK '967 to provided an "aesthetically pleasing appearance" (final rejection, page 5).

The appellant argues that UK '967 discloses a walking stick that may be used to step over barbed wire fences as shown in Figure 4 and is nonanalogous art. We agree.

In order to rely on a reference under 35 U.S.C. § 103, the reference must either be in the field of the applicant's endeavor or be reasonably pertinent to the particular problem with which the inventor was concerned. In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992).

Our review of UK '967 confirms that the reference describes a walking stick which can be used for crossing barbed wire fences. For this purpose, the body portion 3 is

provided at one end with a guard or crosspiece 1 and a pair of step members or arms 4 pivoted to the body 3 as shown in Figure 6. In order to use the walking stick to cross a wire fence, the guard 1 is placed over the top strand of the fence, the foot 6 or pointed end of the body is forced into the ground by the user exerting pressure with his or her foot on the flange 6w and the step arms are unfolded as shown in Figures 1 and 4. The user then steps onto the nearest arm 4, swings his or her other leg over the fence, placing the other foot on the further step.

Recognizing that the walking stick described in UK '967 is not in the field of the applicant's endeavor, the examiner asserts that UK '967 is reasonably pertinent to the particular "issue" with which the inventor was concerned (answer, page 6). To support the assertion, the examiner describes the step member 4 as "handles." However, as correctly pointed out by the appellant (reply brief, page 4), the elements 4 are not handles and the walking stick disclosed by the reference is not intended to be planted in the ground by rotation. In fact, UK '967 teaches implanting a stick or pole in the ground using one's weight by stepping on the plate 6w. There is

simply no teaching or suggestion in the reference that the step members 4 are to be used as handles. Thus, we are constrained to agree with the appellant that UK '967 is not reasonably pertinent to the particular problem with which the appellant was concerned, i.e., providing a firm ground anchor for various types of soil that is light weight, compact and requires no additional heavy, bulky parts to be carried (specification, page 3).

In light of the foregoing, we will not sustain the standing 35 U.S.C § 103 rejection of independent claims 1 and 8 and dependent claims 2 through 7, 10 and 11.

Independent claim 18 recites a method for anchoring a pole [17] including the step of hingeably pivoting a monolithic handle [36] away from an anchor body [16] so that it extends radially outwardly to provide at least two hand grips on opposite sides of the anchor body for rotating the anchor body. We agree with the appellant's argument that the combined teachings of the applied prior art fail to disclose this step. In this regard, we disagree not only with the examiner's determination that the elements 4 of UK '967 are handles, but also with the examiner's determination that the

independently hinged elements 4 together form a "monolithic" member.

It is a well-settled maxim of our patent law that, in proceedings before the Patent and Trademark Office, claims must be given their broadest reasonable interpretation consistent with the specification, and that the claim language cannot be read in a vacuum, but instead must be read in light of the specification as it would be interpreted by one of ordinary skill in the pertinent art. See In re Sneed, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983). With that in mind, we understand the word "monolithic" as used in claim 18 to mean one-piece. This interpretation of the word "monolithic" is also consistent with the dictionary definition of the word.<sup>2</sup> Neither the independently hinged elements 4 of UK '967 nor the independently hinged handles 14 and 15 of Hall constitute a one-piece member. Thus, we conclude that the combined teachings of the applied prior art fail to teach or suggest the claimed subject matter.

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<sup>2</sup> Webster's Third New International Dictionary of the English Language, Unabridged, G. & C. Merriam Co., Springfield, MA, 1971 (hereinafter Webster's) defines "monolithic" as "constituting one massive undifferentiated whole exhibiting solid uniformity often without diversity or variability."

Since all limitations of independent claim 18 are not taught or suggested by the applied prior art, we will not sustain the standing 35 U.S.C. § 103 rejection of independent claim 18 and dependent claims 19 through 21.

Rejection (II)

We will also not sustain the standing 35 U.S.C. § 103 rejection of claim 9. Claim 9 is dependent on claim 8 and, accordingly, includes the limitation of claim 8 found lacking in Hall and UK '967, supra. The additionally cited EP '675 reference does nothing to remedy the deficiencies in Hall and UK '967. Therefore, we conclude that the combined teachings of the applied prior art fails to teach or suggest the claimed invention.

Turning next to the examiner's rejection of claims 13 and 15 through 17, it is the examiner's position that Hall and UK '967 teach or suggest all of the claimed subject matter, except for a bit at one end of an anchor pole having a centrally disposed spike and at least one blade forming from two to four turns around the spike with the spike having a diameter much smaller than the anchor pole (final rejection, page 5). The examiner relies on EP '675 for a teaching of a

sunshade stick having a screw-point for easy penetration of the ground (col. 1, lines 17-22 and col. 2, lines 52-54). Specifically, the reference discloses a stick or support member 2 for anchoring an umbrella including a pointed end or spike 1 and a helical screw thread or blade 3 having a diameter slightly greater than the diameter of the stick 2 (col. 1, lines 29-34). The examiner determined that EP '675 teaches a spike 1 having a smaller diameter than the stick 2 (final rejection, page 5). We agree. Figures 1, 4, 5 and 8 all show the spike 1 as having a smaller diameter than the pole or stick 2. The expression "much smaller" does not distinguish the claimed subject matter from what is shown in EP '675, since the appellant has not defined the expression with any particularity in the specification. Thus, the expression is considered to read on the pointed end 1 and stick 2 of EP '675.

The examiner concluded that it would have been obvious to modify Hall by providing "a nail member having a smaller diameter than the anchor pole, and a blade forms from two to four turns around the spike" in order to facilitate insertion of the support member into the ground, as suggested by EP '675

(final rejection, page 6). As to the limitation of claim 13 that the blade forms from two to four turns around the spike, the examiner takes the position that the limitation is taught by EP '675. In addition, the examiner asserts that the number of turns recited in claim 13 and the three to six inch range for the length of the spike recited in claim 17 are obvious matters of design choice (final rejection, page 6 and answer, page 8).

We do not agree with the examiner's position that EP '675 teaches a blade forming from two to four turns around the spike. Claim 13 calls for a range of two to four turns, i.e., at least two but no more than 4 turns. Such is clearly not shown in EP '675. However, we do agree with the examiner that the ranges recited in claims 13 and 17 are obvious matters of design choice. We observe that Hall discloses a bit having a single turn (see, e.g., Figure 1) and that EP '675 discloses a bit having approximately ten turns. Also, the references show that the pitch of the helical blade and the length of the spike portion varies. Thus, it is known in the art to provide a blade with as few as one and as many as 10 turns and to vary the length of the spike, clearly establishing that the

particular number of turns and the length of the spike are result effective variables which are recognized in the art. This being the case, the selection of an optimum value for such variables is ordinarily an obvious matter which is within the skill of the art. In re Geisler, 116 F.3rd 1465, 1470, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997) and In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). See also In re Fields, 304 F.2d 691, 695-96, 134 USPQ 242, 245 (CCPA 1962), In re Troiel, 274 F.2d 944, 949, 124 USPQ 502, 505 (CCPA 1960) and In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

As the court stated in In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990)

[n]or can patentability be found in the difference in . . . ranges recited in the claims. The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims. . . . These cases have consistently held that in such a situation, the applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art range . . . (obviousness determination affirmed because dimensional limitations in claims did not specify a device which performed and operated differently from the prior art). . . . [Citations omitted.]

Here, however, the appellant has made no persuasive showing that the particular ranges set forth in claims 13 and 17 are in any way critical or produce results which would be unexpected.

Claim 16 calls for a handle movable from a radially extended position for rotating the elongated pole to a closed position substantially flush with the elongate anchor pole 12. Hall shows a handle, such as 14, movable about a pivot axle 14a from a radially extended position for rotating the pole 12 to a closed position in which it is adjacent to the pole 12 (see col. 3, lines 29-37 and Figure 3). Webster's defines "flush" as meaning "directly abutting or immediately adjacent to." Thus, Hall's handle 14 is immediately adjacent the pole when in the closed position.

In view of the above, we conclude that Hall and EP '675 provide a sufficient evidentiary basis to establish the prima facie obviousness of claims 13, 16 and 17 and that UK '967 is surplusage.

It follows that we will sustain the standing 35 U.S.C. § 103 rejection of claims 13, 16 and 17.

Claim 15 calls for a handle being tubular and longitudinally cut to fit around the anchor pole with the pivot member engaging the handle on either side of the pole. No such structure is taught by Hall, UK '967 or EP '675 or suggested by their combined teachings. Accordingly, we will not sustain the standing 35 U.S.C. § 103 rejection of claim 15.

Rejection (III)

Finally, we will not sustain the standing 35 U.S.C. § 103 rejection of claim 14. Claim 14 is dependent on claim 13 and further requires a bit cover for covering the spike during transportation of the elongated pole. We agree with the appellant's argument (reply brief, page 8) that the tube 12 of Rodriguez is not disclosed as a bit cover for covering the spike during transportation of the elongated pole, but a tool for digging a hole in wet sand and for supporting the lower end of the umbrella support pole (col. 2, line 65 through col. 3, line 6). Since the support pole 12 of Hall does not

require a separate tool for digging a hole in the ground, the only suggestion for using the digging tool of Rodriguez with the support pole of Hall is the appellant's own disclosure.

SUMMARY

The rejection of claims 1 through 8, 10, 11 and 18 through 21 under 35 U.S.C. § 103 as being unpatentable over Hall in view of UK '967 is reversed.

The rejection of claims 9, 13 and 15 through 17 under 35 U.S.C. § 103 as being unpatentable over Hall in view of UK '967 in combination with EP '675 is affirmed as to claims 13, 16 and 17, but reversed as to claims 9 and 15.

The rejection of claim 14 under 35 U.S.C. § 103 as being unpatentable over Hall in view of UK '967 in combination with EP '675 and Rodriguez is reversed.

The decision of the examiner is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

NEAL E. ABRAMS )  
Administrative Patent Judge )  
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