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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HELMUT JERG and KAI PAINTNER

Appeal 2011-000044
Application 11/792,685
Technology Center 1700

Before JAMES DONALD SMITH, *Chief Administrative Patent Judge*,
BRADLEY R. GARRIS, HUBERT C. LORIN, LINDA M. GAUDETTE,
and RAE LYNN P. GUEST, *Administrative Patent Judges*.

GUEST, *Administrative Patent Judge*.

DECISION ON APPEAL

I. STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision to reject claims 19, 20, 22, 23, 26 and 27 under 35 U.S.C. § 102(b) as anticipated by Fried (EP 0 358 279 B1; published December 2, 1992)¹ in

¹ The Examiner's evidence consists of a machine (computer) translation, which was made of record in an Office Communication dated December 16, 2009. Appellants do not contest that the machine translation reflects the teachings of the German-language reference as originally published.

addition to Appellants' admitted state of the prior art (i.e., discussion of Fried on Specification pages 2-3) and to reject claims 21, 24, and 25 under 35 U.S.C. § 103(a) as unpatentable over Fried in addition to Appellants' admitted state of the prior art. Appellants also appeal from the Examiner's provisional rejections based on the judicially created doctrine of obviousness-type double patenting:

1. Claims 19-23 as unpatentable over claims 12, 14, and 20-22 of US Application No. 11/791,381;
2. Claims 19-21 and 23 as unpatentable over claims 18-22, 33, and 34 of US Application No. 11/791,383; and
3. Claims 19 and 20 as unpatentable over claims 10 and 11 of US Application No. 10/564,230.

We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

Appellants' invention relates to a dishwasher in which air heated by a heating device is used to desorb a reversibly dehydratable material and subsequently is conducted to a rinsing container to heat the rinsing solution and/or the items to be washed (Spec. 1:5-11).

Figure 2 of Appellants' Specification is reproduced below.

Therefore, we consider the machine translation as evidence of the teachings of Fried.

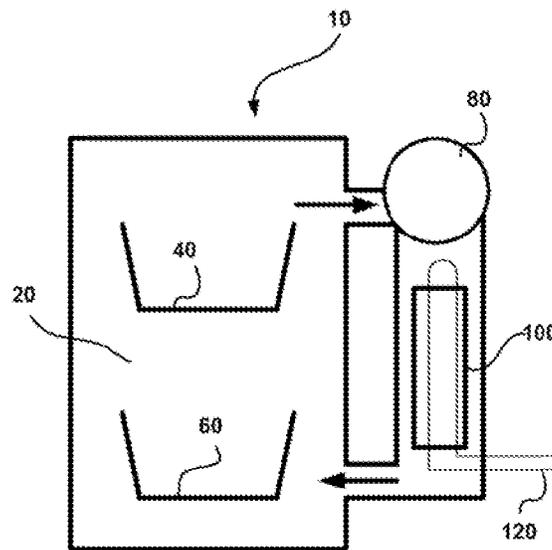


Figure 2

Figure 2 depicts a schematic illustration of a dishwasher 10 having a rinsing container 20 and an air heating device 120 arranged in a sorption dryer containing reversibly dehydratable material 100 disposed in a conduit from and returning to rinsing container 20 (*see* Spec. 7:24-8:2).

Claims 19 and 23 are illustrative:

19. A dishwashing machine comprising:

a washing container;

at least one device for washing crockery using a rinsing solution, the washing of crockery being performed in a plurality of partial programme steps and the rinsing solution being heatable to a nominal temperature; and

a sorption drying device communicated with the washing container for the passage of air between the sorption drying device and the washing container,

the sorption drying device containing reversibly dehydratable material that operates to withdraw moisture from

air during the passage of the air through the sorption drying device, wherein, on the one hand, the sorption drying device is used to dry crockery being handled by the dishwasher and, on the other hand, thermal energy utilized for desorption of the sorption drying device is used to at least partially heat at least one of the rinsing solution in the washing compartment and crockery, and the sorption drying device being operable to heat the rinsing solution to the nominal temperature required in each partial programme step.

23. The dishwasher according to Claim 22, wherein the heating device is arranged in the reversibly dehydratable material or in a pipe to the sorption column.

With respect to the § 102 rejection, Appellants' arguments are directed to claims 19, 23, 26, and 27 separately (App. Br. 8-15). Appellants rely on the arguments directed to limitations in claim 19 in support of patentability of the remaining dependent claims, including claims 21, 24, and 25, which are separately rejected under § 103 (*id.*).

We decline to reach the provisional obviousness-type double patenting rejections as discussed below.

II. PROVISIONAL OBVIOUSNESS-TYPE DOUBLE PATENTING REJECTIONS

Each of the claims relied upon in the provisional obviousness-type double patenting rejections has been further prosecuted since the rejections were made initially.

Claims 12, 14, and 20-22 of US Application 11/791,381, relied upon in Provisional Rejection 1

The '381 application issued as US Patent 7,846,270 B2 on December 7, 2010 ("the '270 patent"), after the Examiner's Answer mailed July 6, 2010 and Appellants' Reply Brief filed August 30, 2010. Application

dependent claim 13 was incorporated into application independent claim 12 and issued as claim 1 of the '270 patent. Application claims 14-22 issued as claims 2-10 of the '270 patent. Claims 11-13 of the '270 patent also were added. Neither the Examiner nor the Appellants have provided arguments on the merits directed to the claims of the '270 patent.

Claims 18-22, 33, and 34 of US Application 11/791,383 ("the '383 application"), relied upon in Provisional Rejection 2

Claims 18 and 33 of the '383 application were last amended on December 8, 2008. Claims 19-22 and 34 have not been amended since being added in a preliminary amendment filed May 23, 2007. It is unclear whether the Examiner's rejection in the Final Office Action mailed December 4, 2009 considered claims 18-22, 33 and 34 in their currently pending form.

Claims 10 and 11 of US Application 10/564,230 ("the '230 application"), relied upon in Provisional Rejection 3

Claim 11 of the '230 application was cancelled on May 26, 2009. Claim 10 of the '230 application has not been amended. Appellants identify cancelled claim 11 and argue that the cancelation renders the rejection based on claim 11 moot (App. Br. 20; Reply Br. 23). The Examiner has not altered the provisional rejection in light of cancelled claim 11.

As indicated above, at least some of the claims relied upon in the provisional obviousness-type double patenting rejections on appeal either clearly are, or may be, different in language or status from the claims originally relied upon when these rejections were initially made by the Examiner. We decline to reach these rejections because the claims now relied upon are not clearly the same as those originally considered by the

Examiner when the rejections were initially made. Panels have the flexibility to reach or not reach provisional obviousness-type double-patenting rejections. *See Ex parte Moncla*, 95 USPQ2d 1884 (BPAI 2010).

III. § 102 REJECTION OF CLAIM 19

A. ISSUE ON APPEAL

A first issue on appeal arising from the contentions of Appellants and the Examiner is: Does the evidence support the Appellants' view that the Examiner erred in finding the drying container 7 of Fried satisfies the claim 19 functional limitation of a sorption drying device "being operable to heat the rinsing solution to the nominal temperature required in each partial programme step"? We answer this question in the negative.

B. DISCUSSION

We adopt the Examiner's findings in the Answer as our own and add any additional findings of fact appearing below for emphasis.

Claim 19 structurally recites a washing container, at least one device for washing crockery, and a sorption drying device that communicates with the washing container and contains a reversibly dehydratable material (claim 19). Appellants have further claimed the sorption drying device functionally. The Examiner has found, and Appellants do not dispute, that Fried teaches the structural components of claim 19.

Fried's Figure 1 is reproduced below.

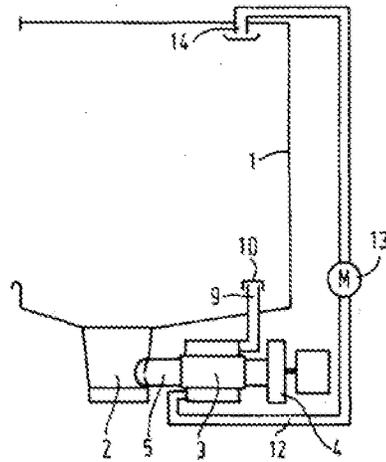


Fig.1

Figure 1 depicts a schematic cross-section of a dishwasher comprising a rinsing container 1, provided with a sump 4, water heater 3, and pipes 2, 5, 9 and 12 (Fried trans., p. 2, fifth and sixth paragraphs).

Fried's Figure 2 is also reproduced below.

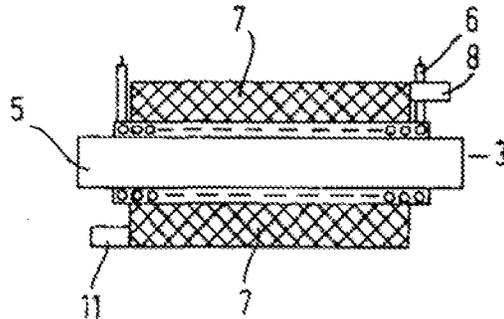


Fig.2

Figure 2 depicts a schematic cross-section of the formation and allocation of a drying container 7 to the water heater 3 (*id.*). In Figure 2, a flow pipe 5 is surrounded by a heating element 6. Surrounding heating element 6 is a double walled hollow cylinder 7 filled with a desiccant (i.e., the drying container). Water is heated in pipe 5. Pipes 9 and 12 are

connected to the drying container 7 at terminals 8 and 11, respectively, to recirculate water vapor into and out of the rinsing container 1 (*id.*, last four paragraphs).

Choosing to define an element functionally, i.e., by what it does, rather than what it is, carries with it a risk: Where there is reason to conclude that the structure of the prior art is inherently capable of performing the claimed function, the burden shifts to Appellants to show that the claimed function patentably distinguishes the claimed structure from the prior art structure. *See In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997); *In re Ludtke*, 441 F.2d 660, 664 (CCPA 1971); *In re Hallman*, 655 F.2d 212, 215 (CCPA 1981).

We agree with the Examiner that Fried's drying container need only be *capable* of heating the rinsing solution to the nominal temperature required in each partial programme step (*see* claim 19; Ans. 4). The Examiner has put forth a rationale to support a finding that the structure of Fried is capable of functioning as claimed. Particularly, the Examiner reasons that "the heating element 6 could be turned off and residual heat from air and desiccant in the cylinder 7 would flow into and heat any liquid present inside pipe 5" (Ans. 10).

Appellants contend that, if heating element 6 were turned off, heat from the drying container 7 would not be capable of heating the water in pipe 5 because the heat would be dissipated and insufficient to heat the water to a "nominal temperature" (App. Br. 9-10).

We further agree with the Examiner that Appellants' Specification does not define the "nominal temperature required in each partial programme step" to any particular degree (Ans. 10). Thus, the claim

function would be satisfied by any device capable of heating the rinsing solution to any degree, even minor temperature increases.

We find the Examiner's rationale to be sufficient. It is reasonable that at least some heat from the desiccant cylinder 7 would be transferred back into the water (i.e., rinsing solution) in pipe 5 if heating element 6 were turned off. Appellants' above contention regarding dissipation of the heat is not persuasive since at least some of the heat would be transferred into the water in pipe 5.

Moreover, we find that Fried's device would have been capable of performing the function even if heating element 6 were left on. Appellants do not dispute that Fried teaches that thermal energy from the heating element 6 desorbs the water from the drying device 7, which returns to the rinsing container 1 as water vapor via pipe 9 (Fried translation, p. 2, last ¶; *see generally* App. Br.). As such, the water vapor itself would have sufficient thermal energy to raise the temperature of any rinsing solution in the rinsing container to some degree, even if some of that heat is dissipated as the water vapor travels along pipe 9, in the same manner that Appellants' invention uses the air coming from the heated drying device to heat the rinsing solution in the washing container (*see* Spec. 2:20-30).

Appellants have not structurally distinguished the claimed invention from Fried's dishwasher. Claim 19 is not limited to a device in which the rinsing solution is *only* heated by the thermal energy used to desorb the drying device. To the contrary, claim 19 requires that the structure of the device need only be capable of having thermal energy from the sorption drying device "at least partially" heat the rinsing solution (claim 19). Thus, we are not persuaded by Appellants' assertions that the claimed structure is

not met because the dishwasher also uses heating element 6 to heat rinsing solution in water pipe 5. We further find it of no moment that Fried's device would require a high power, loud, and energy-consuming fan (*see* App. Br. 9), as such a fan is not precluded from the claimed invention.

The Examiner's finding that the sorption drying device taught by Fried has a structure which is *capable* of heating the rinsing solution to some degree, as claimed, is reasonable. Appellants have not shown that the claimed function patentably distinguishes the claimed structure from Fried's structure.

IV. § 102 REJECTION OF CLAIM 26

A. ISSUE ON APPEAL

A second issue on appeal arising from the contentions of Appellants and the Examiner is: Does the evidence support Appellants' view that the Examiner erred in finding Fried teaches a dishwasher that "is operable to perform [a step of] . . . continuing to operate the heating device after a desorbed condition of the reversibly dehydratable material is attained until the nominal temperature of the rinsing solution is reached," as recited in claim 26? We answer this question in the negative.

B. DISCUSSION

We adopt the Examiner's findings in the Answer as our own and add any additional findings of fact appearing below for emphasis.

Based on the Examiner's reasoning that "the heating element 6 could be turned off" (Ans. 10) to meet the functional limitation of claim 19 as discussed above, Appellants contend that the heating device would not continue to operate until a nominal temperature is reached (App. Br. 10-12).

As we discussed above, claim 19 reads on the teachings of Fried even without the heater being turned off.

We agree with the Examiner that heating element 6 of Fried is capable of being operated even after the water from the drying container 7 has been fully desorbed, such that the rinsing solution would be heated, both by heating element 6 as the water moves through pipe 5 and by heated air as it enters the container through pipe 9 (Ans. 11). Appellants have not shown that the claimed function patentably distinguishes the claimed structure from Fried's structure.

V. § 102 REJECTION OF CLAIMS 23 AND 27

A. ISSUE ON APPEAL

A third issue on appeal arising from the contentions of Appellants and the Examiner is: Does the evidence support the Appellants' view that the Examiner erred in finding Fried's heating element 6 is "arranged in the reversibly dehydratable material or in a pipe to the sorption column" as recited in claims 23 and 27? We answer this question in the negative.

B. DISCUSSION

We adopt the Examiner's findings in the Answer as our own and add any additional findings of fact appearing below for emphasis.

The Examiner has interpreted the phrase "in the reversibly dehydratable material" broadly as requiring that the heater be disposed "inside or interior to" the reversibly dehydratable material and not as requiring the heater to be "embedded in" the reversibly dehydratable material (Ans. 12).

Appellants contend that the heater being positioned between the cylinder 7 and the water pipe 5 is not equivalent to being "in the reversibly

dehydratable material” (App. Br. 12) and that one of ordinary skill in the art would not interpret the term “in” as meaning “inside or interior to” as asserted by the Examiner (App. Br. 13; Reply Br. 17).

During examination, “claims . . . are to be given their broadest reasonable interpretation consistent with the specification, and . . . claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art.” *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (*quoting In re Bond*, 910 F.2d 831, 833 (Fed. Cir. 1990)).

We agree with the Examiner’s interpretation of the disputed claim language. Appellants’ Specification provides no definition of the phrase “in the reversibly dehydratable material” (*see generally* Spec.). Appellants provide no evidence to support their contention that one of ordinary skill in the art would not read the claimed phrase as interpreted by the Examiner and do not provide any rationale as to why the Examiner’s interpretation is not a reasonable interpretation consistent with the Specification.

Appellants place much emphasis on the alternative location of the heater recited in claims 23 and 27, i.e., “in the reversibly dehydratable material *or* in a pipe to the sorption column” (App. Br. 12-14). However, claims 23 and 27 would read on a device in which only one of these alternatives is met. The Examiner has shown that claims 23 and 27 read on the Fried device because heating element 6 is disposed in a reversibly dehydratable material (Ans. 12). As such, it is of no moment if Fried does not teach a heater disposed “in the pipe to the sorption column.” Appellants have provided no reason why the Examiner’s interpretation of the first alternative is inappropriate in view of the second alternative.

VI. CONCLUSION

On the record before us and for the reasons discussed above, we sustain the rejections maintained by the Examiner under 35 U.S.C. §§ 102(b) and 103(a). We do not reach the provisional obviousness-type double patenting rejections maintained by the Examiner.

VII. DECISION

We affirm the Examiner's decision.

VIII. TIME PERIOD FOR RESPONSE

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

AFFIRMED

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