

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 29

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN A. PAZIK

Appeal No. 95-4002
Application 08/081,858¹

ON BRIEF

Before ABRAMS, STAAB and McQUADE, Administrative Patent Judges.

STAAB, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 8-22, all the claims remaining in the application.

¹ Application for patent filed June 22, 1993. According to the applicant, the application is a continuation of Application 07/761,714, filed September 17, 1991.

Appeal No. 95-4002
Application 08/081,858

Appellant's invention pertains to an integrally molded plastic fuel tank with an internal baffle. Independent claim 8, a copy of which is appended to appellant's brief, is representative of the claimed subject matter.²

The single reference of record relied upon by the examiner as evidence of obviousness is:

Durrett et al. (Durett)	3,595,422	July 27, 1991
-------------------------	-----------	---------------

Claims 8-22 stand rejected under 35 U.S.C. § 103 as being unpatentable over Durrett.

The rejections are explained in the examiner's answer (Paper No. 28, mailed August 13, 1997).

The opposing viewpoints of appellant are set forth in the brief (Paper No. 23, filed February 1, 1995) and the reply brief (Paper No. 25, filed June 5, 1995).

Appellant also relies on affidavits under 37 C.F.R. § 1.132 filed May 27, 1993 and March 3, 1994, in support of his position that the claimed subject matter would not have been obvious.

OPINION

In rejecting claims 8-22 under 35 U.S.C. § 103, the examiner bears the initial

² In independent claim 22, seventh to the last line, "the pocket" lacks a clear antecedent and should apparently be --the baffle--. Appellant may wish to correct this error in the event of further prosecution.

Appeal No. 95-4002
Application 08/081,858

burden of presenting a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993), *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). A conclusion that the claimed subject matter is obvious must be supported by evidence, as shown by some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. *In re Fine*, 837 F.2d 1071, 1073-74, 5 USPQ2d 1596, 1598-99 (Fed. Cir. 1988).

Independent claim 8 calls for a vehicle tank integrally molded out of a plastic material having a length along a longitudinal axis and a width along a transverse axis, with the length of the tank being greater than the width. The tank is provided with means for mounting the tank such that the longitudinal axis is disposed transverse to a forward direction of motion of the vehicle. Further, the tank is provided with a single, integrally molded pocket extending between the top and bottom walls of the tank, the pocket being at right angles to the longitudinal axis and being positioned approximately midway between the left and right sides of the tank to form a transverse baffle to minimize sloshing of fuel between the left and right side walls of the tank during turns of the vehicle. Claim 8 additionally requires that the hollow interior of the tank is otherwise unobstructed by any other baffle forming walls except for the walls forming the single, integrally molded pocket.

Durrett discloses a plastic fuel tank “constructed so as to resist impact loading failure by forming said tank from a plurality of containers and adapting said tank to distribute the energy of impact loading relatively equally throughout the container by adapting the tank to communicate fluid between the containers” (abstract). Several embodiments are disclosed. In Figures 1-2, a rectangular tank comprising containers 1 and 2 is formed by joining upper and lower parts along a horizontal seam. A vertical seam could also be used, or the entire tank molded without seams as one unit (column 3, lines 14-16). The containers are separated by a centrally located pocket (not numbered) extending between the top and bottom walls of the tank along the length of the tank. Figure 3 illustrates a rectangular tank comprising three compartments separated by pockets that extend transverse to the length of the tank. In Figure 4, a tank comprising four containers is shown, with the containers collectively forming a cross-like pocket. Figure 5 shows a further embodiment made up of identical containers 50 joined along vertical seams 53. Although not expressly stated, the pockets of the various embodiments of Durrett reasonably appear to be capable of acting, at least to some degree, as baffles to restrict sloshing of fuel contained in the tank.

The examiner concedes that Durrett does not disclose, among other things, a pocket forming a baffle positioned in accordance with the requirements of claim 8. The examiner deals with this deficiency as follows:

The particular mounting orientation [of the tank] . . . would have been an obvious matter of engineering design choice determined by the space available in the particular vehicle. Attention is directed to Durrett, Jr. et. al., fig. 3 which discloses a pocket orientation that is transverse to the long axis of the tank. To have employed such teaching with a single pocket would have been obvious [sic, obvious] to one of ordinary skill in the art in light of the cost savings to be realized. It is widely accepted in the field to employ baffles that restrict the flow of fluids. These baffles are placed across the path of the fluid flow. [answer, page 4]

We cannot accept this position. First, it is not clear that providing the Figure 3 embodiment of Durrett with only a single pocket would result in any significant cost savings. Second, the examiner has not explained, and it is not clear to us, why the skilled artisan would carry out such a modification of the Figure 3 embodiment in a way that would necessarily result in the tank of claim 8. In this regard, Durrett's Figure 1 embodiment is a "single pocket" tank of the type generally proposed by the examiner, yet it clearly does not correspond to that which is called for in claim 8. Also, when only two modular containers of Durrett's Figure 5 embodiment are employed, a "single pocket" container results, however, it too clearly does not correspond to that which is called for in claim 8. The mere fact that the prior art structure *could* be modified in a manner which would result in the claimed subject does not make such a modification obvious unless the prior art suggests the desirability of doing so. *In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984). In the present instance, we fail to perceive any teaching, suggestion or incentive in Durrett which would have led one of ordinary skill in the art to modify the fuel tank thereof in a manner which would result

in the subject matter of claim 8.

Therefore, we will not sustain the standing § 103 rejection of claim 8, or claims 9-16 and 21 which depend either directly or indirectly therefrom.

Independent claims 17 and 22 are broader than independent claim 8 in the specifics of the baffle. Claims 17 and 22, however, recite a fuel sender means for sensing and reporting the level of fuel in the tank, and specify a particular location for the float of the sender means relative to the baffle. In particular, claim 17 requires that the float of the sender means “is spaced from one side of the baffle by a distance which is approximately equal to or less than the width of the float as it moves vertically up and down.” Claim 22 calls for the float to be mounted on a pivot arm of the sender means and for the sender means to be located such that “the float [is] spaced from the one side wall [of the baffle] by a distance which is substantially less than the length of the support arm.”

The examiner contends, and appellant has not disputed, that “[t]he employment of fluid level sensors that operate via a pivoted arm mounted float . . . are standard construction in fuel tanks and would have been obvious in the construction of the above set forth device [of Durrett]” (answer, pages 4-5). As for the particular location of the fuel sensor, the examiner further contends:

The placing of the float adjacent the baffle wall in order to lessen the float movement due to fluid movement (sloshing) would have been obvious to one of ordinary skill in the art motivated by the desire to have accurate

fuel level sensing. The particular spacing of the float in relation to the pocket provides no novel or unexpected result and solves no stated problem and thus would have been a mere matter of choice and therefore obvious. See *In re Kuhle*, 526 F.2d 553, 118 USPQ 7 (CCPA 1975).

The examiner's position is not well taken. Of course, *if* Durrett were to be provided with a conventional fuel level sensor having a pivoted arm mounted float, and *if* the sensor were to be located such that the float is positioned closely adjacent the baffle wall, as proposed by the examiner, the resulting structure would lessen the float movement due to fluid movement (sloshing). This fact, however, does not provide the proper motivation for combining the teachings of these references. It is the teachings of the prior art taken as a whole which must provide the motivation or suggestion to combine the references. See *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1051, USPQ2d 1434, 1438 (Fed. Cir. 1988); *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1143, 227 USPQ 543, 551 (Fed. Cir. 1985) and *In re Deminski*, 796 F.2d 436, 442-43, 230 USPQ 313, 315-16 (Fed. Cir. 1986). Here, only appellant has suggested the fuel level sensor location called for in claims 17 and 22, and the benefit to be derived therefrom. As the court stated in *Uniroyal*, 837 F.2d at 1051, 5 USPQ at 1438, "it is impermissible to use the claims as a frame and the prior art references as a mosaic to piece together a facsimile of the claimed invention."

The examiner's reliance on *In re Kuhle*, 526 F.2d 553, 118 USPQ 7 (CCPA 1975), in an attempt to dismiss the particular claimed location for the fuel sender

means as an obvious matter of choice and design is also not well taken. In contrast to the situation in *Kuhle*, here the location of the fuel sender such that the float is situated closely adjacent the baffle *is* disclosed in appellant's specification as solving a problem of accurately sensing fuel level within the tank.³ Thus, the claimed fuel sender locations cannot be dismissed as obvious matters of design choice without supporting evidence.

In light of the foregoing, we also will not sustain the standing § 103 rejection of claims 17 and 22, or claims 18-20 which depend either directly or indirectly from claim 17.

³ See page 10 of the specification of the present application, wherein it is stated: "Float 60 is desirably located closely adjacent one side wall of the pocket 40 as shown in Fig. 3. This allows fuel sender unit to more accurately sense the fuel level within the tank 2 unaffected by fuel movement within the tank."

Appeal No. 95-4002
Application 08/081,858

In that the examiner has not met his initial burden of presenting a *prima facie* case of obviousness of the subject matter of the appealed claims, it is unnecessary for us to consider appellant's evidence of nonobviousness, i.e., the affidavits submitted under 37 C.F.R. § 1.132.

The decision of the examiner is reversed.

REVERSED

NEAL E. ABRAMS)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
LAWRENCE J. STAAB)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
JOHN P. McQUADE)	
Administrative Patent Judge)	

Appeal No. 95-4002
Application 08/081,858

James W. Miller, Esq.
Suite 1005
Foshay Tower
821 Marquette Avenue
Minneapolis, MN 55402