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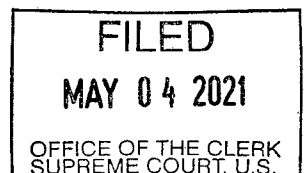
SUPREME COURT OF THE UNITED STATES

Matthew Earley pro se,
Petitioner,

vs.

U.S. Court of Appeals / Federal Circuit,

Respondent,



On petition for a Writ of Certiorari to
the United States Court of Appeals
at the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Matthew Earley pro se Applicant

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I. Question to the Court

Can the “burden of proof” regarding inherency shift if the Court (US Court of Appeals / Federal Circuit) and Board (US Patent Trial and Appeal Board) have not determined or demonstrated that the prior art reference and the claimed invention are identical or substantially identical as is required in MPEP 2112 and MPEP 2125 ?

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III Jurisdiction

Applicants petition for a rehearing to the U.S. Court of Appeals / Federal Circuit was denied on February 17, 2021 (case 2020-1816 / Application 12/925,235). Applicant invokes this Courts Jurisdiction under 28 USC 1257 having timely filed this petition for writ of certiorari within ninety days of the US Court of Appeals / FC judgment.

IV. Statement of the Case

Regarding Inherency

The Board (Patent Trial and Appeal Board) introduced an undesignated new ground of rejection (inherency) in their 11/14/2019 decision (Appx7,8,9&10 - 4. Opinion A). Preamble Limitation Issue) and at the same stated that “the burden was on the appellant to show that Earley’s wind turbine as modified by the suggestions in the prior art references would not inherently perform the same function recited in claim 26”. Was it reasonable for the Board to place the “burden” on the appellant as they introduced this new ground of rejection?

In the Court’s decision (US Court of Appeals at the Federal Circuit) of 12/14/2020 (Appx37,38&39) they recognized the Board’s new ground of rejection and also concluded that the “burden of Proof” had shifted.

MPEP 2112 paragraph’s III and V state that a rejection under USC 102 and 103 can be made if “the prior art product seems to be identical except that the prior art is silent as to an inherent characteristic” and “once a reference teaching product appearing to be substantially identical is made the basis of a rejection, and the

examiner presents evidence or reasoning to show inherency, the burden of production shifts to the applicant”.

MPEP 2125 states that, “Drawings and pictures can anticipate claims if they clearly show the structure which is claimed. However, the picture must show all of the claimed structural features and how they are put together”.

The prior art of Earley 842 (US 6,949,842 B2) and the claimed invention are very far from being “identical” or “substantial identical”. The prior art of Earley 842 is a patent for a “Centrifugal Weight Control (CWC) apparatus” and the claims protect only said apparatus. The title is “Centrifugal weight Control for Wind or Water Turbine”. The Earley 842 product is the CWC apparatus. It is misleading for the Board to refer to this prior art as “Earley’s wind turbine”. The turbine drawings in Earley 842 illustrate placement of the CWC apparatus (product) on a low or intermediate speed shaft.

In the Board’s Opinion (Appx8) they state: “it possesses the **authority** to require an applicant to prove that the subject matter shown in the prior art does not possess the specified characteristic”, presenting in Figure 1 (Appx8) from Earley 842. Other than the CWC apparatus, this Figure fails to

disclose the following structural elements found in claim 26: a rotor with fixed pitch blades, a horizontal low speed shaft; a right angle gearbox; an extended vertical shaft; a multi-gear transmission; a high speed output of said multi-gear transmission; a clutch that journals to said high speed output; an induction generator that operatively connects to said clutch. Per **MPEP 2125** the Board's use of Figure 1 in Earley 842 is inappropriate.

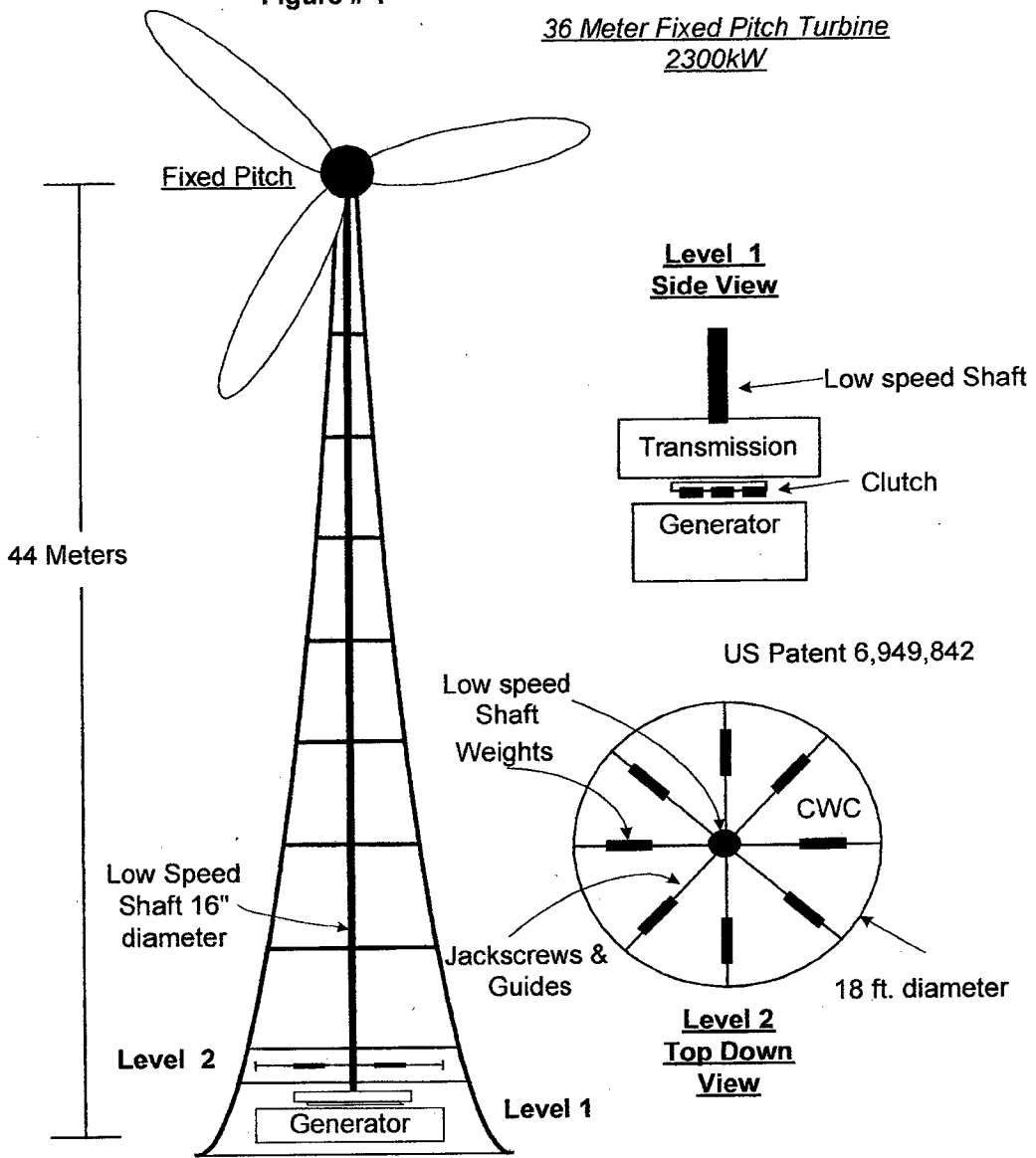
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This “**authority**” discussed above is established “once a reference teaching product appearing to be substantially identical is made the basis of a rejection, and “the Examiner presents evidence of reasoning to show inherency, the burden of production shifts to the applicant” (MPEP 2112 - Requirements of Rejection Based on Inherency; Burden of Proof - Section V).

For contrast below is Figure 1 from the claimed invention. It includes a 36 meter fixed pitch turbine; a tower to support a vertical shaft; a 16” vertical shaft; a CWC apparatus; a transmission; a clutch; and induction generator rated at 2300 kW.

Figure # 1

36 Meter Fixed Pitch Turbine
2300kW



Matthew Earley 732-528-9201

On page 8 (Appx8 - bottom) of the Board's decision they again quote Earley 842 and state "permits the capture and transformation of energy in an increasing flow (wind or water) while maintaining a desired operating speed" and "permits capture and transformation of additional offered kinetic energy" (Appx48 - Earley, col, I.31-49). It must be noted that all wind turbines (induction type) permit the capture and transformation of increasing amounts of energy in an increasing flow while maintaining a desired operating speed. The Earley 842 patent does not disclose one quantitative measure regarding size, diameter, height, speed, or capacity. (Appx41-49).

The distinction between the claimed invention and current technology is that the claimed invention generates increasing amounts of energy through 24 m/s with cutout at 25 m/s and has no aerodynamic means of control, whereas, current technology (at the time of the invention) generates increasing amounts of energy through 14m/s with continuing operation through 24 m/s and cutout at 25 m/s (where rotor power in winds above 15 m/s is controlled/limited with active aerodynamic solutions - typically active pitch). The blades are feathered accordingly to maintain (but not increase) energy capture.

On page 9 (Appx9 - top) of the Board's decision they say; "As Appellant concedes, Earley's wind turbine includes a fixed pitch rotor and a CWC falling within claim 26's scope". A fixed pitch rotor is an undisclosed feature that is implied in the Earley 842 specification. This specification (Appx49) Earley col. III Ln. 11-16) does re-task a control system typically employed for active pitch (or active stall) to control movement of CWC weights along their jackscrews. Other aerodynamic means of control would continue to be available, including air brakes, passive stall and yaw (yaw only in very small systems). Earley's 842 drawing (Figure 1) discloses only the CWC apparatus.

On page 9 (Appx9 – Ln 4) of the Board's decision they state; "Because Earley's wind turbine includes the same structural elements that the Appellant discloses are responsible for the functional limitations recited in claim 26's preamble....".

This statement is not correct. Structural elements in claim 26 that are not disclosed in Earley 842 and are critical to the functional limitation include fixed pitch rotor, induction generator, transmission, vertical shaft, and high-speed output of said multi-gear transmission. In particular the induction generator in claim 26 is sized for rated power at 25 m/s, which can deliver

necessary amounts of (opposing) generator torque to control rotor power through 24 m/s (Appx50-51).

The Earley 842 patent and the claimed invention are not identical or substantially identical, therefore the novelty of claim 26 “for the production of increasing amounts of energy in increasing wind speeds up to cut-out at 25 m/s” remains and the “burden of proof” does not shift. Such a functional limitation was not a known capability in the art at the time of the invention.

Regarding Obviousness

The Examiner simply articulates in his rejection an assembly of parts found in Earley, Simon, and Carter to demonstrate obviousness (Appx52-55). The Examiner does not provide any suggesting or motivating rationale. The functional limitation in claim 26 certainly would flow from Examiner’s articulated assembly (with properly sized components). At the time of the invention the functional limitation “for the production of increasing amounts of energy in increasing wind speeds up to cut-out at 25 m/s” was unknown in the art. This same functional limitation / element is certainly not disclosed in Earley 842. Yes, the Earley 842 product (the CWC apparatus) and implied fixed pitch feature are found in Claim 26.

KSR 550 U.S. at 401, 1.(a) provides insight: “A patent composed of several elements is not proved obvious merely by demonstrating that each element was, independently, known in the art. Although common sense directs caution as to a patent application claiming an innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the art to combine the elements as the new invention does”.

At the time of the invention virtually all wind turbines actively avoided the capture and transformation of additional energy content above 15 m/s. They did so by using active aerodynamic solutions (typically / but not exclusively active pitch). The functional limitation at issue was not recognized in the art at the time of the invention and, therefore, cannot also serve as a reason to combine. If not known then it cannot be obvious. One would have to conclude that Examiner’s motivation was improperly gleaned from the application (hindsight reconstruction).

The specification of the claimed invention states that “ employing CWC (in lieu of pitch or stall solutions) in conjunction with induction generator

torque, enables on demand control of necessary amounts of opposing torque to manage rotor speed in gusty and increasing winds speeds through cut-out typically 25 meters per second” (Appx56 - par 0020). The CWC apparatus (in lieu of pitch or stall solutions) is not the exclusive or prime means of controlling rotor speed through 24 m/s with cut-out at 25 m/s. The properly sized induction generator is the prime means of control. This being the case, should the undisclosed inherent element (fixed pitch rotor) serve as a reason to combine the prior art elements in the way claimed in the new invention?

On page 4 of the Courts decision they state, “The arrangement in the ‘235 application purports to use more of the available energy”. The claimed invention does, in fact, use more of the available energy (see table 2 of the ‘235 application – Appx51).

V. Reason for Granting the Writ

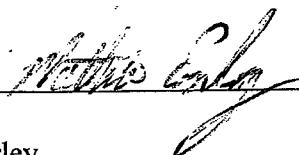
Both the Court and the Board have stated that aspects of this case are complex and the pro se status of the applicant hasn't likely made things any easier. That aside, the position of the Court and the Board regarding inherency and novelty do not meet the requirements found in MPEP 2112 and MPEP 2125.

VI. Conclusion

For the foregoing reasons, the Applicant respectfully requests that this Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals at the Federal Circuit.

Dated this 17th day of May, 2021

Respectfully submitted,

A handwritten signature in cursive script, reading "Matthew Earley", is written over a horizontal line.

Matthew Earley

Applicant pro se

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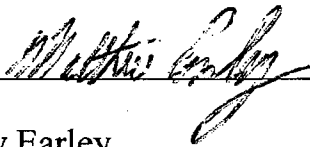
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VII. Declaration

I declare under penalty of perjury that the foregoing Writ Of Certiorari is true and correct. Executed and dated this 17th day of May, 2021.

A handwritten signature in cursive script, appearing to read "Matthew Earley", is written over a horizontal line.

Matthew Earley