

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIRAC, INC.,
Petitioner,

v.

ECOFASTEN SOLAR, LLC,
Patent Owner.

IPR2021-00532
Patent 10,763,777 B2

Before SCOTT B. HOWARD, SEAN P. O'HANLON, and
BRENT M. DOUGAL, *Administrative Patent Judges*.

HOWARD, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing of Decision
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.71(d)

INTRODUCTION

Unirac, Inc. (“Petitioner”) filed a Petition requesting *inter partes* review of claims 1–14 and 16–24 of U.S. Patent No. 10,763,777 B2 (Ex. 1001, “the ’777 patent”). Paper 2 (“Petition,” “Pet.”). EcoFasten Solar, LLC (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”). We issued a Decision Denying Institution of *Inter Partes* Review. Paper 7 (“Decision” or “Dec.”). Petitioner filed a timely Request for Rehearing Pursuant to 37 C.F.R. § 42.71(d). Paper 8 (“Req. Reh’g”). For the reasons set forth below, Petitioner’s rehearing request is *denied*.

ANALYSIS

A. Legal Standard

When rehearing a decision on institution, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c) (2020). An abuse of discretion may arise if the decision is based on an erroneous interpretation of law, if substantial evidence does not support a factual finding, or if an unreasonable judgment is made in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

Also, 37 C.F.R. § 42.71(d) sets forth, in relevant part that:

A party dissatisfied with a decision may file a single request for rehearing without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

B. The Panel Did Not Misapprehend or Overlook Petitioner's Evidence that Wentworth's Stanchion Is a Bracket.

In the Institution Decision, we determined that Petitioner did not sufficiently persuade us that Wentworth's¹ stanchion 24 is a "bracket" as recited in the claims of the '777 patent. Dec. 19–21. Specifically, we found that (1) Wentworth calls stanchion 24 a stanchion, not a bracket and (2) because Mr. Dregger's² testimony that Wentworth's stanchion 24 is a bracket was conclusory, we accorded the testimony no weight. *Id.* at 19–20.

In its Request, Petitioner argues that we overlooked the ordinary and customary meaning of bracket. *See* Req. Reh'g 3–8. For example, Petitioner argues that "[t]he ordinary and customary meaning of 'bracket' is 'a projecting support.'" *Id.* at 3 (citing Ex. 1022, 262; Ex. 1023, 137). However, Exhibits 1022 and 1023 were submitted along with the Request for Rehearing. Petitioner has not identified where in the Petition Petitioner set forth that understanding of the definition of a bracket. *See id.* Because the definition was not presented in the Petition, we could not have overlooked or misapprehended it.

Petitioner also argues that we overlooked or misapprehended Mr. Dregger's testimony confirming the meaning of the term bracket. Req. Reh'g 3–6 (citing Ex. 1003 ¶¶ 38, 58, 61–63, 95–97, 121; Pet. 4, 17–19, 21–22, 39, 41, 56; Ex. 1001 Figs. 1, 13–19, 28–34, 40–42, 47–53, 60–62, 64, 65, 68–94). For example, Petitioner argues that the Petition and Mr. Dregger cited to specific prior art references and explained that:

¹ US 7,762,027 B1, filed Sept. 28, 2006, issued July 27, 2010 (Ex. 1005).

² Mr. Dregger's testimony is Exhibit 1003. Petitioner proffered Mr. Dregger as an expert witness. Pet. 2.

[D]epending on the type of roof (e.g., flat, shingled, tiled), design and mounting considerations (e.g., low-profile, angle of sun), etc., it was well-known that a bracket for attaching a structure could be formed in a variety of shapes and configurations, including bases in solid or “U” shapes with threaded portions extending upwardly or holes to receive fasteners vertically; mounts with extensions formed in “L” or “Z” shapes for attachment with clamps or fasteners horizontally; stanchions integral to, or separate from, a base or other mount to provide, e.g., stand-off from the roof surface. . . . The figures below (annotated with colors and labels) demonstrate that it was known to use a variety of configurations and shapes of brackets or stanchions (blue) affixed to a roof with fasteners (purple) to provide support for structures attached to roofs. . . .

Id. at 4 (quoting Pet. 17–19; Ex. 1003 ¶ 58) (alterations in original).

We did not misapprehend or overlook Petitioner’s argument or Mr. Dregger’s substantially identical testimony. Rather, we considered Mr. Dregger’s testimony and did not find it sufficiently persuasive. *See* Dec. 20. As we stated in the Decision, Mr. Dregger’s testimony “merely parrots the conclusory statements of Petitioner” without sufficient explanation or support. The Decision specifically cited most of Mr. Dregger’s testimony that Petitioner directs us to in the Request. *See id.* Although we did not specifically address the testimony in paragraph 58 in our Decision,³ that testimony suffers the same infirmity as the testimony we explicitly addressed. That is, it “merely parrots the conclusory statements” in the Petition without providing sufficiently persuasive evidence. *See id.* Like the other testimony, Mr. Dregger states that a stanchion is a type of bracket without citing a single piece of corroborating evidence that describes a

³ Although the Petition cited the testimony of paragraph 58 when discussing the State of the Art (Pet. 19), it was not cited in the analysis section of the Petition (Pet. 39–43).

stanchion as a bracket. Based on the facts of this case, such conclusory testimony without sufficient support is not sufficiently persuasive. *See* 37 C.F.R. 42.65(a) (“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.”); *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1368 (Fed. Cir. 2004) (“[T]he Board is entitled to weigh the declarations and conclude that the lack of factual corroboration warrants discounting the opinions expressed in the declarations.”); *Verlander v. Garner*, 348 F.3d 1359, 1371 (Fed. Cir. 2003) (Board has discretion to accord little weight to broad conclusory statements from expert witness); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 294 (Fed. Cir. 1985) (noting that the “[l]ack of factual support” for an expert opinion “may render the testimony of little probative value”).

Finally, Petitioner rebuts various arguments made by Patent Owner. Req. Reh’g 6–9.⁴ But because those arguments were not made in the Petition, we could not have misapprehend or overlooked them. Moreover, none of the evidence cited in that section sufficiently shows that a stanchion—and specifically Wentworth’s stanchion 24—is a bracket.

⁴ We also disagree with Petitioner’s implication that we adopted an improper *ipsissimus verbis* test. Req. Reh’g. 6. Although we found that Wentworth did not use the word “bracket,” we also addressed whether “a stanchion is a type of bracket” or if the “specific stanchion taught in Wentworth is a bracket.” Dec. 20. Thus, our analysis did not focus exclusively on the word used by Wentworth, but also considered whether Petitioner had sufficiently shown that the Wentworth’s stanchion was a type of bracket.

C. The Panel's Decision Was Not Based on an Erroneous Interpretation of Law

Petitioner similarly argues that “the Board failed to apply the ordinary and customary meaning of ‘bracket’ in its analysis of whether Wentworth’s stanchion is a ‘bracket.’” Req. Reh’g 9–11. Specifically, Petitioner reiterates (1) its newly argued ordinary and customary meaning of the term “bracket” and (2) Mr. Dregger’s testimony discussed above. *Id.*

We disagree that we based our determination on an erroneous interpretation of law. As discussed in the previous sections, Petitioner’s newly proffered ordinary and customary meaning of “bracket” is tardy. Similarly, because Mr. Dregger’s testimony was conclusory and not supported by factual corroboration, it was not sufficient to demonstrate that Wentworth’s stanchion 24 was a bracket as claimed in the ’777 patent.

D. The Panel's Determinations Regarding the Proposed Modifications of Wentworth Were Not Premised on Legal Error

In the Decision, we determined that Petitioner did not persuasively argue that “a person having ordinary skill in the art would have modified [Wentworth’s] stanchion 24 to include a body portion.” Dec. 20–21. As Petitioner points out, that determination “was based on the premise that Wentworth’s stanchion is not a ‘bracket.’” Req. Reh’g 12. Petitioner argues that “[b]ecause the Petition established that Wentworth’s stanchion is indeed a ‘bracket’ under the ordinary and customary meaning of that term, as discussed *supra*, this criticism of the Petition’s modification to Wentworth’s stanchion cannot stand.” *Id.*

For the reasons set forth above, Petitioner has not persuasively argued that we misapprehended or overlooked evidence regarding whether Wentworth’s stanchion is a bracket. Accordingly, for the same reasons,

because our determination was based on Petitioner's failure to sufficiently show that Wentworth's stanchion was a bracket, we did not err in finding Petitioner had not sufficiently shown why a person having ordinary skill in the art would have modified stanchion 24 to include a body portion. *See* Dec. 20.

E. The Board Did Not Overlook Arguments Regarding Whether Wentworth's Stanchion Includes a Flange

Petitioner argues that the ordinary and customary meaning of a flange is "a rim of a mechanical part for strength, for guiding, or attachment to another object." Req. Reh'g 13–14 (citing Ex. 1022, 767; Ex. 1023, 442). Petitioner further argues that the Petition and Mr. Dregger applied that definition. *Id.* at 14 (citing Pet. 39, 47; Ex. 1003 ¶ 95, 105).

We are not persuaded that we overlooked Petitioner's argument. First, Petitioner relies on definitions not provided in the Petition; instead, Petitioner relies on definitions included with the Request for Rehearing. *See* Req. Reh'g 13–14 (citing Ex. 1022, 767; Ex. 1023, 442). We could not have overlooked arguments that were not made in the Petition.

Second, although Petitioner directs us to arguments in the Petition that describe stanchion 24 and how it is used, none of the descriptions are of a "rim of a mechanical part" as required by Petitioner's new formulation of the ordinary and customary meaning. *See* Pet. 39, 47, *cited by* Req. Reh'g 14. Because Petitioner did not argue in the Petition that Wentworth's stanchion 24 was the rim of a mechanical part, we could not have overlooked or misapprehended that argument.

F. The Board Did Not Commit Legal Error Regarding the Combination of Wentworth and Ullman

In the Decision, we determined that “we are not sufficiently persuaded that a person having ordinary skill in the art would have replaced Wentworth’s stanchion 24 with the structure Petitioner identifies as a mounting bracket from Ullman Figure 16.” Dec. at 27. Petitioner argues that determination was based on the premise that Wentworth’s stanchion is not a “bracket,” which Petitioner describes as “a mistake. Req. Reh’g 14–15. However, because we are not persuaded that we erred in determining that Petitioner has not sufficiently shown that Wentworth’s stanchion 24 is a bracket, we are similarly not persuaded that our determinations regarding the combination of Wentworth and Ullman were based on legal error.

CONCLUSION

For the forgoing reasons, Petitioner has not shown that we abused our discretion or misapprehended or overlooked a matter in denying institution. Accordingly, Petitioner’s Request for Rehearing is denied.

ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Petitioner’s Request for Rehearing Pursuant to 37 C.F.R. § 42.71(d) (Paper 8) is *denied*.

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