

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LAROSE INDUSTRIES, LLC
Petitioner

v.

CHOON'S DESIGN, LLC
Patent Owner

Case IPR2014-00218
Patent 8,485,565 B2

Before GRACE KARAFFA OBERMANN, JEREMY M. PLENZLER, and
JON B. TORNQUIST, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

On June 3, 2014, LaRose, LLC (“Petitioner”) filed a request for rehearing (Paper 11, “Reh’g Req.”) of the Board’s decision (Paper 9, “Decision”) denying *inter partes* review of claims 9 and 12-14 of U.S. Patent No. 8,485,565 B2 (“the ’565 patent”). The Petition (Paper 1, “Pet.”) challenged claims 1 and 5-14 of the ’565 patent. We determined that the information presented, at the preliminary stage of this proceeding, establishes a reasonable likelihood that Petitioner would prevail at trial with respect to claims 1, 5-8, 10, and 11 of the ’565 patent. We further determined, however, that the information does not show sufficiently that there is a reasonable likelihood that Petitioner would prevail at trial with respect to claims 9 and 12-14. Accordingly, we declined to institute trial as to those claims.

Petitioner’s request for rehearing is limited to our decision declining to institute trial with respect to claims 9 and 12-14 of the ’565 patent. For the reasons that follow, we deny the request for rehearing.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988). In its request for rehearing, the dissatisfied party must

identify the place in the record where it previously addressed each matter it submits for review. 37 C.F.R. § 42.71(d).

III. ANALYSIS

Petitioner seeks rehearing of the Board’s denial of *inter partes* review of (1) claims 12-14 under 35 U.S.C. §102 as unpatentable over MacBain¹; and (2) claim 9 under 35 U.S.C. §103 as unpatentable over Pugh² in view of Meltzer,³ Darnell,⁴ Hunter⁵ or Carruth.⁶ Reh’g Req. 1.

A. Claims 12-14 – Anticipation by MacBain

Claim 12 requires “capturing one end of an elastic band and pulling the end over and onto an adjacent pin while engaged with another elastic band.” Claims 13 and 14 depend from claim 12. Petitioner does not argue claims 13 and 14 separately in the request for rehearing. *See* Reh’g Req. 2-6. Petitioner considers warp 103 and weft 101 in MacBain as the claimed elastic bands and contends that warp 103 inherently would engage weft 101 while warp 103 is pulled through loom finger 19. Reh’g Req. 3 (citing Pet. 33). We do not find this argument persuasive for the reasons explained in our Decision. *See* Dec. 14.

¹ U.S. Patent No. 5,231,742 (Ex. 1010) (“MacBain”).

² UK Patent App. No. GB 2147918 A (Ex. 1015) (“Pugh”).

³ U.S. Patent No. 5,426,788 (Ex. 1011) (“Meltzer”).

⁴ U.S. Patent No. D592,537 S (Ex. 1012) (“Darnell”).

⁵ U.S. Patent No. 7,040,120 B2 (Ex. 1013) (“Hunter”).

⁶ U.S. Patent No. 8,418,434 B1 (Ex. 1014) (“Carruth”).

Petitioner now further contends, relying on a new modified version of MacBain's Figure 7A that was not raised in the Petition, that "engagement would necessarily occur due to the manner in which the warp 103 is pulled through the loom finger 19₂ by hook 105, as well as the physical dimensions of the relevant parts of MacBain's loom, namely, the depth of the channel 77 of the loom finger 19₂ and the diameters of the hook 105 and the warp 103." Reh'g Req. 3. Petitioner does not identify in the record where these contentions were previously presented. Although Petitioner previously asserted that "[w]hile the warp 103 is pulled through the loom finger 19₂, the warp 103 would inherently engage the closed loop weft 1011 (i.e., another elastic band), as well as the loom finger 19₂," the Petition does not mention anything regarding the orientation of hook 105 relative to loom finger 19₂ or the relative dimensions of warp 103, loom finger 19₂, and hook 105. Pet. 33. We could not have overlooked or misapprehended Petitioner's contentions, as they were not raised in the Petition.

B. Claim 9 – Obviousness over Pugh/Meltzer/Darnell/Hunter/Carruth

Claim 9 depends from claim 1 and further recites "a clip for securing ends of the series of links together." Petitioner contends that it would have been obvious "to provide the loom apparatus of Pugh with the clip disclosed in Meltzer, Darnell, Hunter or Carruth such that parts of the knitted fabric product formed by Pugh can be conveniently secured to one another." *Id.* at 7 (citing Pet. 42).

Petitioner now further contends that it is a "well-known fact that knitted fabric products have been provided with fasteners, such as clips, for holding parts thereof together," and requests the Board to take judicial notice of this alleged fact. *Id.* at 7-8. In the request for rehearing, Petitioner comes

forward with new evidence that was not presented in the Petition and alleges that the evidence provides examples of fasteners for holding parts of knitted fabric products together (e.g., buttons or clips for fastening portions of sweaters to one another, clips or other fastening mechanisms for holding ends of knitted mufflers together, or metallic clips for securing ends of a scarf together). *Id.* at 8-9 (citing Exs. 1018-1023). Petitioner contends that, because “the apparatus of Pugh is used for making a knitted fabric product, a skilled person would have found it obvious to include *a* clip with the Pugh apparatus for securing parts of the fabric product to one another.” *Id.* (emphasis added). Petitioner relies on the clip being one of the various clips from the newly-advanced Exhibits 1018-1023.

Petitioner does not identify in the record where these contentions were previously presented. The only citation to the Petition for the limitations of claim 9 is to page 42. There the Petition states that “the connecting member 24 disclosed in Meltzer holds ends of a series of links to secure the ends together and therefore constitutes a clip,” and “it would have been obvious to provide the apparatus of Pugh with *the* connecting member 24 in Meltzer since ends of the series of links formed in Pugh can be conveniently secured to one another with the use of same.” Pet. 42 (emphasis added). The Petition provides similar reasoning for the combination of Pugh with Darnell, Hunter, or Carruth. The Petition only proposes combining the specific clips from Meltzer, Darnell, Hunter, or Carruth with Pugh. The Petition does not mention anything with respect to the Board taking judicial notice of the limitations in claim 9, and the newly submitted evidence (Exs. 18-23) was not presented, much less relied upon, in the Petition. We could

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not have overlooked or misapprehended Petitioner's contentions, as they were not raised in the Petition.

IV. CONCLUSION

Petitioner's request for rehearing is *denied*.

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