

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NECKSGEN, INC.,
Petitioner,

v.

SIMPSON PERFORMANCE PRODUCTS, INC.,
Patent Owner.

Case IPR2018-00133
Patent 9,351,529 B1

Before MICHAEL W. KIM, BART A. GERSTENBLITH, and
JASON W. MELVIN, *Administrative Patent Judges*.

GERSTENBLITH, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71; 35 U.S.C. § 314(a)

I. INTRODUCTION

NecksGen, Inc. (“Petitioner”) filed a Petition (Paper 2, “Pet.”) requesting institution of *inter partes* review of claims 1–19 of U.S. Patent No. 9,351,529 B1 (Ex. 1001, “the ’529 patent”). Simpson Performance Products, Inc. (“Patent Owner”) filed a Corrected Preliminary Response (Paper 8).¹ In our Decision Denying Institution (“Decision”), we determined that Petitioner failed to establish a reasonable likelihood of prevailing at trial on any of its asserted challenges. Paper 9 (“Dec.”). Petitioner filed a Request for Reconsideration (“Request”) of our Decision. Paper 10 (“Req. Reh’g”). For the reasons provided below, we deny Petitioner’s Request.

II. STANDARD OF REVIEW

When considering a request for rehearing, the Board reviews its decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may arise if the decision was based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, 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). Additionally: “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. 37 C.F.R. § 42.71(d).

¹ In response to Patent Owner’s unopposed request, we authorized Patent Owner to file, *inter alia*, a corrected preliminary response on March 22, 2018.

III. ANALYSIS

Petitioner contends that we abused our discretion “by failing to construe the claim term ‘tether’” in our Decision. Req. Reh’g 3. Petitioner asserts that an “actual dispute exists regarding the construction of the claim term,” which Petitioner contends “[t]he record unambiguously demonstrates.” *Id.* at 3–4. Petitioner explains that it proposed a construction for “tether” that Patent Owner did not oppose expressly, but that Patent Owner’s arguments in the Preliminary Response reveal that Patent Owner applied a narrower construction of the term. *Id.* at 4 (citing Paper 2, 22; Paper 8, 1, 3–8, 32 (pointing to Patent Owner’s arguments regarding the recitations of the claim terms “side” and “rear” tethers)). Petitioner contends that the construction of “tether” was central to our consideration of Petitioner’s challenges. *Id.* at 7. Petitioner asserts that our alleged failure to consider the appropriate claim scope resulted in an abuse of discretion in our (1) application of the art to the claims and (2) evaluation of whether Petitioner established a reasonable likelihood of demonstrating that one of ordinary skill in the art would have been motivated to combine the teachings of the references with a reasonable expectation of success. *Id.* at 7–15.

A. Construction of “Tether”

In the Petition, Petitioner proposed that we construe five claim terms or phrases: (1) “attached”; (2) “jointly attached”; (3) “being disposed between shoulder belts of a seat belt assembly”; (4) “helmet”; and (5) “tether.” Pet. 20–22. With respect to “tether,” Petitioner stated:

The BRI of the term “tether” should be construed to mean “any tether, webbing, strap, dashpot, belt, cord, chain, cable, rope, band, or the like, that is adapted to attach a restraint device to a helmet, and includes the hardware and components (e.g. ring,

loops and clips) thereon that allow the tether to be attached to a helmet, restraint device or seat belt assembly. The BRI of the term “tether” should also include “a tether that attaches a skull cap to an embodiment of the restraint device.[”] The BRI of the term “tether” should also include that a “tether” “may be comprised of more than one section and that the term tether may include only the tether section that attaches to the support member and/or the entire tethering system that joins the support member to the helmet.”

Id. at 22 (citing Ex. 1001, 4:46–54, 4:63–5:3; Ex. 1002 ¶ 76).

Patent Owner did not propose a construction for the term “tether” in the Preliminary Response. In our Decision, we determined that “[w]e do not need to construe expressly any claim terms for purposes of this Decision” because it did not appear, from the arguments presented, that any claim terms were in dispute. Dec. 6. When we considered the parties’ positions in reaching our Decision, we were aware that the term “tether” was defined in the ’529 patent, even though Petitioner did not state that expressly. In other words, we understood, and now explicitly determine, that the patentee acted as his own lexicographer by setting forth a specific definition for “tether” in the ’529 patent. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) (if the specification “reveal[s] a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess[,] . . . the inventor’s lexicography governs”) (citing *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)).

The ’529 patent’s discussion of “tether” is as follows:

The term “tether”, as used herein, includes, without limitation, any tether, webbing, strap, dashpot/dashpot containing a controllable rheological fluid such as that disclosed in U.S. Pat. No. 7,155,747 to Gregg S. Baker, belt, cord, chain, cable, rope, band, or the like, that is adapted to attach a restraint device to a helmet. Tether also includes the hardware and

components (e.g. rings, loops and clips) thereon that allow the tether to be attached to a helmet, restraint device or seat belt assembly. Moreover, the term tether includes, without limitation, where the tether has one end attached to a helmet and the other end attached to the restraint device or seat belt assembly (an example of which is side tether 48 of FIG. 1); where the tether is one continuous length having terminal ends available for attaching to a helmet and an intermediate section attached to an embodiment of the restraint device (an example of which is rear tether 18 of FIG. 1); a network of webbing (not illustrated) that wraps over a helmet and which attaches to an embodiment of the restraint device; a tether that attaches a skull cap (not illustrated) to an embodiment of the restraint device; and the other suitable arrangements. It is to be understood that each tether may be comprised of more than one section and that the term tether may include only the tether section that attaches to the support member and/or the entire tethering system that joins the support member to the helmet.

Ex. 1001, 4:37–5:3. Accordingly, although we understood “tether” as set forth above when considering the parties’ positions on institution, we make explicit that our construction of “tether” is in accordance with the patentee’s definition of the term.

B. Claim Element 1[d] and Ashline ’360

The focus of our Decision was on what Petitioner referred to as “element [d]” of claim 1. Element [d] recites “wherein the at least one rear tether and one of the pair of side tethers are jointly attached to the helmet at a single attachment point on each respective side of the helmet.” Ex. 1001, 11:47–49; *see also* Pet. 23; Dec. 10. As a preliminary matter, we found that Petitioner had not shown that Ashline ’360² teaches element 1[d]. Dec. 11. In particular, we noted that Ashline ’360 teaches *front* and *rear* tethers, but

² U.S. Patent no. 6,871,360 B2, issued March 29, 2005 (Ex. 1008).

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