

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WILLIAM SYKES,
Petitioner,

v.

SMART VENT PRODUCTS, INC.,
Patent Owner.

Case IPR2019-01061
Patent 9,909,302 B2

Before KRISTEN L. DROESCH, GEORGE R. HOSKINS, and
KEVIN W. CHERRY, *Administrative Patent Judges*.

DROESCH, *Administrative Patent Judge*.

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

I. INTRODUCTION

Petitioner filed a “Request for Reconsideration” of the Decision Denying Institution of *Inter Partes* Review of claims 1, 3, 7, 11, 12, and 18 of U.S. Patent No. 9,909,302 B2 (Ex. 1001, “302 Patent”) (Paper 11, “Decision” or “Dec.”). We treat Petitioner’s “Request for Reconsideration” as a request for rehearing under 37 C.F.R. § 42.71(d). *See* Paper 12 (“Request” or “Req. Reh’g”). Specifically, Petitioner requests rehearing of the portion of the Decision denying institution of review of claims 7 and 11 because, according to Petitioner, the Board overlooked the incorporation by reference of materials related to the limitations requiring 0.5–5.0 pounds per square inch of pressure for uncoupling the panel from the frame. *See* Req. Reh’g 2. For the reasons explained below, Petitioner’s Request for Rehearing is denied.

Brief Overview of Petition and Decision

In the Petition, Petitioner cited to column 4, lines 28–45 and Figure 1 of Shook, and paragraph 37 and Figure 1 of Malitsky to address “one or more connectors configured to . . . uncouple the metal panel from the frame when 0.5–5.0 pounds per square inch of pressure is applied to a portion of the metal panel on a first side of the metal panel” and “a second side of the metal panel,” as recited in independent claim 7. *See* Pet. 13–14 (citing Ex. 1002, 4:28–45, Fig. 1; Ex. 1003 ¶ 37, Fig. 1). In the Decision, we found Petitioner’s evidence insufficient to demonstrate that Shook discloses, and the combination of Shook and Malitsky teach or suggest the aforementioned limitations of claim 7 because Shook is silent regarding the “amount of pressure applied to uncouple the panel from the frame.” *See* Dec. 18–19. We also found that Petitioner did not direct us to evidence explaining how

the cited portions of Shook account for uncoupling the panel from the frame by applying 0.5–5.0 pounds per square inch of pressure on either side of the panel. *See id.* at 19. Finally, we found Petitioner’s assertion of obviousness did not address sufficiently how one with ordinary skill in the art at the time of the invention would have modified the teachings of Shook in view of Malitsky such that the combination of references would teach or suggest the aforementioned limitations of claim 7. *See id.*

Standard of Review

The applicable standard for a request for rehearing is set forth in 37 C.F.R. § 42.71(d), which provides that a request for rehearing “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.” The party challenging a decision bears the burden of showing the decision should be modified. *See id.* “When rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” *Id.* § 42.71(c).

Analysis

In its Request, Petitioner asserts that the range limitation of 0.5–5.0 pounds per square inch for uncoupling the panel from the frame, as required by independent claim 7, is incorporated by reference in the ’302 Patent, Shook, and Malitsky, and is well known to those skilled in the art. *See* Req. Reh’g 3. According to Petitioner, flood vents are designed to be compliant with government regulations promulgated by the Federal Emergency Management Agency (FEMA). In that regard, Petitioner contends the ’302 Patent cites, under the heading “OTHER DOCUMENTS,” to the following FEMA documents: FEMA, Openings in Foundation Walls and

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Walls of Enclosures, Technical Bulletin, Aug. 1, 2008, and FEMA, Non-Residential Floodproofing, Technical Bulletin, Apr. 3, 1993. *See id.* at 4. Petitioner asserts that Shook “teaches that FEMA requirements provide the impetus for the inventive steps taken in designing flood vents.” *Id.* at 4–5 (quoting Ex. 1002, 1:13–24). Petitioner contends that Malitsky acknowledges the same state of the art as the ’302 Patent and Shook. *See id.* at 5 (quoting Ex. 1003 ¶¶ 3–4). Petitioner further asserts that Malitsky’s invention was designed to comply with the following standards: FEMA/FIA Technical Bulletin TB 1-93 “Engineered Opening Requirements;” American Society of Construction Engineers (ASCE) 24-05 “Flood Resistant Design and Construction;” and FEMA National Flood Insurance Program Regulations 44 CFR 60.3. *See id.* (quoting Ex. 1003 ¶¶ 16–19). Petitioner concludes that the state of the art for flood vents and flood vent designs is disclosed and incorporated by reference in the ’302 Patent, Shook, and Malitsky. *See id.* at 6

Petitioner contends, the “state of the art, well known by those skilled in the art, is those guidelines and restrictions promulgated by FEMA in its publications related to flood mitigation and the use of flood vents.” Req. Reh’g 6. Petitioner urges that the Board may take judicial notice of those FEMA guidelines and regulations as public and allowable according to Federal Rules of Evidence Rule 201. *See id.* (citing 37 C.F.R. § 42.62) According to Petitioner, “[t]he public records provided by FEMA related to the design and state of the art related to flood vents is therefore properly before the Board.” *Id.*

On the foregoing premises, Petitioner directs attention to following new evidence: (1) FEMA calculations related to hydrostatic loads of

standing water and for floodwater openings, which, according to Petitioner, can be found at https://www.fema.gov/media-library-data/20130726-1518-20490-6246/05_fema_p550_ch3.pdf; and (2) FEMA requirements directed to 1 foot of flood water, which, according to Petitioner, can be found at https://www.fema.gov/medialibrary-daa/20130726-1502-20490-9949/fema_tb_1__1_.pdf. *See* Req. Reh’g 6–8. From the FEMA calculations, Petitioner asserts “the pressure, at one foot of water depth, on a vertical surface is 0.434 pounds per square inch.” *Id.* at 7. Petitioner argues, for the first time, “[i]t would have been obvious, therefore, to one skilled in the art to provide a flood vent that opens (or releases) upon a pressure differential between the interior and exterior of a crawl space that meets or exceeds the pressure differential at or exceeding the minimum requirements defined by FEMA.” *Id.* Based on the FEMA requirements directed to 1 foot of flood water, Petitioner asserts that the FEMA requirements dictate that flood vents must maintain a maximum of one foot of differential in height between the water depth in an enclosed crawl space and the exterior structure. *See id.* at 8. Petitioner argues for the first time that it was well understood by those skilled in the field of flood vents that a flood vent “must be able to equilibrate pressure on either side of a flood vent once water pressure reached a certain value.” *See id.* Petitioner also asserts that under FEMA guidelines, a flood vent “must be able to allow the flow of water to limit the water height differential on either side of the flood vent” to one foot. *See id.*

We are not persuaded that we overlooked any incorporation by reference of any FEMA materials identified by Petitioner. Petitioner does not identify where in the Petition the alleged incorporation by reference of

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