

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION and
KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,
Petitioner,

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,
Patent Owner.

PGR2020-00022
Patent D850,341 S

Before GRACE KARAFFA OBERMANN, SCOTT A. DANIELS, and
CHRISTOPHER G. PAULRAJ, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request
For Rehearing of Decision on Institution
37 C.F.R. § 42.71

I. INTRODUCTION

Petitioner filed a Motion for Rehearing (Paper 9, “Rehearing Request” or “Req. Reh’g.”) of the Decision Denying Institution of Post-Grant Review (Paper 8, “Decision” or “Dec.”). We also refer to the Petition (Paper 2, “Pet.”) and Preliminary Response (Paper 7, “Prelim. Resp.”).

When rehearing a decision on institution, the Board does not review the merits *de novo*, but instead reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). 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) (citations omitted).

The party requesting rehearing bears a burden of showing with particularity why a decision should be modified. 37 C.F.R. § 42.71(d). Significantly, a rehearing request is not a vehicle for raising new arguments or evidence, but rather, “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.” *Id.*

II. DISCUSSION

A. *Background of the Dispute*

The Petition challenges the patentability of the sole design claim of U.S. Patent No. D850,341 S (Ex. 1001, “the ’341 patent”). Pet. 1. The challenged claim relates to an “ornamental design for a vehicle fender” as illustrated in four figures set forth in the ’341 patent and reproduced in the Decision. Ex. 1001 [57]; Dec. 3. Based on the arguments and evidence

presented in the Petition and the Preliminary Response, the Board denied the Petition and did not institute a post-grant review. Dec. 2, 20.

As Petitioner observes, the Decision identifies three deficiencies in the challenge. That is, the Petition fails to (1) discern the correct overall visual impression created by the claimed design; (2) address prominent differences between the claimed design and the asserted prior art design disclosed in 2015 ATS Coupe; and (3) show sufficiently that 2015 ATS Coupe is a proper *Rosen* reference.^{1,2} Req. Reh’g 3 (citing Dec. 7–18).

B. Three Rationales for Modification

Petitioner advances three rationales for modification of the Decision. In Petitioner’s view, the Board erred by (1) adopting a claim construction that does not capture the correct visual impression created by the claimed design as a whole; (2) analyzing incorrectly the anticipation ground based on 2015 ATS Coupe; and (3) rejecting Petitioner’s view that 2015 ATS Coupe is a proper *Rosen* reference. Req. Reh’g 3–15.

Petitioner further divides the second alleged error into three subparts, arguing that the Board (a) failed to apply the ordinary observer test; (b) misapprehended or overlooked the overall visual impression created by the claimed design; and (c) misapprehended or overlooked that a top plan view of the claimed design is “almost identical” to the 2015 ATS Coupe design.

¹ As we did in the Decision, we adopt Petitioner’s convention and refer to Exhibit 1008 as “2015 ATS Coupe.” Dec. 4 n.1 (quoting Pet. 3).

² *See* Dec. 17 (To meet the threshold showing for trial institution, with respect to the grounds based on obviousness, Petitioner must first identify “a reference, a something in existence, the design characteristics of which are basically the same as the claimed design.”) (quoting *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982)).

Id. at 8–14 (direct quote from heading on page 12). We arrange our analysis into sections that mirror the organization of the Rehearing Request.

1. Claim Construction

Petitioner’s first rationale for modification is that “the Decision lost sight of the visual impression created by the design as a whole” and overlooked that Petitioner’s proposed claim “construction encompassed prominent, defining features that materially influenced the visual impression.” Req. Reh’g. 7. In that regard, Petitioner argues (and we agree) that design patent claims “should be construed upon their illustrations rather than verbal descriptions of those illustrations.” *Id.* at 5. Petitioner also argues (and we agree in this case) that “an illustration depicts a design better ‘than [] any description and a description would probably not be intelligible without the illustration.’” *Id.* at 5 (quotation omitted).

Petitioner (not the Board) purported to “reduce[] to words the most prominent and defining elements of the claimed design” in a “verbal description” limited to “six elements” keyed to two of four figures from the ’341 patent. *Id.* at 4; *see* Pet. 15–17 (verbal description mapped solely to Figures 3 and 4). The Board, by contrast, took account of the overall visual impression created by the claimed design as reflected in all four patent figures. Dec. 3 (reproducing those four figures), 7 (explaining that Figures 1–4 “reflect the scope of the patented design” and taking “into account Petitioner’s verbal description of the design in our analysis”).

Petitioner unequivocally averred that its proposed construction “identifies all features of the claimed design that materially contribute to the overall visual impression it creates.” Pet. 19. Against that backdrop, the Board properly considered three additional features identified in the

Preliminary Response (but ignored in the Petition). Dec. 9–12 (citing Prelim. Resp. 17–22). The information presented establishes that those three features “affect the overall shape of the claimed design and contribute to its visual appearance.” Dec. 12 (quoting Prelim. Resp. 26–27). The Rehearing Request directs us to no argument or evidence that the Board misapprehended or overlooked in finding that Petitioner advanced “an incomplete description of the actual design.” *Id.* at 7; *see* Prelim. Resp. 14–22 (citing persuasive authority and evidence), 35 (Patent Owner contending that Petitioner relies “on an incomplete description of the claimed design”); Req. Reh’g. 3–7 (expressing disagreement with the Board’s findings but pointing out no evidence or argument overlooked or misapprehended in the Decision).

We understand that Petitioner disagrees with the Board’s assessment of the three additional features identified by Patent Owner in the Preliminary Response. Req. Reh’g. 5–7. Nevertheless, simple disagreement is insufficient to show error. Petitioner ignored those features in the Petition, and the Rehearing Request belatedly advances new theories about their relative impact on the visual impression created by the claimed design as a whole. *Id.*

A rehearing request is not a vehicle for correcting or improving a challenge advanced in a petition. A 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). We could not have overlooked or misapprehended the arguments, raised for the first time in the Rehearing Request, that the three features identified by Patent Owner are “small, subtle, and inconsequential” or “minor features” having “virtually no impact on the overall visual impression created by the design.” Req. Reh’g. 5–7.

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