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Paper 13
Entered: January 8, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ATAS INTERNATIONAL, INC.
Petitioner

v.

CENTRIA
Patent Owner

Case IPR2013-00259
Patent D527834 S

Before SALLY C. MEDLEY, JENNIFER S. BISK, and TRENTON A. WARD, *Administrative Patent Judges.*

BISK, *Administrative Patent Judge*.

DECISION
Request for Rehearing
37 C.F.R. § 42.71(d)

SUMMARY

Petitioner, ATAS International, Inc. ("ATAS"), requests rehearing of the Board's decision (Paper 11) ("Decision"), entered September 24, 2013, denying institution of *inter partes* review of the sole claim of U.S. Patent D527834 S (Ex. 1001) ("the '834 patent"). Paper 12 ("Reh'g Req."). For the reasons that follow, ATAS's request for rehearing is *denied.*

DISCUSSION

The applicable standard for granting a request for rehearing is abuse of discretion. The requirements are set forth in 37 C.F.R. § 42.71(d), which provides in relevant part:

> A party dissatisfied with a decision may file a 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.

ATAS argues that there are four reasons the Board abused its discretion by: (1) mischaracterizing the claimed design of the '834 patent; (2) improperly assessing the visual impression created by the prior art ATAS MPS120 panel; (3) improperly comparing the claimed design and the MPS120 panel for purposes of obviousness; and (4) applying the wrong legal standard in assessing obviousness under 35 U.S.C. § 103. Reh'g Req. 1. Based on these arguments, ATAS requests that the Board institute *inter partes* review of the '834 patent. *Id*.

First, ATAS argues that the Board mischaracterized the claimed design of the '834 patent because it did not "adequately articulate what it meant by 'overall asymmetry and irregularity' or how it arrived at that conclusion." Reh'g Req. at 2-3. Further, ATAS argues that the characterization ignores embodiments and visual

features of the claimed design that are inconsistent with that characterization. *Id.* at 3. Specifically, ATAS points to Figures 20 and 38 and the petition's annotation of Figure 38 that allegedly show that several features of these two embodiments are symmetric and repeating. We are not persuaded by ATAS's arguments. *Id.* at 3-6. We do not agree that Figures 20 and 38 have an "overall symmetrical and regularly repeating appearance." Reh'g Req. 4. We agree with ATAS's statement that "the shape of the well-type areas is not the defining source of the alleged overall asymmetry and irregularity of the claimed design." Reh'g Req. at 5-7. Instead, as explained in the Decision, it is the appearance resulting from the combined characteristics of all portions of the design that creates the overall impression. Decision 9-10. ATAS does not dispute the Board's characterization of the various portions of the design. Reh'g Req. 2. ATAS has not persuaded us that the characterization of the overall appearance of the claimed design is incorrect.

Second, ATAS argues that the Board failed to properly assess the visual impression of the prior art MPS120 panel. Reh'g Req. 7-12. ATAS contends that the MPS120 panel does not include a well-type area with a "v-shape" as described by the Decision. *Id.* at 7-8 (citing Decision 17). ATAS also argues that MPS120 does not have an overall symmetrical appearance based on the central recess alone. *Id.* at 8. Although we agree it is not based on the central recess alone (see Decision 17), we do not agree that MPS120 does not have an overall symmetrical appearance.

Third, ATAS argues that both the claimed design and the MPS120 panel are "flat" and that the slight difference in depths in recesses of the MPS120 panel does not distinguish the two designs. *Id.* ATAS contends that the Board focuses only on the differences between the MPS120 panel and the claimed design and ignores

the common characteristics. *Id.* at 9-12. We are not persuaded by ATAS's arguments because the Board properly applied the test as to whether there is a single reference that creates "basically the same visual impression," and determined that the overall appearance of the MPS120 panel and the claimed design is very different. Decision 7, 18.

Fourth, ATAS argues that the Board applied the wrong legal standard in assessing obviousness under 35 U.S.C. § 103 by erroneously applying the ordinary observer standard to assess obviousness when a recent Federal Circuit case held that obviousness of a design patent must be assessed from the viewpoint of an ordinary designer. Reh'g Req. at 12 (citing Decision 7; *High Point Design LLC v. Buyer's Direct, Inc.*, 730 F.3d 1301 (Fed. Cir. 2013)). We are not persuaded that ATAS has demonstrated a legal error requiring rehearing. *High Point,* which is not an en banc decision, does not overrule the Federal Circuit's *International Seaway* case quoted in the Decision. *See, e.g., Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305 ("Panel opinions are, of course, opinions of the court and may only be changed by the court sitting en banc."). Further, *High Point* expressly indicated that *International Seaway* was not inconsistent. 730 F.3d at 1313, n.2 ("We do not believe our decision in *International Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1240 (Fed. Cir. 2009), cited by the district court, compels a contrary conclusion. The *International Seaway* court may in fact have had the 'designer of ordinary skill' standard in mind when it used the term 'ordinary observer.' In any event, the court could not rewrite precedent setting forth the designer of ordinary skill standard." (citations omitted)).

In addition, ATAS concedes that it is not clear that any alleged misconception about the standard of obviousness affected the outcome in this case. Reh'g Req. 12. Instead, ATAS requests that the Board reassess obviousness in

view of the proper standard. *Id.* However, ATAS does not point to any argument or evidence set forth in the petition that addresses the characteristics of an ordinary observer or an ordinary designer. Thus, ATAS provides no indication that the results of the obviousness analysis would change depending on the particular vantage point from which it is assessed. Moreover, we are not persuaded that any alleged distinction between the vantage point from which obviousness is analyzed would affect patentability in this case.

ATAS has not carried its burden of demonstrating an abuse of discretion in the Board's Decision. ATAS's request for rehearing is *denied.*

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