

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

POLARIS INDUSTRIES INC.,
Petitioner,

v.

ARCTIC CAT INC.,
Patent Owner.

Case IPR2016-01713
Patent 7,743,864 B2

Before MICHAEL W. KIM, SCOTT A. DANIELS, and
SCOTT C. MOORE, *Administrative Patent Judges*.

KIM, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

A. *Background*

Polaris Industries Inc. (“Petitioner”) filed a Petition to institute an *inter partes* review of claims 1–14 of U.S. Patent No. 7,743,864 B2 (Ex. 1001, “the ’864 patent”). Paper 1 (“Pet.”). Arctic Cat Inc. (“Patent Owner”) filed a Preliminary Response. Paper 7 (“Prelim. Resp.”).

On February 27, 2017, we instituted an *inter partes* review of claims 1–14 on certain grounds of unpatentability set forth in the Petition. (Paper 9, “Dec.”). After institution of trial, Patent Owner filed a Patent Owner Response (Paper 12, “PO Resp.”) and Petitioner filed a Reply (Paper 15, “Pet. Reply”).

An oral hearing was held on November 17, 2017. Paper 28 (“Tr.”). The Board has jurisdiction under 35 U.S.C. § 6. In this Final Written Decision, issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, we determine that Petitioner has met its burden of showing, by a preponderance of the evidence, that claims 1–14 of the ’864 patent are unpatentable.

B. *Related Proceedings*

Petitioner and Patent Owner identify the following district court proceeding concerning the ’864 patent: *Arctic Cat Inc. v. Polaris Industries Inc.*, Case No. 0:16-cv-00010-WMW-HB (D. Minn.). Pet. 2; Paper 6, 2.

C. *The ’864 patent*

The ’864 patent is related generally to multiple purpose vehicles (“MPV”) having a straddle mount seat that seats two passengers. Ex. 1001, 1:14–15. Figures 1 and 4 illustrate an exemplary embodiment of MPV 100 of the ’864 patent, and are set forth below.

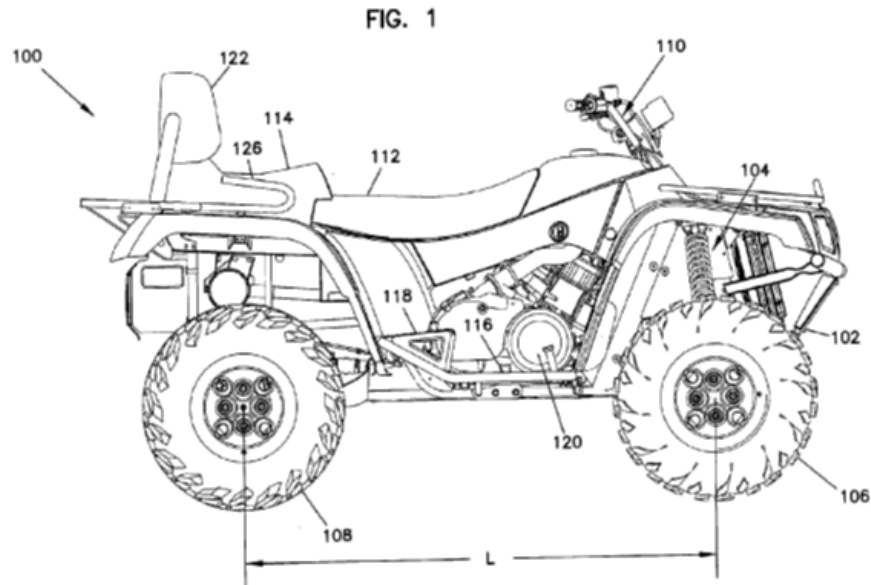


Figure 1 is a side view of the four-wheel MPV vehicle and straddle mount seat.

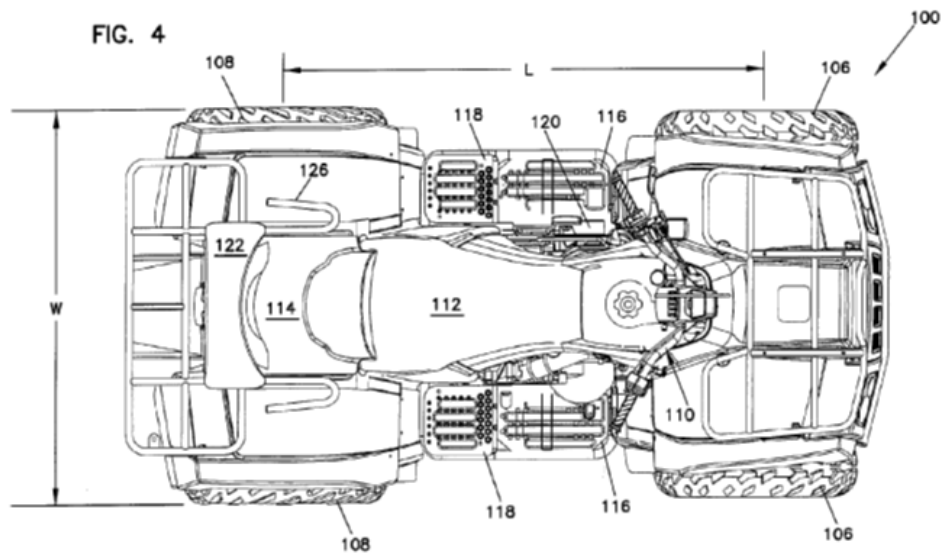


Figure 4 is a top down view of the four-wheel MPV vehicle and straddle mount seat.

As shown above, MPV 100 includes frame 102, front suspension 104, rear suspension 105, front wheels 106, rear wheels 108, engine 120, and the following items associated with driver's seat position 112: handlebars 110

for steering and driver footrests 116. Ex. 1001, 2:27–32. MPV 100 also includes the following items associated with passenger's seating position 114: backrest 122 and handles 126. Ex. 1001, 2:31–35.

D. Illustrative Claim

A trial was instituted for claims 1–14 of the '864 patent. Claims 1 and 9 are the only independent claims at issue, and are reproduced below:

1. A multi-purpose vehicle, comprising:
 - a frame;
 - a suspension secured to the frame;
 - four wheels secured to the suspension;
 - handle bars for steering the vehicle;
 - a straddle mount seat secured to the frame, the seat having seating positions for a driver and a passenger of the vehicle, the position for the passenger being located rearward and significantly above the seating position for the driver;
 - rear wheel fenders spaced apart from the rear two wheels, each rear wheel fender having a substantially planar portion located at least as far forward as an approximate longitudinal mid-region of the passenger seating position;
 - a cargo rack secured to the vehicle rearward of the seating position for the driver, the cargo rack having left and right handles removably coupled to the vehicle, the handles extending upwardly from a portion of a rack main deck below the passenger seating position and being positioned vertically adjacent to upwardly facing surfaces defining the substantially planar portions of rear wheel fenders and the handles being at least as far forward as the approximate longitudinal mid-region of the passenger seating position, each handle having a grippable portion positioned laterally adjacent to the seating position for the passenger and vertically above the seating position for the driver, substantially inboard of the outer sides of the rear wheel fenders, and

a pair of footrests for the driver and a separate pair of footrests for the passenger, wherein the footrests for the passenger are raised with respect to the footrests for the driver.

9. A multi-purpose vehicle, comprising:

a frame;

a suspension secured to the frame;

four wheels secured to the suspension;

handle bars for steering the vehicle;

a straddle mount seat secured to the frame, the seat having a driver seat and a passenger seat located rearward and raised substantially above the driver seat so as to provide a passenger a view of oncoming terrain;

rear wheel fenders spaced apart from the rear two wheels, each rear wheel fender having a portion located at least as far forward as an approximate longitudinal mid-region of the passenger seat;

a first handle and a second handle extending laterally and upwardly from a lower portion of either side of the passenger seat, the handles positioned vertically above the rear wheel fenders and said first and second handles further positioned at least as far forward as the approximate longitudinal mid-region of the passenger seat, each handle having respective grippable portions that extend upward proximate to and spaced from the side of the passenger seat for use as passenger handles; and

footrests for the driver and a separate pair of footrests for the passenger, the passenger footrests being raised with respect to the footrests for the driver.

*E. Prior Art References Applied by Petitioner
and Instituted Grounds of Unpatentability*

A trial was instituted on claims 1–14 based on the following grounds and items of prior art (Pet. 15–35):

Reference(s)	Basis	Challenged Claims
Rondeau '917 ¹	§ 102(e)(2)	1–5 and 8
Rondeau '917, Thompson ² , and Cycle Article ^{3, 4}	§ 103(a)	1–14
Grinde ⁵ , Fecteau ⁶ , and Thompson	§ 103(a)	1, 4, 5, 7, 9, and 11–14
Grinde, Fecteau, Thompson, and Walker ^{7, 8}	§ 103(a)	2 and 10
Grinde, Fecteau, Thompson, and Bombardier ⁹	§ 103(a)	3 and 8
Grinde, Fecteau, Thompson, and Cycle Article	§ 103(a)	6

¹ U.S. Patent No. 6,968,917 B2, issued Nov. 29, 2005 (Ex. 1019; “Rondeau '917”).

² U.S. Patent No. 6,491,124 B1, issued Dec. 10, 2002 (Ex. 1012; “Thompson”).

³ Matt Miles, *The 1000-Mile Day*, Cycle Magazine, October 1988, pp. 36–51 (Ex. 1025; “Cycle Article”).

⁴ The Order section of the Decision on Institution inadvertently omitted Thompson. Dec. 49. The correct citation was made, however, in the substantive portion of the Decision. Dec. 30. In any case, as set forth below, because we ultimately remove Thompson from this ground, the effect of the inadvertent omission is moot.

⁵ U.S. Patent No. 4,570,738, issued Feb. 18, 1986 (Ex. 1017; “Grinde”).

⁶ U.S. Patent No. 7,213,669 B2, issued May 8, 2007 (Ex. 1027; “Fecteau”).

⁷ U.S. Patent No. 4,546,993, issued Oct. 15, 1985 (Ex. 1029; “Walker”).

⁸ The Petition relies on Walker and Nakajima in the alternative for certain grounds of unpatentability. *See, e.g.*, Pet. 82–83. In our Institution Decision, we required Petitioner to elect one of Walker and Nakajima. Dec. 38. Petitioner elected Walker. Paper 11, 2.

⁹ U.S. Patent No. 6,659,566 B2, issued Dec. 9, 2003 (Ex. 1031; “Bombardier”).

Reference(s)	Basis	Challenged Claims
Grinde, Cycle Article, Stippich ¹⁰ , and Walker	§ 103(a)	1, 2, 4–7, and 9–14
Grinde, Cycle Article, Stippich, Walker, and Bombardier ¹¹	§ 103(a)	3 and 8

II. ANALYSIS

A. *Level of Ordinary Skill in the Art*

“Section 103(a) forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 405 (2007).

Regarding the level of skill in the art, Petitioner asserts the following:

A person of ordinary skill in the art (“POSA”) in the field of the ’864 patent at the time of its filing would be familiar with designs from various recreational vehicles, including motorcycles, snowmobiles, and ATVs, with at least a degree in fields relating to engineering or industrial design or two to three

¹⁰ U.S. Patent No. 3,795,354, issued Mar. 5, 1974 (Ex. 1008; “Stippich”).

¹¹ The Order section of the Decision on Institution inadvertently cited Fecteau for this ground, instead of Cycle Article. Dec. 49. The correct citation was made, however, in the substantive portion of the Decision. Dec. 48. Furthermore, claims 3 and 8 are dependent claims, with the ground for the corresponding independent claim citing Cycle Article instead of Fecteau, and the Patent Owner addressed the rationale to combine Grinde and Cycle Article. PO Resp. 31–33. *See also* Pet. Reply 26, n.2 (“Patent Owner incorrectly asserts Ground 8 relies upon Fecteau. *See* POR at 31. As is clear from the Petition and the Institution Decision, this instituted ground relies instead on Cycle Article. Pet. at 109–110; Dec. at 48.”).

years of experience designing recreational vehicles such as ATVs, motorcycles, and/or snowmobiles. (Ex. 1004, ¶ 16.)

Pet. 5. Patent Owner does not dispute Petitioner’s proffered level of skill in the art. *See generally* PO Resp. In response to Patent Owner’s assertions that Cycle Article is not properly combinable with Grinde (PO Resp. 32), Petitioner asserts further that “Patent Owner has previously presented sworn testimony to the Patent Office in the context of a snowmobile patent that ‘[a] person of ordinary skill would have considered designs from motorcycles, dirt bikes, and ATVs’ in December 1998, which is before the priority date of the ’864 patent.” Pet. Reply 26 (quoting Ex. 1024 ¶ 21, also citing Ex. 1024 ¶¶ 22–31). Having considered all the assertions and evidence, we find that Petitioner’s articulation of the level of ordinary skill is correct.

B. Claim Construction

In an *inter partes* review, a claim in an unexpired patent shall be given its broadest reasonable construction in light of the specification of the patent in which it appears. 37 C.F.R. § 42.100(b); *see also* *Cuozzo Speed Techs., LLC v. Lee*, 136 S.Ct. 2131, 2142 (2016) (affirming that USPTO has statutory authority to construe claims according to 37 C.F.R. § 42.100(b)). Under the broadest reasonable construction standard, claim terms are generally given their ordinary and customary meaning, as would have been understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Any special definition for a claim term must be set forth in the specification with reasonable clarity, deliberateness, and precision. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). We must be careful not to read a particular embodiment appearing in the written description into the

claim if the claim language is broader than the embodiment. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993).

“the seat having seating positions for . . . a passenger . . . located rearward and significantly above the seating position for the driver” and “a passenger seat located rearward and raised substantially above the driver seat so as to provide a passenger a view of oncoming terrain”

Independent claim 1 recites “the seat having seating positions for a driver and a passenger of the vehicle, the position for the passenger being located rearward and *significantly above* the seating position for the driver.” Emphasis added. Independent claim 9 recites “the seat having a driver seat and a passenger seat located rearward and *raised substantially* above the driver seat *so as to provide a passenger a view of oncoming terrain.*” Emphases added. Petitioner asserts both of these limitations (hereinafter, the “substantially above” limitations) should be construed as including “passenger seats for which the entire seat is visibly above the driver seat.” Pet. 20–22 (citing Exs. 1001, 1002, 1018). Patent Owner asserts that the “substantially above” limitation of independent claim 1 should be construed as “[n]ot substantially on the same level as the driver seating position such that the passenger has a better view of the oncoming terrain,” and that the “substantially above” limitation of independent claim 9 should be construed as “[n]ot substantially on the same level as the driver seat so as to provide a passenger a view of oncoming terrain.” Prelim. Resp. 16–20 (citing Exs. 1001, 1002, 1018). In the Decision on Institution, we nominally adopted Patent Owner’s constructions, but noted (1) that neither party had identified sufficiently a substantive difference between any of the proposed constructions, and (2) that

[m]ore specifically, similar to Patent Owner's insinuation that Petitioner's use of the term "visibly above" is imprecise and leaves too much to speculation (Prelim. Resp. 17), we discern that the same can be said for the claim phrase "so as to provide a passenger a view of oncoming terrain." For example, it would appear that making such a determination would have required one of ordinary skill to take into account one or more of various factors, such as heights of the drivers and passengers, their relative longitudinal and angular positioning, and the field of vision necessary to be considered an adequate "view of oncoming terrain" to meet the claim limitation. Patent Owner does not identify any such guidance in the '864 patent.¹² Absent such guidance, at this juncture of the proceeding and on this record, we have no objective basis to determine why any positioning of the passenger seat above the driver seat, however minimal "visibly" or otherwise, would not meet the aforementioned claim limitation.

Dec. 8–9.

After Institution, Patent Owner indicated that it does not object to the specific wording of the Board's construction, and cited case law supporting the proposition that claim language employing terms of degree should be given full effect. PO Resp. 6–7. In support, Patent Owner cites the following from the Declaration of Herman Christopherson:

By and large, I find that the terms of the '864 patent relevant to my opinions have plain and ordinary meanings that

¹² Aside from the Figures, the only guidance from the '864 patent that we are able to ascertain as relevant in construing this claim limitation is "[s]eating position 114 may be either on the same horizontal plane or in a raised position relative to driver position 112. A raised position or plane may provide the passenger with a better view for anticipation of terrain." Ex. 1001, 3:41–45. Going strictly by this disclosure only, under a broadest reasonable construction, any raised position, however minimal, would satisfy "provide the passenger with a better view for anticipation of terrain."

do not require any particular construction other than the claim language itself. With regard to the passenger seat located “significantly above” the driver’s seating position (Claim 1) and the passenger seat “raised substantially above the driver seat so as to provide a passenger a view of oncoming terrain” (Claim 9), I believe that these terms both mean the same thing: that the passenger seat is raised such that the passenger would have a view of the oncoming terrain. The specification supports my understanding. See ’864 patent, 3:43-45 (“A raised position or plane may provide the passenger with a better view for anticipation of terrain.”). I recognize that there could be situations (for example, a very tall driver and a very short passenger) where the passenger’s view would be impeded regardless of the raised seat. However, I believe that such exceptions would not prevent one of skill in the art from appreciating that the claim is describing a seating configuration such that in most typical rider situations the raised seat would allow the passenger to see the terrain ahead.

Ex. 2010 ¶ 16.

Petitioner responds that it agrees with the logical conclusion of the Board’s construction, namely, that “any positioning of the passenger seat above the driver seat would meet these claim limitations,” and that the cited portion of the Christopherson Declaration should be given minimal weight. Pet. Reply 2–3.

We agree with Petitioner. Patent Owner does not provide any persuasive evidence to counter Petitioner’s argument that “any positioning of the passenger seat above the driver seat would meet these claim limitations.” Neither Patent Owner, nor their expert, provides any standards for “so as to provide a passenger a view of oncoming terrain.” The portion of the specification cited by Mr. Christopherson merely repeats the words of the Patent Owner’s proposed construction, without providing any further details, and, in any case, uses the word “may,” indicating that even that

minimal guidance is merely exemplary. Finally, Mr. Christopherson acknowledges the difficulty posed by the situation of “a very tall driver and a very short passenger,” but does not propose any meaningful resolution.

Patent Owner asserts further that “[t]he plain language of claims 1 and 9 recites a **separate** passenger seat or position that is both ‘substantially above’ and ‘rearward’ with respect to the driver seat or position.”

PO Resp. 8–9 (citing Ex. 1020, Fig. 1; emphasis added). Through their application of the cited references, Patent Owner is explaining essentially that “a single, elongated, continuous seat that is unitary in nature and capable of accommodating two or more passengers” does not meet Patent Owner’s proposed construction. PO Resp. 18–21.

Petitioner disagrees, asserting that (1) each of independent claims 1 and 9 recite expressly that both the seats are part of “**a** straddle mount seat,” (2) certain limitations in the claim expressly recite “separate,” e.g., “footrests for the driver and a separate pair of footrests for the passenger,” while other limitations do not, and (3) the only portion of the ’864 patent cited in support is Figure 1, but none of the text relevant to Figure 1 provides any support for Patent Owner’s construction. Pet. Reply 4–6.

We agree with Petitioner. The “substantially above” limitations at issue do not include any express language that would exclude “a single, elongated, continuous seat that is unitary in nature and capable of accommodating two or more passengers,” and Patent Owner’s only proffered evidence, Figure 1 of the ’864 patent, is wholly inadequate to upset that understanding.

We construe the aforementioned “substantially above” limitations as indicated above, with the understanding that any positioning of the

passenger seat above the driver seat, however minimally “visibly” or otherwise, would meet the aforementioned claim limitations.

C. The Parties’ Post-Institution Arguments

In our Decision on Institution, we concluded that the arguments and evidence advanced by Petitioner demonstrated a reasonable likelihood that claims 1–14 were unpatentable over one or more of Rondeau ’917, Cycle Article, Grinde, Fecteau, Thompson, Walker, Bombardier, and Stippich. Dec. 49. We must now determine whether Petitioner has established by a preponderance of the evidence that the specified claims are unpatentable over the cited prior art. 35 U.S.C. § 316(e). We previously instructed Patent Owner that “any arguments for patentability not raised in the [Patent Owner Response] will be deemed waived.” Paper 10, 6; *see also* 37 C.F.R. § 42.23(a) (“Any material fact not specifically denied may be considered admitted.”). Additionally, the Board’s Trial Practice Guide states that the Patent Owner Response “should identify all the involved claims that are believed to be patentable and state the basis for that belief.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012).

In connection with the arguments and evidence advanced by Petitioner to support its positions that Patent Owner chose not to address in its Patent Owner Response, the record now contains persuasive, unrebutted arguments and evidence presented by Petitioner regarding the manner in which the asserted prior art teaches corresponding elements of the claims. Based on the preponderance of the evidence before us, we conclude that the prior art identified by Petitioner describes all limitations of the reviewed claims that were not contested by the Patent Owner in the Patent Owner

Response. *In re NuVasive*, 841 F.3d 966, 974 (2016). We address only the contested limitations below.

D. Certain Grounds Including Grinde, Fecteau, and Thompson

Petitioner challenges claims 1–8 as obvious over the various combinations of Grinde, Fecteau, Thompson, Walker, Bombardier, and Cycle Article, with all of these grounds including at least Grinde, Fecteau, and Thompson. Pet. 71–84, 96–98; Dec. 39, 41, 42, 49.

1. Analysis of Independent Claim 1

After institution, both Petitioner and Patent Owner agreed that Thompson is not available as prior art to the '864 patent under 35 U.S.C. § 103(c)(1), because Thompson and “the subject matter and the claimed invention [of the '864 patent] were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person.” PO Resp. 21–23; Pet. Reply 18–19; Tr. 18:2–6, 33:15–16. The manner in which Petitioner relies on Thompson is set forth as follows:

And, while Fecteau's handles appear to be below the driver seating position, *a slight modification to the handles' height is not novel*. The Patent Owner itself has represented in the context of snowmobile passenger grab handles and before the '864 patent's priority date that “it is preferable that the hand hold . . . be adjustable in height, so as to permit comfortable use by persons of varying stature” and “it will be apparent to those knowledgeable in the art that [a particular] configuration is exemplary only, and that other hand holds may be equally suitable.” (Ex. 1012, 4:10–15.) *Minor adjustments to handle configurations are therefore admittedly within the knowledge of a POSA*.

Ex. 1004 ¶ 174 (emphases added).

More specifically, Petitioner relies on Thompson with respect to its position concerning the following limitation of independent claim 1: “each handle having a grippable portion positioned . . . vertically above the seating position for the driver.” Pet. 80 (citing Ex. 1012, 4:10–15); Dec. 33–34. There is no dispute that Fecteau discloses “each handle having a grippable portion . . .” Pet. 77–80 (citing Ex. 1004 ¶¶ 171–174; Ex. 1027, Figs. 2, 3); *see generally* PO Resp. 21–23 (Patent Owner does not dispute that Fecteau discloses this limitation). That leaves us with the balance of the limitation, i.e., “positioned . . . vertically above the seating position for the driver.”

Petitioner asserts that it only relies on Thompson as an admission of Patent Owner concerning “what one skilled in the art at the time of the invention would have known.” Pet. Reply 18–19. Petitioner’s assertions with respect to Thompson are moot, however, as even if Petitioner’s reliance on Thompson is proper¹³, its reliance is only with respect to the above-italicized portions of Mr. Roensch’s Declaration, i.e., “a slight modification to the handles’ height is not novel,” and “minor adjustments to handle configurations are therefore admittedly within the knowledge of a POSA.”

¹³ In this regard, we determine that Petitioner’s reliance on *In re Morsa* is unpersuasive. Pet. Reply 18–19 (*citing In re Morsa*, 803 F.3d 1374 (Fed. Cir. 2015)). First, the issue there concerned what one skilled in the art at the time of the invention would have known in the context of enablement of the claimed invention, which differs from the issue here. *In re Morsa*, at 1376–77. And second, the purported admission there was in applicant’s own specification, whereas, here, the purported admission is in another reference with no overlapping inventorship. *Id.* Whereas Petitioner would have us bridge that distinction by noting that the two are commonly owned, Petitioner has not identified, and we are unaware, of any case law supporting the proposition that Section 103(c)(1) can be used in such a manner.

Ex. 1004 ¶ 174. Petitioner has not provided sufficient analysis, or evidence, to bridge the “gap” between the aforementioned “background knowledge,” and the *specific height* set forth in the aforementioned claim limitation, i.e., “positioned . . . vertically above the seating position for the driver.” *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1365 (Fed. Cir. 2016) (“Appellees have failed to show why it is proper to extrapolate from this general background knowledge” the more specific claim limitation at issue.).

Even without Thompson, Petitioner may be relying on several paragraphs of Mr. Roensch’s Declaration. Pet. 80 (citing Ex. 1004 ¶¶ 171–174). We note, however, that for the same reasons as set forth above, the Petition is similarly deficient.

3. *Analysis of Dependent Claims 2–8*

None of the analysis or evidence, set forth for dependent claims 2–8, are identified by Petitioner as remedying the aforementioned deficiency of independent claim 1.

4. *Conclusion*

We are unpersuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that claims 1–8 are obvious over the grounds including at least Grinde, Fecteau, and Thompson.

E. *Whether Rondeau ’917 is Prior Art*

1. *Petitioner’s Positions*

Petitioner challenges (a) claims 1–5 and 8 as anticipated by Rondeau ’917 under 35 U.S.C. § 102(e)(2), and (b) claims 1–14 as obvious under 35 U.S.C. § 103 over Rondeau ’917, Thompson, and Cycle Article. Petitioner asserts that the ’864 patent has an earliest effective filing date of July 31, 2002. Pet. 22–23. Petitioner asserts that Rondeau ’917 is prior art

to the '864 patent under Section 102(e)(2), because Rondeau '917 is entitled to claim priority to provisional patent application no. 60/331,252 ("the '252 provisional"), which was filed on November 13, 2001 (hereinafter "critical date"). More specifically, Petitioner asserts that the '252 provisional provides adequate support, under 35 U.S.C. § 112, for claim 1 of the '917 patent, as required under *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1382 (Fed. Cir. 2015). Pet. 22–33. Petitioner asserts further that the Examiner's determination that Patent Owner sufficiently antedated Rondeau '917 should be disregarded. Pet. 33–34.

2. Patent Owner's Positions

Patent Owner disagrees that Rondeau '917 is prior art for the following reasons:

First, the inventor of the '864 patent successfully antedated Rondeau and its provisional application. Second, in view of *Dynamic Drinkware*, the Rondeau provisional application failed to disclose the separate nature of the driver seat and the passenger seat, as claimed in claims 1 and 9 of the '864 patent. Because the Rondeau provisional application fails to support this key claim element, the Rondeau reference offered by Petitioner fails to qualify as prior art as a matter of law on this additional basis.

PO Resp. 12–21 (citing Ex. 1001; Ex. 1002, 78–79, 100, 353–355, 454; Ex. 1019, 28:8–12, Fig. 3A; Ex. 1020, Fig. 1; Ex. 2009 ¶¶ 20–31; Ex. 2010 ¶¶ 20–21, 24–25, 29). We address each of Patent Owner's assertions, in light of Petitioner's assertions and evidence, in turn.

3. Analysis

Patent Owner asserts that the inventor of the '864 patent conceived of the claimed invention by August 17, 2001, at the latest, which is about three months before the critical date. PO Resp. 13–16 (citing Ex. 1001; Ex. 1002,

78–79, 100, 353–355, 454; Ex. 2009 ¶¶ 20–31; Ex. 2010 ¶¶ 20–21, 24–25, 29). Petitioner disagrees. Pet. Reply 7–13 (citing Ex. 1002, 17–18, 361, 354, 379; Ex. 1032, 38:12–24, 39:14–40:10, 75:21–76:6; Ex. 1033, 7:8–10, 8:19–24; Ex. 1034, 42:11–22, 73:25–74:13; Ex. 2010 ¶¶ 20–28). The dispute comes down to whether Petitioner has met its burden of persuasion to show that the evidence of record is insufficient to corroborate the conception testimony of the inventor, set forth in the Declarations of Ole Tweet (Ex. 1002, 78–79, 350–351, Ex. 2009 ¶¶ 20–31), under a “rule of reason” framework. *Price v. Symsek*, 988 F.2d 1187, 1195 (Fed. Cir. 1993) (“An evaluation of all pertinent evidence must be made so that a sound determination of the credibility of the inventor's story may be reached.”).

Patent Owner appears to assert that some deference should be accorded the fact that, with the submission of an earlier Declaration of Mr. Tweet (Ex. 1002, 78–79), the applicant successfully antedated the ’252 provisional during prosecution. PO Resp. 14 (citing Ex. 1002, 78–79, 100, 454). Petitioner replies that “[t]he pending claims when the applicant swore behind Rondeau during prosecution were broader than the issued claims, and when the alleged evidence of conception submitted during prosecution is viewed in light of the narrower, issued claims, that evidence fails to establish conception of those claims.” Pet. Reply 7–9 (citing Ex. 1002, 17–18, 361, 379). We agree with Petitioner. The Examiner’s statements in support of Patent Owner’s assertion were made relatively early during prosecution, and before several claim amendments had been made. Furthermore, later in prosecution, the Examiner asserted the following:

Applicant's arguments with respect to claims 1-20 have been considered but are moot in view of the new ground(s) of rejection.

Applicant argues that the Rondeau publication is not prior art of the claimed invention under 35 USC 102(e). The examiner is now relying on Bombardier, which is related to the Rondeau publication except that it is a continuation, not a continuation in part, of the provisional application that is dated September 13, 2000, and predates applicant's invention.

Ex. 1002, 121. That statement demonstrates that, based on Bombardier, the Examiner did not need to address the evidence with respect to antedating of the '252 provisional. Finally, in response to a later Declaration Under 37 C.F.R. § 1.131 of Mr. Tweet (Ex. 1002, 350–351), filed after several claim amendments were made, the Examiner expressly stated that “the declaration and evidence presented are not adequate to establish an invention date by applicant that predates the Williams reference” (Ex. 1002, 379), with the Williams reference having a critical date of August 24, 2001, several months before the critical date of the '252 provisional. Accordingly, when weighed in the aggregate, we are persuaded that the Examiner's earlier determination that the applicant successfully antedated the '252 provisional is owed, at best, minimal deference and weight.

Patent Owner next relies on three documents, cited during prosecution, as purportedly corroborating the statements set forth in the Declarations of Mr. Tweet. PO Resp. 14–16 (citing Ex. 1002, 353–355). Petitioner replies that these documents are insufficient to establish conception, for the reasons explained by the Examiner during prosecution, as follows:

The evidence presented in support of the declaration shows that applicant considered making a tandem ATV with a longer

wheelbase and handholds. However, there is no evidence to establish that applicant even considered providing the type of handle structure presently claimed, that is, having removable handles coupled to a cargo rack, adjacent planar portions of rear fenders, extending forward to at least the mid portion of the rider seat, and inboard of the outer sides of the fenders, etc. The evidence that accompanies the declaration does not discuss or show fenders, or handles and their positioning, there is no mention of a removable rack or removable handles and there is nothing to show where handholds would be positioned on the vehicle.

Pet. Reply 7–8 (citing Ex. 1002, 379). We agree with the Petitioner and the Examiner. While we acknowledge that a rule of reason framework does not necessarily require corroboration for every claim limitation, we agree that the lack of disclosure concerning a cargo rack, a prominent limitation recited in independent claim 1, as well the lack of any details with respect to the arrangement of the handles (Ex. 1002, 353), recited in both independent claims 1 and 9, weigh heavily in favor of Petitioner. The lack of corroboration with respect to the claimed arrangement of the handles is especially important because this arrangement is mentioned explicitly in the Examiner’s stated reasons for allowance. Ex. 1002, 454 (“The claims are allowable for their overall combination of features on an ATV (four wheeled straddle seat vehicle) including the handle arrangement and their relationship to the driver seat, passenger seat, fenders and rack, and the relationship between the driver and passenger seats and footrests.”).

Patent Owner additionally relies on the Declaration of Mr. Christopherson, a former Arctic Cat consultant. PO Resp. 14–16 (citing Ex. 2010 ¶¶ 20–21, 24–25, 29). Petitioner replies that the Mr. Christopherson’s *post hoc* testimony concerning the same documents cited

above does not constitute sufficient corroboration, and that any further details provided by Mr. Christopherson are vague and unreliable. Pet. Reply 10–13 (citing Ex. 1002, 354; Ex. 1032, 38:12–24, 39:14–40:10, 75:21–76:6; Ex. 1033, 8:8–10¹⁴, 8:19–24; Ex. 1034, 42:11–22; Ex. 2010 ¶¶ 20–28). On the whole, while Mr. Christopherson’s testimony is entitled to some weight, we determine that it should be heavily discounted for the reasons expressed by Petitioner. More specifically, Mr. Christopherson admits that his testimony is based on notes and communications from the relevant time period. The only notes and communications relied upon, however, are the same documents discussed above, and his most relevant testimony concerning these documents (Ex. 2010 ¶¶ 22–27) does not have anything to do with the lack of disclosures concerning a cargo rack and the arrangement of the handles, which are important for the reasons set forth above. We are then left with Mr. Christopherson’s recollections of meetings attended; however, the Declaration does not provide much detail concerning those meetings, and his deposition testimony indicates that the primary basis for his testimony are the notes and communications, and not his recollections. Ex. 1033, 8:8–10, 19–24. With respect to his depositions, Mr. Christopherson does provide testimony as to some details concerning the cargo rack and the arrangement of the handles. Ex. 1032, 38:12–24, 39:14–40:10. No party, however, has sufficiently linked this testimony with a relevant time period, and Mr. Christopherson himself testified that he was

¹⁴ Page 12 of Petitioner’s Reply cites page 7, lines 8–10, but the actual quote appears on the same lines of page 8.

unsure of the exact stage of development in August of 2001. Ex. 1032, 75:21–76:6.

Accordingly, when all of the above evidence is weighed in the aggregate, under a “rule of reason” framework, we are persuaded that there is insufficient evidence to corroborate the Declaration of Mr. Tweet that the claimed invention was conceived prior to November 13, 2001, i.e., the critical date of Rondeau ’917 and the ’252 provisional.

Patent Owner next asserts that Petitioner has not shown that Rondeau ’917 properly claims priority to the ’252 provisional under *Dynamic Drinkware*, because Petitioner has not shown that the ’252 provisional discloses separate driver and passenger seats, as recited by each of independent claims 1 and 9. PO Resp. 16–19 (citing Ex. 1020, Fig. 1). As an initial matter, Petitioner asserts, and we agree, that Patent Owner has made an error of law. In order to meet their burden of showing that Rondeau ’917 properly claims priority to the ’252 provisional under *Dynamic Drinkware*, the proper comparison is between the claims of Rondeau ’917 (not the claims of the ’864 patent) and the ’252 provisional. Pet. Reply 13–15. To that end, Petitioner sets forth how the ’252 provisional provides adequate written description support for every limitation of independent claim 1 of Rondeau ’917 (not independent claim 1 of the ’864 patent). Pet. 22–34. Patent Owner does not dispute any of these assertions, and, with respect to the separate driver and passenger seats, admits that “[t]he issued claims of Rondeau do not claim a separate driver seat and passenger seat.” PO Resp. 19. Accordingly, we are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that Rondeau ’917 properly claims priority to the ’252 provisional.

Finally, the parties appear to disagree on whether the claimed invention is entitled to the December 20, 2001 filing date of the provisional patent application no. 60/342,950 (“the ’950 provisional”). See Pet. 23; PO Resp. 16; Pet. Reply 6. This is relevant because even if Patent Owner shows sufficient conception, if the claimed invention is not entitled to the December 20, 2001, filing date of the ’950 provisional, an additional issue is whether sufficient diligence has been shown between conception and reduction to practice. As best as we are able to ascertain, the only other date of reduction to practice identified by either party is the default: the July 31, 2002, filing date of the ’864 patent. Pet. 23 (“Rondeau ’917 is therefore prior art to the ’864 patent which has a PCT filing date of July 31, 2002. The issued claims are limited to this PCT filing date because the documents submitted by Patent Owner during prosecution in support of a pre-November 2001 filing date do not disclose the limitations of the issued claims.”); see also Pet. Reply 6 (“Rondeau ’917 claims priority to the November 13, 2001 filing date of the ’252 Provisional, which predates the July 31, 2002 filing date of the ’864 Patent.”). Accordingly, given that default, under *Dynamic Drinkware*, a burden of production was on Patent Owner to produce evidence that the claimed invention is entitled to the December 20, 2001 filing date of the ’950 provisional. *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d at 1379–80. To that end, Patent Owner does not provide any supporting analysis or present any evidence in support of that position. See generally PO Resp. 13–16. Accordingly, we determine that Patent Owner has not met its burden of production in showing that the claimed invention is entitled to the December 20, 2001 filing date of the ’950 provisional.

Even if we were to presume, however, that the burden of production was met, in that the most relevant evidence, the prosecution history, is of record, we determine that the evidence is insufficient to support Patent Owner's position. Several papers in the prosecution history appear to indicate at least an attempt to claim priority to the '950 provisional. Ex. 1002, 7, 25, 44, 56, 78–79, 350–351, 458. Those papers, however, are insufficient. Most dispositively, the '864 patent does not refer to the '950 provisional, as required by 35 U.S.C. § 120. *See generally* Ex. 1001. Furthermore, the Examiner stated that “[i]t is also noted that it appears that applicant is not entitled to the filing date of the US provisional application 60/342,950, filed December 20, 2001, because that application fails to teach a cargo rack and it does not teach handles that are removable.” Ex. 1002, 379. Additionally, the reference to the '950 provisional was removed explicitly from the bibliographic data sheet. *Compare* Exs. 1002, 458, 462. Accordingly, we determine, under a rule of reason framework, that a preponderance of the evidence supports the position that the claimed invention is not entitled to the December 20, 2001, filing date of the '950 provisional. And given this determination, determine further that Patent Owner has not met its burden of production, under *Dynamic Drinkware*, of showing diligence between the purported conception and the July 31, 2002, filing date of the '864 patent. Indeed, Patent Owner does not appear to mention, at all, the July 31, 2002 filing date of the '864 patent with respect to reduction to practice. *See generally* PO Resp.

4. *Conclusion*

We are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that Rondeau '917 is prior art to the '864 patent.

F. Claims 1–5 and 8 as Unpatentable over Rondeau '917

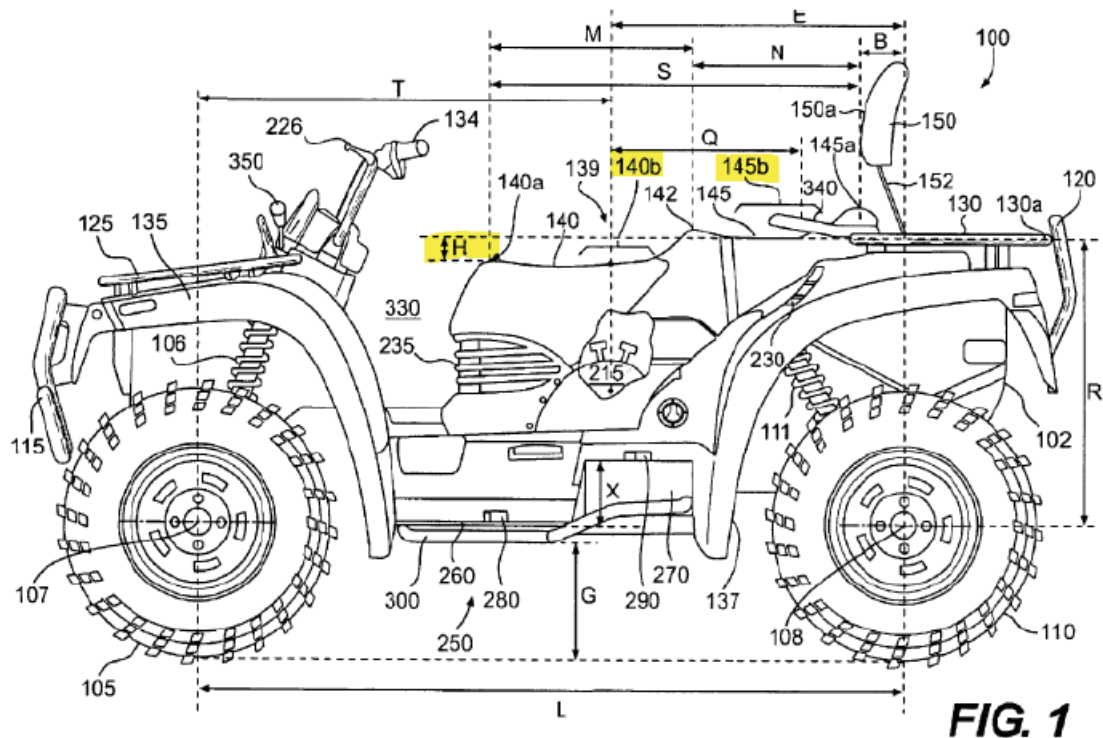
Petitioner asserts that Rondeau '917 discloses claims 1–5 and 8. Pet. 34–49 (citing Exs. 1004, 1019, 1020). Aside from the issue of whether Rondeau '917 is prior art, an issue that we have addressed above, the only issue Patent Owner disputes, with respect to this ground of unpatentability, is whether Rondeau '917 discloses “separate seats,” as required by the following limitation of independent claim 1: “the seat having seating positions for a driver and a passenger of the vehicle, the position for the passenger being located rearward and significantly above the seating position for the driver.” PO Resp. 18–21.

1019, 1020).¹⁵ For example, independent claim 1 recites a frame, suspension, wheels, handlebars, and fenders. Petitioner cites frame 102, suspension 106, wheels 105, 110, handlebars 134, and fenders 135, 137 of Rondeau '917 as corresponding, respectively, to these limitations. Pet. 34–40. Independent claim 1 also recites a straddle mount seat and a pair of footrests. Petitioner cites straddle-type seat 139 and footrests 250 as corresponding, respectively, to these limitations. Pet. 34–36, 47. Independent claim 1 further recites a cargo rack having left and right handles removably coupled to the vehicle. Petitioner cites right and left grab handles 340 attached to and supported by rear rack 130 as corresponding to the these claim limitations. Pet. 40–46. Petitioner performs a similar analysis for dependent claims 2–5 and 8. Pet. 47–49.

Patent Owner asserts that neither Rondeau '917 nor the '252 provisional, to which Rondeau '917 claims priority, discloses “a separate, distinct driver seat and passenger seat configuration,” as required by the “substantially above” limitation of independent claim 1. PO Resp. 18–21 (citing Ex. 1019, 28:8–12, Fig. 3A; Ex. 1021, Fig. 1). Petitioner disagrees, asserting that the aforementioned limitation of independent claim 1 does not require “separate” seats *per se*, and that even if it did, both Rondeau '917 and the '252 provisional disclose such an arrangement. Pet. Reply 15–18 (citing Ex. 1004 ¶¶ 94, 101; Ex. 1019, Fig. 1; Ex. 1020, Fig. 1). We agree with Petitioner. As set forth above, we construe the “substantially above”

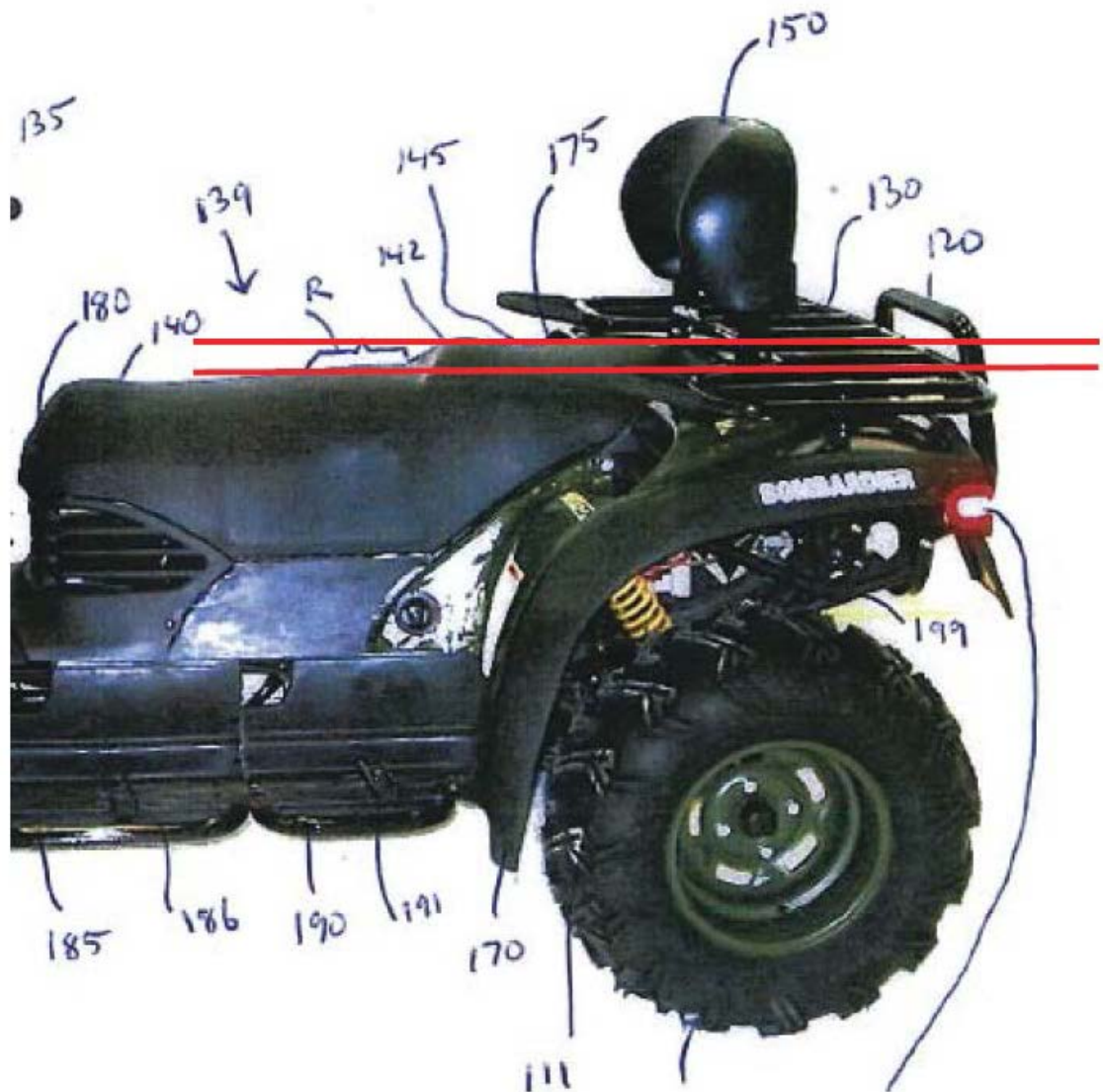
¹⁵ For expediency, for this paragraph, we will only refer to the Petitioner’s citations to Rondeau '917. Petitioner makes corresponding citations, in the Petition, to the '252 provisional.

limitations “with the understanding that any positioning of the passenger seat above the driver seat, however minimally ‘visibly’ or otherwise, would meet the aforementioned claim limitations.” As set forth in the following drawings, annotated by Petitioner and provided in Petitioner’s Reply, we find that the passenger seat disclosed in each of Rondeau ’917 and the ’252 provisional is clearly and visibly above the driver’s seat.



Pet. Reply 16 (citing Ex. 1019, Fig. 1). As illustrated above, Figure 1 of Rondeau '917 is a left side view of ATV 100, with the labels for main supporting range 140b of main seat portion 140 and secondary supporting range 145b of secondary seat portion 145 highlighted by Petitioner. Also highlighted by Petitioner is a vertical two-way arrow H indicating a vertical distance between main supporting range 140b of main seat portion 140 and secondary supporting range 145b of secondary seat portion 145.

Figure 1 of the '252 provisional is set forth below.



Pet. Reply 17 (citing Ex. 1020, Fig. 1). As illustrated above, Figure 1 of the '252 provisional is also a left side view of ATV 100, with two red lines added by Petitioner indicating a vertical distance between main seat portion 140 and secondary seat portion 145. Our finding is supported also by the testimony of Mr. Roensch, which includes the same annotated Figures set forth above, as well as additional explanation, which we find adequately supported and credible. Ex. 1004 ¶¶ 97–101; *see also* Pet. 34–36 (analysis in the Petition concerning the same).

For all other limitations and analysis, we are persuaded that Petitioner met its burden of showing, by a preponderance of the evidence, that claims 1–5 and 8 are anticipated by Rondeau '917 for the reasons set forth in the Petition.

3. *Conclusion*

We are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that claims 1–5 and 8 are anticipated by Rondeau '917.

G. *Claims 1–14 as Unpatentable over Rondeau '917, Thompson, and Cycle Article*

Petitioner asserts claims 1–5 and 8 are obvious over Rondeau '917 and Thompson, and that claims 6, 7, and 9–14 are obvious over Rondeau '917, Thompson, and Cycle Article. Pet. 34–71 (citing Exs. 1004, 1012, 1018–1026). As set forth in the Decision on Institution, we added expressly Thompson to this ground of unpatentability, but only as a “backup” position for a certain claim limitation. Dec. 29–30 (citing Pet. 52). As noted above, however, Thompson is not available as prior art. Accordingly, we only consider, here, whether 1–5 and 8 are obvious over Rondeau '917 alone, and whether claims 6, 7, and 9–14 are obvious over Rondeau '917 and Cycle Article alone.

1. *Cycle Article (Ex. 1025)*

Cycle Article describes four motorcycles: Honda GL1500/6 Gold Wing, Kawasaki XII Voyager, Yamaha XVZ13 Venture, and Suzuki 1400 Cavalcade. Ex. 1025, 3. More specifically, Cycle Article describes and shows photographs of various features of those motorcycles, such as luggage

carriers, driver/passenger seats, and handles. For example, a photograph of a seat of a Honda Goldwing from the Cycle Article is shown below.



The photograph above depicts a Honda Gold wing motorcycle showing a seat.

Ex. 1025, 11.

2. Analysis

For claims 1–5 and 8, Petitioner relies on Rondeau '917 for all claim limitations except for “handles extending upwardly from a rack main deck below the passenger seating position,” as recited in independent claim 1.¹⁶ Pet. 34–52. For that limitation, Petitioner relies on the testimony of Mr. Roensch. Pet. 52 (citing Ex. 1004 ¶¶ 132–137).¹⁷ For claims 6, 7, and 9–14,

¹⁶ This limitation is different from that which was determined to be lacking in the ground based on Grinde and Fecteau. *Compare* Pet. 52, 80.

¹⁷ We note that unlike the analysis of Mr. Roensch’s testimony for the limitation determined to be lacking above, in the ground based on Grinde and Fecteau, here, Mr. Roensch sets forth, for this limitation, a rationale of “[a] POSA would therefore know to position the cargo rack slightly below the passenger seat, to allow for more variability in the handle position and heights.” Ex. 1004 ¶ 137. Unlike the vague and conclusory statements set

Petitioner relies on Rondeau '917 for most of the claim limitations, and relies on Cycle Article for the remaining limitations. Pet. 34–39, 53–71.

Patent Owner asserts that Cycle Article is not properly combinable with Rondeau '917, because industry guidelines, at the time of the invention, “taught away from combining motorcycle or other art and MPV art for the purpose of arriving at the claimed seating arrangement.” PO Resp. 10–11, 32 (citing Ex. 2009 ¶¶ 33–40; Ex. 2010 ¶¶ 10–11, 44–45). Petitioner counters that a person of ordinary skill in the art of ATV design would have been familiar with and considered other recreational vehicles, including snowmobiles and motorcycles. Pet. Reply 26 (citing Ex. 1024 ¶¶ 22–31); *see also* Pet. 5, 50–51, 53, 59, 98 (citing, in relevant part, Ex. 1004 ¶¶ 16, 131, 135, 150, 200; Ex. 1021, 1:16–21; Ex. 1022, 1:20–21; Ex. 1023, 2:40–47) (portions of Petition cited at page 26 of Petitioner’s Reply). After considering all the evidence and assertions, we agree with Petitioner.

As set forth above, we adopt Petitioner’s proffered level of ordinary skill, which weighs in Petitioner’s favor, and is as follows:

A person of ordinary skill in the art (“POSA”) in the field of the '864 patent at the time of its filing would be familiar with designs from various recreational vehicles, including motorcycles, snowmobiles, and ATVs, with at least a degree in fields relating to engineering or industrial design or two to three years of experience designing recreational vehicles such as ATVs, motorcycles, and/or snowmobiles.

Pet. 5. We also find that the portions of Exhibits 1021–1023 cited by Petitioner, going to commonality of features between ATVs, snowmobiles,

forth above, we find that this rationale, unchallenged by Patent Owner, is sufficiently germane to the express claim limitation at issue.

and motorcycles, weigh heavily in favor of Petitioner's assertion. By contrast, while Patent Owner's assertions, and supporting evidence, concerning industry guidance have some merit, ultimately, Patent Owner has not persuasively articulated why this evidence demonstrates that the claimed invention would have been non-obvious. Moreover, Grinde, issued in 1986, discloses a vehicle convertible between running on snow surfaces and paved roads (Ex. 1017, Figs. 3, 4), indicating that whatever "industry guidance" may have existed, one of ordinary skill in the art of ATV design would, nevertheless, have been familiar with and considered other recreational vehicles, including snowmobiles and motorcycles. This latter point is supported by sworn testimony submitted by Patent Owner to the Patent Office. Ex. 1024 ¶¶ 22–31.

Other than the assertions concerning Rondeau '917 that have already been address above, Patent Owner does not further challenge this ground of unpatentability with respect to Rondeau '917 or Cycle Article. See *generally* PO Resp. 12–21. For all other limitations and analysis, we are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that claims 1–14 are obvious, over Rondeau '917 and Cycle Article, for the reasons set forth in the Petition.

3. Conclusion

We are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence that claims 1–14 are obvious over Rondeau'917 and Cycle Article.

H. Claims 1, 2, 4–7, and 9–14 as Unpatentable over Grinde, Cycle Article, Stippich, and Walker

Petitioner asserts claims 1, 2, 4–7, and 9–14 are obvious over Grinde, Cycle Article, Stippich, and Walker. Pet. 71–109 (citing Exs. 1001, 1004, 1008, 1017, 1025, 1029); Paper 11 (adding Walker (Ex. 1029) and removing Nakajima (Ex. 1030) from this ground of unpatentability); *see also* Dec. 47, 49 (concerning same). Patent Owner disagrees. PO Resp. 23–33 (citing, in relevant part, Exs. 1001, 1002, 1017, 1025, 2003–2005, 2010). Petitioner replies. Pet. Reply 18–28 (citing, in relevant part, Exs. 1001, 1004, 1012, 1017, 1024, 1025, 1033, 2010).

1. Grinde (Ex. 1017)

Grinde relates to a vehicle suited for running on hard surfaces and on off-road snow surfaces. Ex. 1017, 1:25–31. Figure 4 of Grinde is shown below.

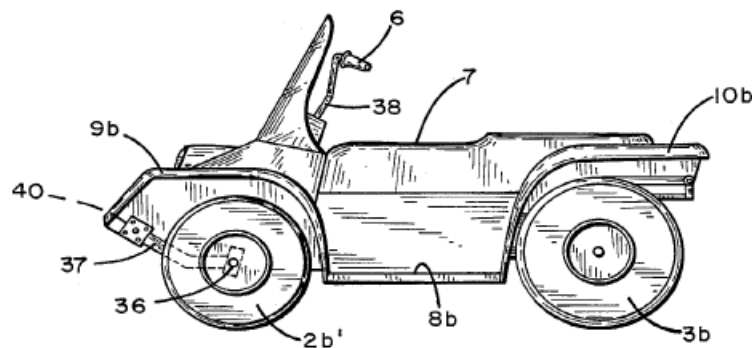


Fig. 4

Figure 4 is a side elevation of a vehicle when rigged for running on paved roads or other firm surfaces.

The vehicle includes frame 1 and wheels 2b', 3b secured to a suspension that is secured to frame 1. Ex. 1017, 2:45–52, 5:8–11. The vehicle further

includes steering handle 6, two passenger seat 7, and fenders 9b, 10b.
Ex. 1017, 2:63–66, 3:1–4.

2. *Analysis*

Petitioner asserts that a combination of Grinde, Cycle Article, Stippich, and Walker renders obvious claims 1, 2, 4–7, and 9–14. Pet. 71–109 (citing Exs. 1001, 1004, 1008, 1017, 1025, 1029). For example independent claim 1 recites a frame with suspension, wheels, handle bars for steering, and rear wheel fenders. Petitioner cites frame 1, wheels 2b', 3b, steering handle 6, and rear fenders 10a, 10b of Grinde as corresponding respectively to the aforementioned claim limitations. Pet. 73–76. Independent claim 1 further recites “a straddle mount seat secured to the frame, the seat having seating positions for a driver and a passenger of the vehicle, the position for the passenger being located rearward and significantly above the seating position for the driver.” Petitioner identifies two-passenger seat 7 as corresponding to the aforementioned claim limitation. Pet. 74–75. Petitioner relies on Grinde for all of the limitations of independent claim 1, except for portions of the following:

[T]he cargo rack having left and right handles removably coupled to the vehicle, the handles extending upwardly from a portion of a rack main deck below the passenger seating position and being positioned vertically adjacent to upwardly facing surfaces defining the substantially planar portions of rear wheel fenders and the handles being at least as far forward as the approximate longitudinal mid-region of the passenger seating position, each handle having a grippable portion positioned laterally adjacent to the seating position for the passenger and vertically above the seating position for the driver, substantially inboard of the outer sides of the rear wheel fenders; and

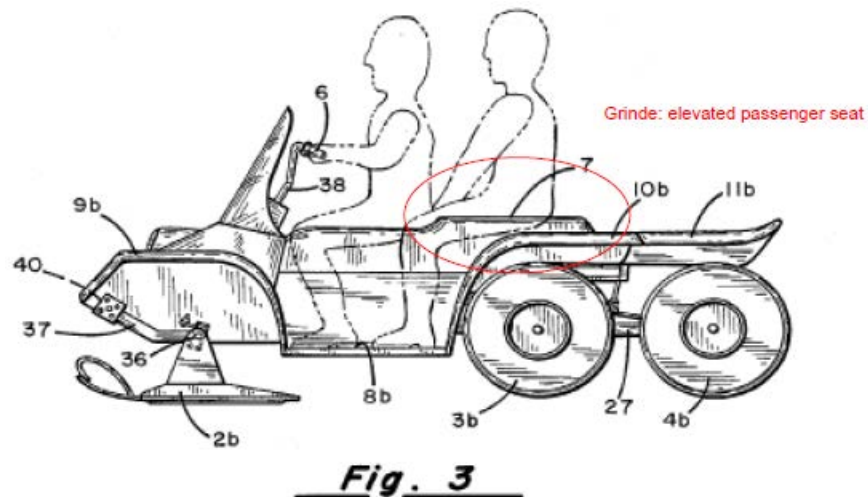
a pair of footrests for the driver and a separate pair of footrests for the passenger, wherein the footrests for the passenger are raised with respect to the footrests for the driver.
Pet. 99–106.

For the cargo rack and handles, Petitioner cites an embodiment of Cycle Article labelled “Suzuki Cavalcade” for disclosing “the cargo rack having left and right handles removably coupled to the vehicle,” and, for certain related limitations, Walker was added to this ground. Pet. 101–102; Dec. 45. For “removably attached,” Petitioner relies on an embodiment of Cycle Article labelled “Kawasaki Voyager,” or in the alternative, Stippich. Pet. 102–104. For “the handles extending upwardly from a portion of a rack main deck,” trial was not instituted on Cycle Article alone; rather it was instituted on the combination of Cycle Article and Stippich. Pet. 104; Dec. 44–45. For the rest of the handles limitations, Petitioner relies on a combination of Grinde and Cycle Article. Pet. 104–106. For the footrests, Petitioner relies largely on the Cycle Article, and, for certain related limitations, the Board required Petitioner to also rely on Walker. Pet. 106; Dec. 46.

Petitioner performs a similar analysis for independent claim 9 and dependent claims 2, 4–5, 7, and 10–14. Pet. 81–109.

Patent Owner asserts that Grinde does not disclose the “substantially above” limitations, recited in each of independent claims 1 and 9, because (1) “[t]he Grinde passenger seat is effectively on the same level as the driver seat, and there is no indication that a passenger so situated would have a view of oncoming terrain” (PO Resp. 24), and (2) Grinde only discloses a single seat, and not separate driver and passenger seats, as required. PO Resp. 23–27 (citing Ex. 1001, Fig. 1; Ex. 1017, 2:63–66, Figs. 3–4;

Ex. 2010 ¶¶ 16, 33–34, 44–45).¹⁸ Petitioner responds that Patent Owner’s assertions concerning Grinde are not credible, especially given that Patent Owner’s expert, at deposition, purportedly admitted that the passenger location in Figure 4 of Grinde “appears to be raised slightly” compared to the driver location and that “just from looking at that Figure 4, you can see that the passenger’s seat is raised over the driver’s seat.” Pet. Reply 20–22 (quoting Ex. 1033, 17:17–19:1; also citing Ex. 1017, Figs. 3, 4). We agree with Petitioner. As set forth above, we construed the “substantially above” limitations “with the understanding that any positioning of the passenger seat above the driver seat, however minimally ‘visibly’ or otherwise, would meet the aforementioned claim limitations.” Figs. 3 and 4 of Grinde, as annotated by Petitioner, are set forth below.



¹⁸ Patent Owner asserts that “[t]o the extent Grounds 7 and 8 rely on Grinde and/or Fecteau, Patent Owner submits that the challenged claims are patentable for at least the reasons give above in Section V.” PO Resp. 31. As this ground of unpatentability does not include Fecteau, however, we find that this is the only argument, in Section V of the Patent Owner Response that is relevant to this ground of unpatentability. *See also* PO Resp. 32 (only mentions this argument from Section V).

Pet. Reply 21 (citing Ex. 1017, Fig. 3). Shown above is Figure 3 of Grinde, which is a side elevation view of a vehicle rigged for running on snow surfaces, with annotations made by Petitioner identifying the elevated passenger seat.

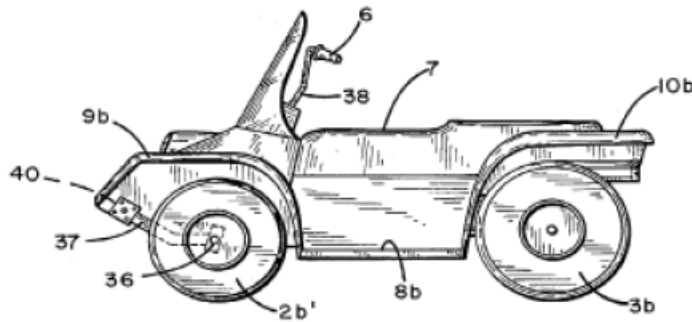


Fig. 4

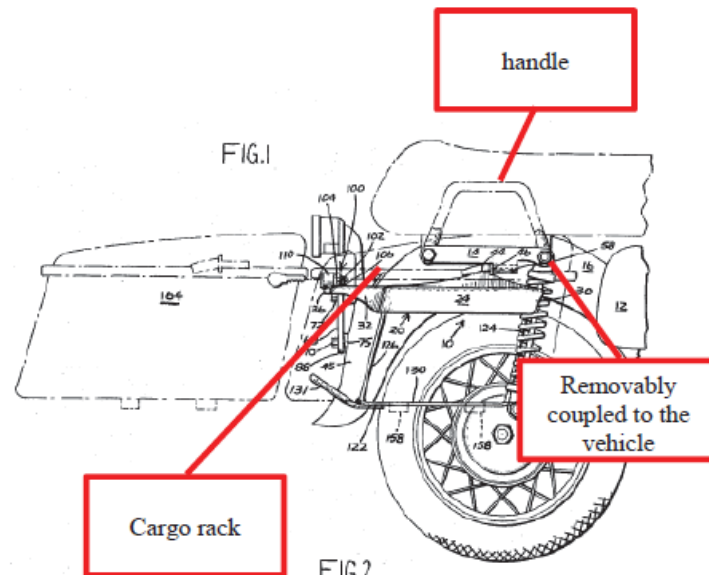
Pet. Reply 21 (citing Ex. 1017, Fig. 4). Shown above is Figure 4 of Grinde, which is a side elevation view of a vehicle rigged for running on paved roads or other firm surfaces. Given the evidence presented, including the concurring testimony of Patent Owner’s expert, we have no trouble finding that Grinde’s passenger seat is visibly above the driver seat, and, thus, that the identified portion of the Grinde meets the “substantially above” limitations. *See also* Pet. 74–75 (citing Ex. 1004 ¶ 169) (“Grinde meets the limitation because the entirety of the passenger seat is visibly raised as compared to the driver seat.”).

Patent Owner asserts also that Cycle Article is not properly combinable with Grinde, because industry guidelines at the time of the invention, “taught away from combining motorcycle or other art and MPV art for the purpose of arriving at the claimed seating arrangement.” PO Resp. 10–11, 32 (citing Ex. 2009 ¶¶ 33–40; Ex. 2010 ¶¶ 10–11, 44–45). We

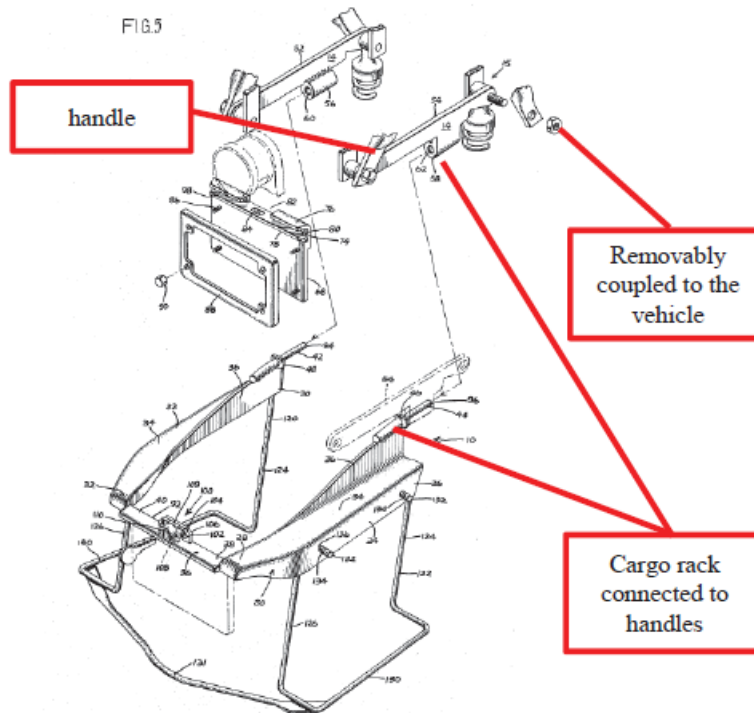
are unpersuaded for the same reasons, set forth above, for the same assertion made by Patent Owner with respect to Rondeau '917 and Cycle Article.

Patent Owner asserts additionally that a combination of Cycle Article and Stippich does not account adequately for “left and right handles removably coupled to the vehicle, the handles extending upwardly from a portion of the main rack deck.” PO Resp. 32 (citing Ex. 1001, 4:33–39; Ex. 2010 ¶¶ 47, 48). The only further analysis provided concerning this assertion, however, is the following testimony from Patent Owner’s expert, Mr. Christopherson: “I see no disclosure in Stippich indicating the pointed-to structure is a handle, and I see no disclosure of a cargo rack with a rack main deck.” Ex. 2010 ¶ 48.

For the handle, Petitioner provides the following annotated Figures from Stippich, with analysis supported by the testimony of its expert, Mr. Roensch (Pet. 102–104 (citing Ex. 1004 ¶¶ 206–208; Ex. 1008, Figs. 1, 5)):



Pet. 103 (citing Ex. 1008, Fig. 1). Figure 1, shown above, is a side-plan view of a luggage attachment shown installed on a rear portion of a tandem-wheeled vehicle, with Petitioner's expert labelling the handle as such.



Pet 104 (citing Ex. 1008, Fig. 5). Figure 5, shown above, is an exploded, perspective view shown in relation to associated portions of a vehicle frame, with Petitioner's expert labelling the handle as such. Petitioner also replies that, at deposition, Mr. Christopherson testified, when asked if the passenger could use the structure identified by Petitioner's expert Mr. Roensch as a hand hold, that 'I would agree that must be the intent.'" Pet. Reply 27 (citing Ex. 1033, 43:5–20). We find that the weight of the evidence aligns with Petitioner's position.

For the cargo rack with a rack main deck, Petitioner relies on Cycle Article and, in the alternative, on Stippich. Pet. 99–100 (citing Ex. 1004 ¶ 202 (citing Ex. 1025, 46)), 104 (citing Ex. 1004 ¶ 209); Dec. 43. We find

that at least the portion of Cycle Article, reproduced below, discloses a cargo rack with a main deck.



Pet. 99–100 (citing Ex. 1004 ¶ 202 (citing Ex. 1025, 46)). The above picture shows a rear view of motorcycle with an annotation by Petitioner indicating the position of the cargo deck with a rack main deck.

Patent Owner asserts further that the footpegs of Cycle Article cannot correspond properly to the “separate pair of footrests for the passenger, wherein the footrest for the passenger are raised with respect to the footrest for the driver,” as recited in each of independent claims 1 and 9, and that “a POSITA would not be motivated to combine the Cycle Article with any

other references to arrive at the ‘864 patent.” PO Resp. 33 (citing Ex. 2010 ¶ 49). The only further analysis provided concerning this assertion, however, is the following testimony from Patent Owner’s expert, Mr. Christopherson: “Motorcycle footpegs are not the same as ATV footrests, and nothing in these references shows that the footpegs are raised. By the time Polaris gets to adding additional motorcycle references (Walker and Nakajima), I still do not see where Polaris has proved the combination provides the footrests as claimed.” Ex. 2010 ¶ 49.

With respect to whether footpegs are footrests, Petitioner replies that “Mr. Christopherson admitted at deposition that the footpegs disclosed in Cycle Article are footrests.” Pet. Reply 27 (citing Ex. 1033, 44:7–45:7). In their Petition (Pet. 106 (citing Ex. 1004 ¶ 211, Ex. 1025, 6)), and also at that deposition, Petitioner referred to the following language of Cycle Article as corresponding to footrests: “Riders get wide footpegs, while GL passengers have fold-down floorboards.” Ex. 1025, 6.¹⁹ We find that the parties agree that, at a minimum, wide footpegs and fold-down floorboards are footrests.

With respect to whether the footpegs are raised, Petitioner replies that Patent Owner does not address Walker substantively. Pet. Reply 27–28 (citing Ex. 1004 ¶¶ 211, 212, 220); *see also* Pet. 82–83, 106–107 (citing Ex. 1029, 3:3–19; Ex. 1004 ¶ 211); Dec. 43, 46–47 (explicitly adding Walker to this ground of unpatentability for this claim limitation). We agree

¹⁹ Petitioner refers to this page of Cycle Article as both page 6, i.e., the sixth page of the Exhibit (Ex. 1033, 44:7–8), and page 39, i.e., the 39th page of the periodical (Pet. 106). For consistency, we refer to the Exhibit page number only.

that the weight of the evidence, and, specifically, the substantively unchallenged portion of Walker, supports Petitioner's position.

Similarly, Patent Owner asserts that Cycle Article contains no disclosure that footpegs are tilted, raised or otherwise positioned to accommodate the passenger, as required by dependent claims 2 and 10. PO Resp. 33 (citing Ex. 2010 ¶ 50). Here again Patent Owner does not address Walker substantively, thus, our analysis is the same as set forth above in the previous paragraph.

For all other limitations and analysis, we are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that 1, 2, 4–7, and 9–14, are obvious over Grinde, Cycle Article, Stippich, and Walker, for the reasons set forth in the Petition.

3. *Conclusion*

We are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that claims 1, 2, 4–7, and 9–14 are obvious over Grinde, Cycle Article, Stippich, and Walker.

I. Claims 3 and 8 as Unpatentable over Grinde, Cycle Article, Stippich, Walker, and Bombardier

Petitioner asserts that a combination of Grinde, Cycle Article, Stippich, Walker, and Bombardier renders obvious dependent claims 3 and 8. Pet. 109–110 (citing Ex. 1004 ¶¶ 226–227); Dec. 48.

Bombardier relates to a vehicle including storage compartments that are capable of hauling a variety of loads over various terrains. Ex. 1031, 1:19–21. Figure 5 of Bombardier is set forth below.

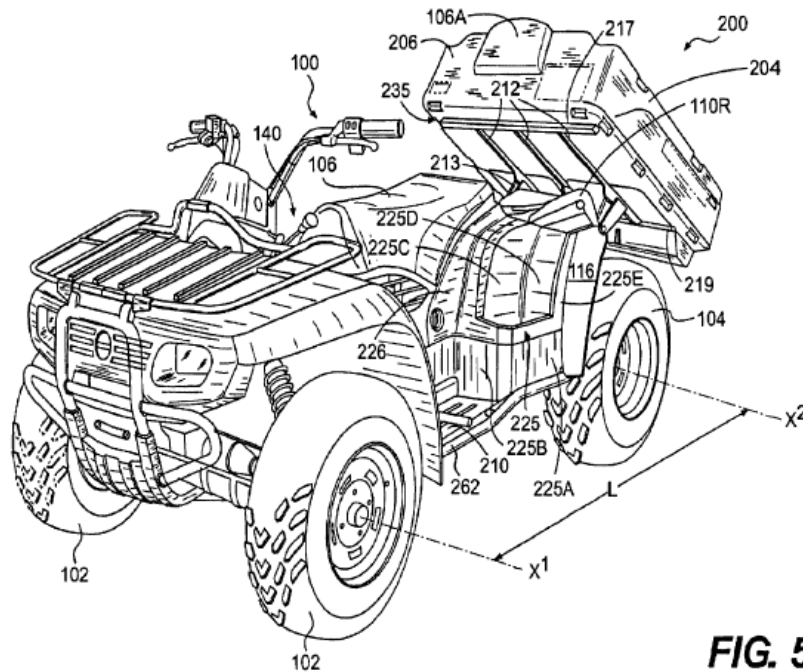


FIG. 5

Figure 5 is a right side view of an ATV.

Ex. 1031, Fig. 5. Bombardier teaches that length L of the wheel base of the ATV is increased, as compared to a conventional ATV, so as to increase stability and make the ATV more resistant to tipping over. Ex. 1031, 7:48–54. Bombardier also discloses that the extended wheel base assists in evenly distributing the load between the front and rear wheels. Ex. 1031, 7:54–56. Bombardier discloses further “[f]or example, the wheel base of the ATV 100 may be from 55 inches to 65 inches.” Ex. 1031, 8:1–2.

Dependent claims 3 and 8 encompass limitations concerning wheelbases having a length of 54 to 65 inches. Petitioner asserts that “[t]hese limitations are disclosed in Bombardier, and the POSA would look to Bombardier to identify an appropriate wheelbase for the tandem ATV of Grinde because both references need to address additional weight located

behind the driver of the vehicle.” Pet. 109–110 (citing Ex. 1004 ¶¶ 226–227).

Other than the assertions concerning Grinde, Cycle Article, Stippich, and Walker that have already been address above, Patent Owner does not further challenge this ground of unpatentability. *See generally* PO Resp. 21–33. We are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence that dependent claims 3 and 8 are obvious, over Grinde, Cycle Article, Stippich, Walker, and Bombardier, for the reasons set forth in the Petition.

J. Claims 9 and 11–14 as Unpatentable over Grinde and Fecteau

Petitioner asserts claims 9 and 11–14 are obvious over Grinde and Fecteau. Pet. 73–76, 80, 81, 83–96 (citing Exs. 1001, 1004, 1017, 1027); Dec. 49 (removing claim 10 from this ground).²⁰ Patent Owner disagrees. PO Resp. 23–31 (citing Exs. 1001, 1002, 1017, 1027, 2003–2005, 2010). Petitioner replies. Pet. Reply 18–25 (citing, in relevant part, Exs. 1001, 1004, 1012, 1017, 1024, 1027, 1033, 2010).

1. Fecteau (Ex. 1027)

Fecteau relates to “a design of a snowmobile that improves the driver’s control over the snowmobile and the riders’ comfort.” Ex. 1027, 1:19–22. Figure 2 of Fecteau is set for shown below.

²⁰ Although we added Thompson to this ground of unpatentability (Dec. 39), the limitation for which Thompson was added is not recited in independent claim 9.

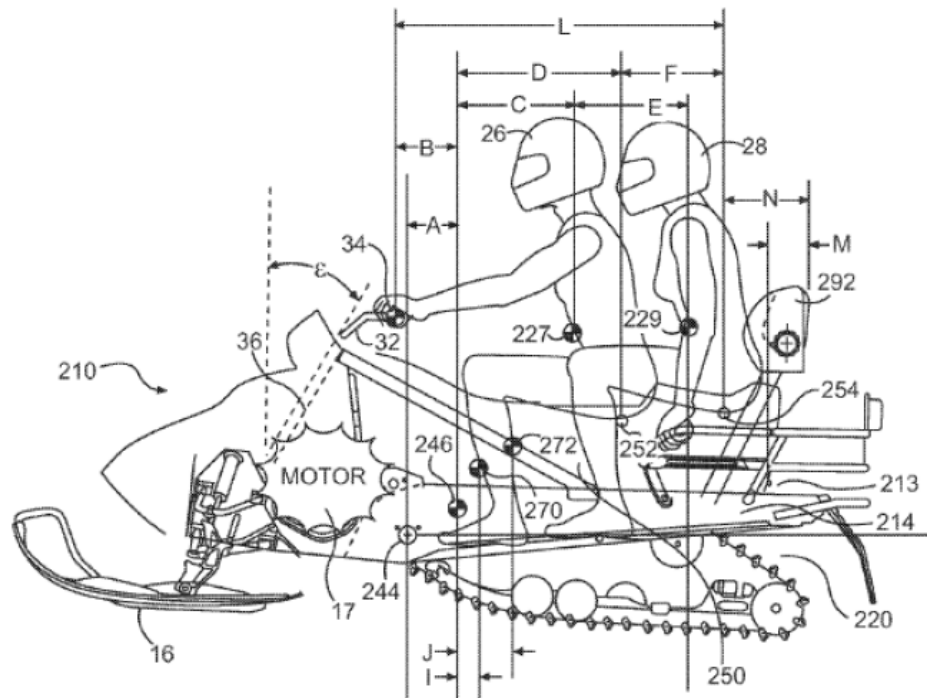


FIG. 3

Figure 2 is a side view of a snowmobile.

2. Analysis

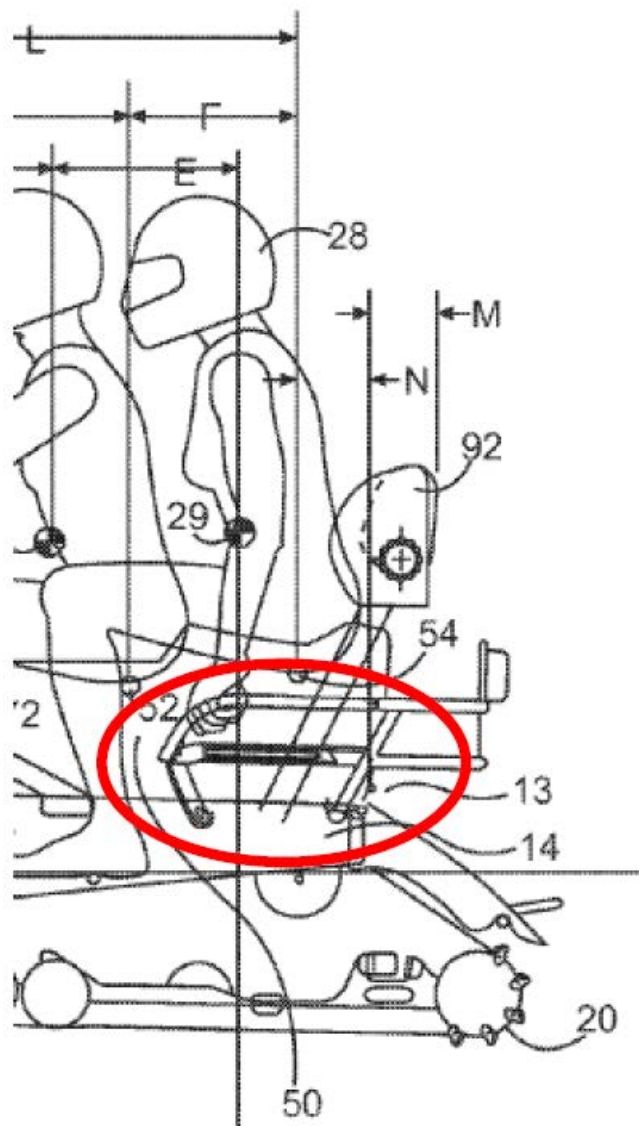
Petitioner relies on Grinde for all of the limitations of independent claim 9, except for portions of the following:

a first handle and a second handle extending laterally and upwardly from a lower portion of either side of the passenger seat, the handles positioned vertically above the rear wheel fenders and said first and second handles further positioned at least as far forward as the approximate longitudinal mid-region of the passenger seat, each handle having respective grippable portions that extend upward proximate to and spaced from the side of the passenger seat for use as passenger handles; and

footrests for the driver and a separate pair of footrests for the passenger, the passenger footrests being raised with respect to the footrests for the driver.

Pet. 73–76, 80, 81, 84–88. For “handle” limitations, Petitioner relies on Fecteau, and provides the following analysis:

Fecteau Figures 2 and 3 disclose passenger handles extending laterally and upwardly from a lower portion of either side of the passenger seat, positioned at least as far forward as the approximate longitudinal mid-region of the passenger seat, and having grippable portions that extend upward proximate to and spaced from the side of the passenger seat for use as passenger handles:



(Ex. 1004, ¶ 188.)

A POSA would be motivated to add Fecteau's handles to Grinde to increase the passenger's safety and comfort. (*Id.*, ¶ 189.) The handles would then be positioned vertically above Grinde's rear wheel fenders, given that the passenger seat is vertically above the rear wheel fenders:

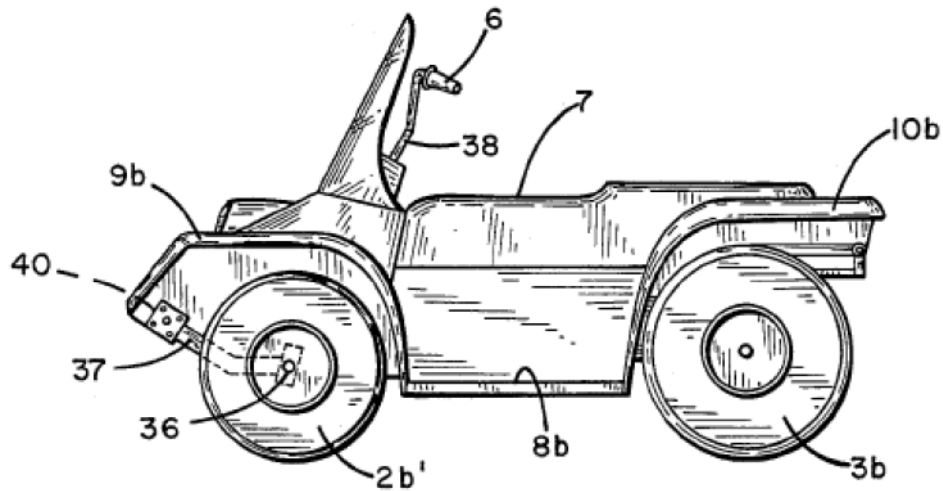
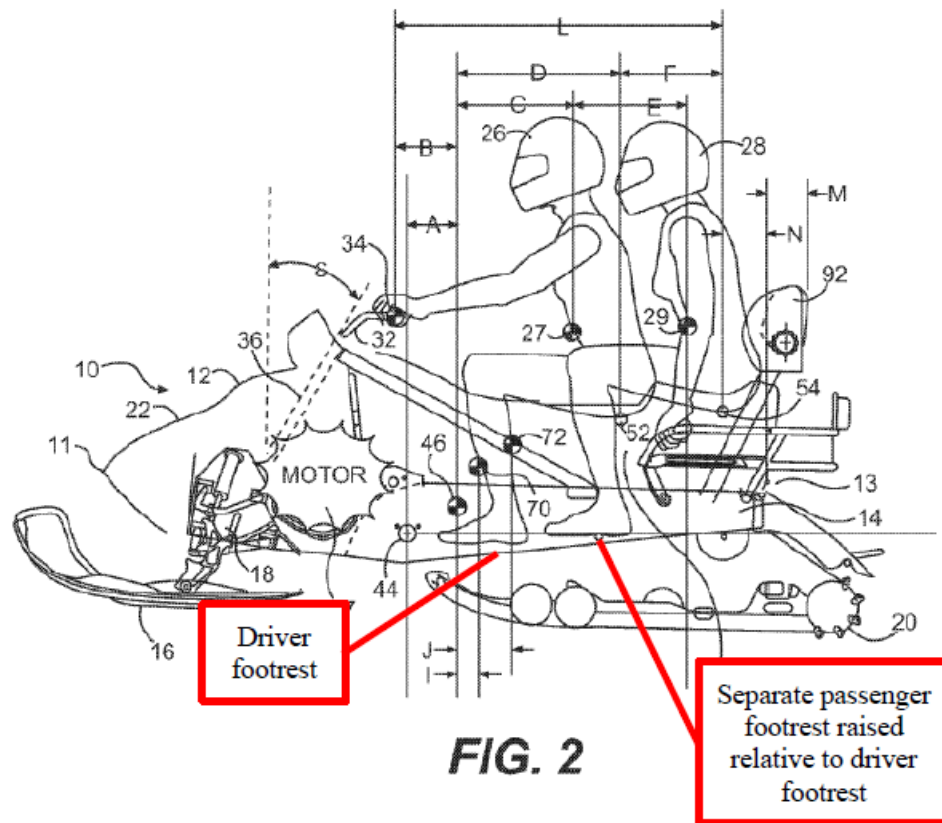


Fig. 4

Pet. 85–87 (showing an annotated version of a side view of a snowmobile of Fecteau, and an unannotated side elevation view of a vehicle of Grinde). For the “footrest” limitations, Petitioner relies on Fecteau (Pet. 80 (citing Ex. 1027, 7:4–8)), and also provides the following analysis:

Fecteau Figure 2 discloses a separate passenger footrest raised with respect to the driver footrest:



Pet. 82 (providing an annotated version of a side view of a snowmobile of Fecteau).

Petitioner sets forth a similar analysis for claims 11–14. Pet. 91–96.

Patent Owner asserts that Grinde does not disclose the “substantially above” limitations, as recited in independent claim 9. PO Resp. 23–27. These assertions are unpersuasive for the same reasons as set forth above with respect to the ground of unpatentability based on Rondeau.

Patent Owner asserts further that Fecteau does not disclose “footrests for the driver and a separate pair of footrests for the passenger, the passenger footrests being raised with respect to the footrests for the driver,” as recited by independent claim 9, in that Fecteau only discloses one pair of footrests, and that the referenced Figures of Fecteau do not disclose any footrests at all. PO Resp. 29 (citing Ex. 1001, 7:4–8, Figs. 2–6; Ex. 2010 ¶ 38).

Petitioner replies that Patent Owner's expert, Mr. Christopherson, admits that Fecteau's figures disclose a passenger footrest, in agreement with Mr. Roensch. Pet. Reply 24–25 (citing Ex. 1004 ¶ 175; Ex. 1033, 32:17–34:6).

We are persuaded that Figures 2, 4A, and 5 of Fecteau would have been read as accounting for the aforementioned limitations to one of ordinary skill in the art. Specifically, we are persuaded that (1) there is no difference between “a peg of some sort; and apparently, it's to put your foot on,” as indicated by Mr. Christopherson, and the recited footrest (Ex. 1033, 34:3–5); (2) Figure 5 discloses separate footrests, and (3) Figures 2 and 4A would have indicated, to one of ordinary skill, that the difference in heights of the feet is sufficient to constitute an express disclosure of a “[s]eparate passenger footrest raised relative to driver footrest,” even if the round object, underneath the driver's foot in Figure 5, is not expressly shown in Figures 2 and 4A. Pet. 80–83. “[A] reference can anticipate a claim even if it ‘d[oes] not expressly spell out’ all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would ‘at once envisage’ the claimed arrangement or combination.” *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381 (Fed. Cir. 2015) (*quoting In re Petering*, 49 CCPA 993, 301 F.2d 676, 681 (1962)).²¹

²¹ Patent Owner also asserts that Fecteau does not disclose certain other claim limitations (PO Resp. 27–29), however, those claim limitations are not recited in independent claim 9, or its dependent claims.

3. Conclusion

We are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence, that 9 and 11–14 are obvious over Grinde and Fecteau.

K. Claim 10 as Unpatentable over Grinde, Fecteau, and Walker

Petitioner asserts that a combination of Grinde, Fecteau, and Walker renders obvious dependent claim 10. Pet. 81–83, 88–91 (citing Ex. 1004 ¶¶ 176–177, 191–192; Ex. 1027, Fig. 2; Ex. 1029, 3:3–19); Paper 11 (adding Walker (Ex. 1029) and removing Nakajima (Ex. 1030) from this ground of unpatentability); *see also* Dec. 38–39, 49 (concerning same).²²

Other than the assertions concerning Grinde, Fecteau, and Walker that have already been addressed above, Patent Owner does not further challenge this ground of unpatentability. *See generally* PO Resp. 23–31. In particular, Patent Owner does not address Walker. We are persuaded that Petitioner has met its burden of showing, by a preponderance of the evidence that dependent claim 10 is obvious, over Grinde, Fecteau, and Walker, for the reasons set forth in the Petition.

III. CONCLUSION

Petitioner has met its burden of showing the following: claims 1–5 and 9 are anticipated by Rondeau '917; claims 1–14 are obvious over Rondeau '917 and Cycle Article; claims 1, 2, 4–7, and 9–14 are obvious

²² Although we added Thompson to this ground of unpatentability (Dec. 39), the limitation for which Thompson was added is not recited in independent claim 9, from which claim 10 depends.

over Grinde, Cycle Article, Stippich, and Walker; claims 3 and 8 are obvious over Grinde, Cycle Article, Stippich, Walker, and Bombardier; claims 9 and 11–14 are obvious over Grinde and Fecteau; and claim 10 is obvious over Grinde, Fecteau, and Walker.

Petitioner has not met its burden of showing the following: claims 1, 4, 5, and 7 are obvious over Grinde, Fecteau, and Thompson; claim 2 is obvious over Grinde, Fecteau, Thompson, and Walker; claims 3 and 8 are obvious over Grinde, Fecteau, Thompson, and Bombardier; and claim 6 is obvious over Grinde, Fecteau, Thompson, and Cycle Article.

Accordingly, Petitioner has demonstrated, by a preponderance of the evidence, that claims 1–14 of the '864 patent are unpatentable.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that claims 1–14 of the '864 patent are held unpatentable; and

FURTHER ORDERED that because this is a final written decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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Patent 7,743,864 B2

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