

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FUSION ORTHOPEDICS, LLC,
Petitioner,

v.

EXTREMITY MEDICAL, LLC
Patent Owner.

Case IPR2023-00894
Patent 11,298,166

**PETITIONER SUR-SUR-REPLY
IN SUPPORT OF PETITION**

I. INTRODUCTION

The Board authorized this Sur-Sur-Reply for Petitioner to address new arguments and evidence in Patent Owner's Sur-Reply (Paper 43). Paper 46, 6.

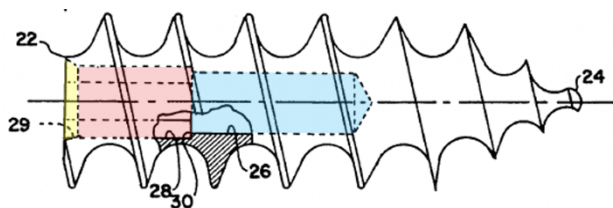
II. ARGUMENT

A. Sur-Reply Page 8

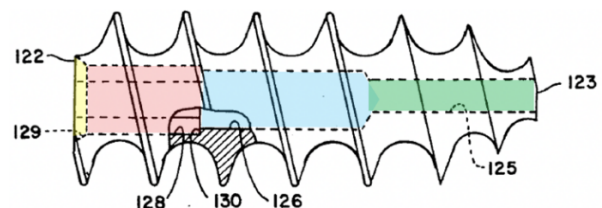
Patent Owner's argument and evidence that the prior art *sometimes* uses "bore" and "counterbore" to distinguish portions of a void from one another really just underscores Petitioner's point that "bore" does not have the constricted meaning upon which Patent Owner's claim construction argument depends.

Petitioner's Reply evidence demonstrates that the prior art also routinely refers to a bore and its counterbore as a single element in which the counterbore forms part of the bore. Reply 9, 18–21. Patent Owner does not contest the accuracy or relevance of this evidence. Patent Owner instead submits new evidence of how the term "bore" is used but does not explain how or why its new evidence negates the effect of Petitioner's evidence when construing "bore."

One of Patent Owner's new exhibits even supports Petitioner's claim construction explicitly. Small (Ex. 2025) describes screw designs:



Small, Fig. 1 (annotated)



Small, Fig. 11 (annotated)

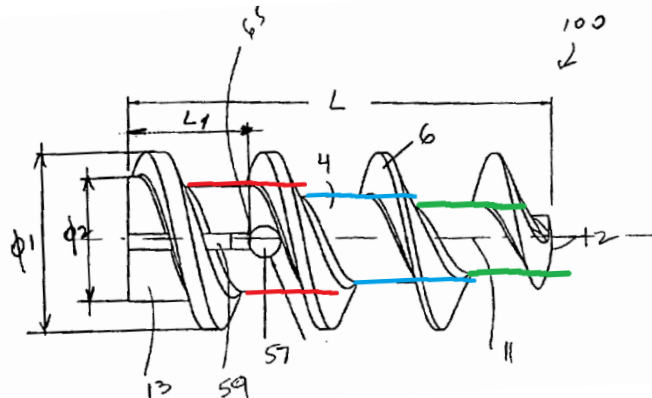
In one embodiment, “blind axial bore 26” is “open to back end 22” (*id.* at 3:35–36). In another, “axial bore 125 ... extends through the entire length of the screw” (*id.* at 8:45–46). By describing bore 26 as “open” to the back end, Small indicates that the bore includes the entire void, including recess 29 (yellow, above), counterbore 28 (red) and the portion demarcated by a stepped diameter at seat 30 (blue). Small further emphasizes this meaning of “bore” by describing the blue-shaded area as being merely a “*portion* of bore 26” between the seat and blind end (*id.* at 3:60–62, emphasis added). And by describing bore 125 as “extend[ing] through the entire length of the screw,” Small indicates that it uses the term “bore” to refer to a void with multiple stepped-diameter portions including counterbore 128.

Thus, evidence filed by both parties establishes that the POSA used the term “bore” to refer to stepped-diameter voids. Patent Owner’s new evidence does nothing to contest that this usage forms part of the “ordinary and customary meaning” under the *Phillips* framework. Nor does it show how or why a person of ordinary skill would have understood the ’166 patent specification, prosecution history of record, or claim language usage demand a construction of “bore” that excludes stepped-diameter voids. Instead, Patent Owner relies on testimony of its expert, cursorily supported by one non-prior-art patent, as to whether a “bore” can encompass steps. POR 16. *See* DI 11 (discussing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–19 (Fed. Cir. 2005) (en banc)).

B. Page 6, Footnote 3

Patent Owner's evidence that the prior art sometimes uses the phrase "tapered cylinder" demonstrates, if anything, that the term "cylindrical hole" is not limited to structures having perfectly cylindrical shapes. Patent Owner's argument does nothing to explain why the term "bore" should exclude stepped diameters.

Indeed, Patent Owner's Exhibit 2035 specifically describes its anchor 100 as having an "inner diameter [ϕ_2] tapering in stepped fashion from the proximal end to the distal end." Ex. 2035, ¶ [0028]. The stepped taper of inner diameter ϕ_2 is clearly shown in Figure 1 (annotated with red, blue, and green lines by Petitioner):



Ex. 2035, Fig. 1 (annotated)

III. CONCLUSION

Petitioner requests cancellation of all claims.

Dated: August 7, 2024

Respectfully submitted,
Fusion Orthopedics, LLC

By:
/Jennifer R. Brinkerhoff/
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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6, I certify that on the date listed below, a copy of this paper and every exhibit filed with this paper was served on the following:

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Dated: August 7, 2024

Respectfully submitted,
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