

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GLOBUS MEDICAL, INC.,
Petitioner,

v.

SPINELOGIK, INC.,
Patent Owner.

Case IPR2025-00226
U.S. Patent No. 8,460,385

**PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW
OF FINAL WRITTEN DECISION**

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CASES

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STATUTES

35 U.S.C. § 316(e)	2–3, 7, 11
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REGULATIONS

37 C.F.R. § 42.75(c)	1, 3, 11
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I. INTRODUCTION

Patent Owner Spinelogik, Inc. respectfully requests Director Review of the Final Written Decision (Paper 21, “Decision” or “Dec.”). Review is warranted under 37 C.F.R. § 42.75(c)(1)–(4) because the Decision rests on an erroneous allocation of the statutory burden, credits a material factual proposition unsupported by reasoned evidence, and conflicts with the precedential rule the same Decision applied to the same expert on another ground.

The point is narrow and dispositive. Claim 1 requires two curved channels whose cross-sectional planes are parallel. Neither Moskowitz nor Steffee discloses that geometry in the proposed combination. Moskowitz shows straight channels for rotating screws; Steffee shows curved fasteners but not curved channels through Moskowitz’s screw box. Petitioner therefore had to prove that, after converting Moskowitz’s straight channels into curved trajectories, the claimed planes would remain parallel. Its entire proof on that limitation was one sentence in paragraph 179 of Mr. Culbert’s declaration asserting that a skilled artisan “would have maintained” the planes. Ex. 1002 ¶ 179; Pet. 93–94.

Patent Owner identified that evidentiary failure in its Response and at the hearing. PO Resp. 64–66; Tr. 72:4–13. Yet the Decision did not ask whether Petitioner had proved the modified geometry. It faulted Patent Owner for not explaining why a skilled artisan “would not have maintained” the parallel relationship and credited the assertion because it was “unrebutted.” Dec. 38. For claims 2 and 4, the Decision likewise found “no reason—certainly, no reason explained by [Patent Owner]” why the relationships would change. *Id.* at 40, 45. Section 316(e), however, places the burden of persuasion on Petitioner and never requires Patent Owner to disprove an unsupported proposed combination.

The inconsistency is especially consequential because the Decision correctly rejected Petitioner’s Hess ground under *Xerox Corp. v. Bytemark, Inc.*: Mr. Culbert could not supply a missing limitation by “simply stat[ing]” the desired result without explaining how or why the modification would work. Dec. 18–20. The Decision then accepted materially the same mode of proof for Moskowitz–Steffee. Director Review is needed to apply one burden and one evidentiary rule to the entire Decision. The error controls every challenged claim because claim 1 contains the parallel-plane limitation, all other challenged claims depend directly or indirectly from claim 1, and no other ground survived. *Id.* at 12–13, 20, 53–54.

II. STANDARD FOR DIRECTOR REVIEW

Director Review of a final written decision is available for an abuse of discretion, an important issue of law or policy, an erroneous finding of material fact, or an erroneous conclusion of law. 37 C.F.R. § 42.75(c). This request presents each of those grounds: the Decision inverted the burden imposed by 35 U.S.C. § 316(e), made the dispositive factual finding without reasoned evidentiary support, and applied precedential *Xerox* inconsistently within a single final written decision.

Section 316(e) requires the petitioner to prove unpatentability by a preponderance of the evidence. The burden of persuasion “never shifts to the patentee.” *In re Magnum Oil Tools International, Ltd.*, 829 F.3d 1364, 1375–78 (Fed. Cir. 2016); see also *Dynamic Drinkware, LLC v. National Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). For obviousness, Petitioner also must provide an articulated reason, supported by a rational underpinning, for the proposed modification and a reasonable expectation of success. *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007); *Magnum*, 829 F.3d at 1380–81; *Intelligent Bio-Systems, Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367–68 (Fed. Cir. 2016). Conclusory expert testimony cannot supply a claim limitation missing from the references. *Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9 at 15–17 (PTAB Aug. 24, 2022) (precedential).

III. THE DISPOSITIVE RECORD

A. Only the Moskowitz–Steffee Ground Survived

The Petition presented three theories. Petitioner abandoned its Moskowitz-plus-knowledge ground at the hearing because that theory depended on an overbroad construction of “curved channel.” Dec. 12–13; Tr. 58:18–30. The Board rejected the Hess ground, holding that the references and Mr. Culbert’s testimony did not show how Hess could be redesigned from an interspinous spacer into the claimed interbody fusion device with the required arrangement. Dec. 18–20. The Board found only the Moskowitz–Steffee combination sufficient. Id. at 20–53. Thus, if that combination lacks one limitation of claim 1, the Decision’s unpatentability determination cannot stand.

The combination was not a simple substitution. Moskowitz’s screw box uses straight channels aligned with straight, rotational screws. Steffee’s rigid fasteners are curved, and Steffee does not disclose channels through an implant. To reach the claims, Petitioner proposed replacing Moskowitz’s screws, converting its straight screw guides into curved channels, and changing the insertion mechanics. Pet. 84–94; Ex. 1002 ¶¶ 159–179. The Decision nevertheless had to determine the geometry of the newly created channels, not the geometry of unmodified Moskowitz.

B. Petitioner Supplied Only a Conclusion for the Parallel-Plane Limitation

Limitation 1.3 requires a first cross-sectional plane “along” the path traversed by the first curved channel and a second such plane along the second curved path, with the two planes parallel. Dec. 36–38. The Petition relied on figures and text describing Moskowitz’s original straight screw channels, then invoked Steffee’s parallel anchors. Pet. 47–48, 93–94. But the Petition did not analyze the cross-sectional planes of the curved channels that its combination would create. It cited only paragraph 179:

A POSA would have maintained the same cross-sectional planes in Moskowitz-Steffee as disclosed in Moskowitz itself, which are parallel. . . . Steffee also teaches or suggests that its anchors are inserted parallel to one another. . . . Accordingly, . . . the cross-sectional planes of the curved channels of Moskowitz-Steffee are parallel.

Ex. 1002 ¶ 179. The paragraph assumes the proposition to be proved. It does not identify the geometry of either modified curved path, explain how a plane is derived from that path, or show why curving the channels preserves the original planes. Steffee’s depiction of parallel fasteners does not fill the gap; a fastener orientation is not itself proof of the claimed cross-sectional plane “along” a curved channel through Moskowitz’s fusion member.

Patent Owner squarely preserved the issue. Its Response explained that Moskowitz’s parallelism resulted from the symmetry of rigid, linear, rotational screws and that Petitioner offered no evidence that the relationship would survive the proposed redesign. PO Resp. 64–66. At the hearing, Patent Owner again stated that “Petitioner bears a burden of showing” that the combined system satisfies the geometric limitations and had not done so. Tr. 72:4–13. Petitioner answered that Mr. Culbert’s assertion was “the only evidence of record on that point.” Tr. 74:20–75:4. The issue is therefore not new and does not depend on any new evidence.

The Decision adopted the assertion precisely because Patent Owner had not disproved it:

Patent Owner’s contention . . . does not adequately address why one of ordinary skill would not have maintained the parallel spatial relationship On this record, we credit the unrebutted declaration testimony of Mr. Culbert

Dec. 38 (emphasis added). That reasoning supplied the missing limitation by shifting the decisional burden.

IV. DIRECTOR REVIEW IS WARRANTED

A. The Decision Shifted Petitioner's Burden to Patent Owner

The Decision's analysis cannot be reconciled with § 316(e). Petitioner had to establish that its proposed modification would produce the claimed parallel cross-sectional planes. Patent Owner did not have to establish the negative proposition that the modification would not do so. *Magnum*, 829 F.3d at 1375–78. Calling an expert's testimony “unrebutted” cannot cure the absence of an explanation supporting the ultimate proposition. The question remains whether Petitioner's evidence, standing on its own, carries the preponderance burden.

The language of the Decision confirms that the missing proof was placed on Patent Owner. For claim 1, the Decision required Patent Owner to explain why a skilled artisan “would not have maintained” the parallel relationship. Dec. 38. For claim 2, it found “no reason—certainly, no reason explained by [Patent Owner]” why curving the channels would displace terminal points or plane orientation, and faulted Patent Owner for not identifying evidence that the geometry “would necessarily change.” *Id.* at 40. It repeated the same reasoning for claim 4. *Id.* at 45. Those formulations ask whether Patent Owner disproved the claim limitation, not whether Petitioner proved it.

This is the error *Magnum* forbids. There, the Federal Circuit rejected an approach that effectively required the patent owner to disprove obviousness after a petitioner failed to develop a sufficient theory. 829 F.3d at 1375–81. A patent owner may, of course, choose to present expert evidence. But the absence of a competing declaration does not convert an unsupported conclusion into affirmative proof or shift the burden of persuasion. The Decision itself correctly stated that Petitioner’s burden “never shifts to Patent Owner.” Dec. 6. Its dispositive analysis applied the opposite rule.

The error is material, not semantic. The record supplies no reasoned bridge from the straight-channel geometry of Moskowitz to the cross-sectional planes of the modified curved paths. Paragraph 179 merely says the planes would be maintained. Once the burden is correctly assigned, the absence of proof requires a finding that Petitioner did not establish limitation 1.3 by a preponderance of the evidence.

B. The Decision Applied Opposite Xerox Standards to the Same Expert

The Decision’s treatment of the Hess ground demonstrates the correct analysis. Hess did not show how its wings and guide tracks could be reoriented from engaging spinous processes to anchoring an interbody fusion member in adjacent vertebral bodies. Mr. Culbert asserted that the wings “would engage” the vertebrae, but did not explain how or why. Dec. 18. The Board held that this testimony did more than support a motivation to modify; it attempted to supply a missing limitation. Applying precedential *Xerox*, the Board found the showing insufficient. *Id.* at 19–20.

Paragraph 179 has the same defect. Moskowitz does not disclose curved channels with the claimed planes, and Steffee does not disclose channels in Moskowitz’s fusion member. The declaration says the modified channels “would have” parallel planes but does not explain how or why. The fact that the assertion concerns geometry rather than anatomy does not change the evidentiary rule. Nor does the label “unrebutted.” *Xerox* evaluates whether the proponent’s testimony is supported and reasoned, not whether the opposing party retained another expert to contradict it. Paper 9 at 15–17.

The Decision also cannot substitute “ordinary skill” for evidence of the missing geometry. An expert may explain what the references teach and why a skilled artisan would combine them. But *KSR* still requires articulated reasoning with a rational underpinning, 550 U.S. at 418, and *Xerox* bars using expert say-so as the missing disclosure itself. Paragraph 179 neither identifies a known geometric principle nor applies one to specified dimensions, radii, entry points, or paths. It states the result and cites unmodified Moskowitz and Steffee’s fasteners.

Director Review should resolve this internal inconsistency. A final written decision should not reject one ground because the expert supplied a missing limitation without explanation, yet uphold the only surviving ground by crediting the same expert’s unexplained assertion of another missing limitation.

C. The Error Is Outcome-Determinative

Limitation 1.3 is part of independent claim 1. Claims 2–5, 7, and 9 all depend, directly or indirectly, from claim 1 and therefore incorporate it. Dec. 2–5. The abandoned Moskowitz-only theory cannot support the Decision, and the Board rejected the Hess theory. *Id.* at 12–13, 20. Thus, the challenged claims stand or fall with the Moskowitz–Steffee ground and its proof of limitation 1.3. Correcting the burden and applying *Xerox* to paragraph 179 changes the result for every challenged claim.

D. Review Is Important to the Uniform Administration of IPRs

The recurring question is broader than this record: whether a petitioner may establish a missing limitation through an expert's unexplained assertion whenever the patent owner does not submit a competing declaration. The answer affects the statutory burden in any IPR where the petitioner labels a conclusion "unrebutted." Section 316(e), *Magnum*, and *Xerox* require the Board first to test the sufficiency of the petitioner's affirmative proof. Consistent application of that rule is an important issue of law and PTAB policy warranting Director Review under § 42.75(c).

V. RELIEF REQUESTED

Patent Owner respectfully requests that the Director grant review, vacate the determination that claims 1–5, 7, and 9 are unpatentable, and determine that Petitioner failed to prove those claims unpatentable. Alternatively, Patent Owner requests remand for application of the correct burden and a uniform *Xerox* analysis without treating the absence of a Patent Owner expert declaration as affirmative proof of the missing limitation.

Dated: August 8, 2026

Respectfully submitted,

GARTEISER HONEA PLLC

By: /M. Scott Fuller/
M. Scott Fuller
Reg. No. 54,716
119 W. Ferguson Street
Tyler, Texas 75702
Telephone: (903) 705-7420
sfuller@ghiplaw.com

Lead Counsel for Patent Owner

René A. Vazquez
Reg. No. 38,647
SINERGIA TECHNOLOGY LAW
GROUP, PLLC
18296 St. Georges Court
Leesburg, Virginia 20176
Telephone: (703) 989-2244
rvazquez@sinergialaw.com

Back-Up Counsel for Patent Owner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on August 8, 2026, a true and correct copy of PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW OF FINAL WRITTEN DECISION was served by electronic mail on Petitioner's counsel of record at the following addresses:

Stephen D. Zinda (Reg. No. 67,272)
James H. Hall (Reg. No. 66,317)
CABELLO HALL ZINDA, PLLC
801 Travis Street
Houston, Texas 77002
Stephen@CHZFirm.com
James@CHZFirm.com

/M. Scott Fuller/
M. Scott Fuller
Reg. No. 54,716