

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BLUECATBIO MA INC.,
Petitioner,

v.

YANTAI AUSBIO LABORATORIES CO., LTD.,
Patent Owner.

PGR2020-00051
Patent 10,338,063 B2

Before CHRISTOPHER L. CRUMBLEY, JO-ANNE M. KOKOSKI, and
ELIZABETH M. ROESEL, *Administrative Patent Judges*.

ROESEL, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request for Rehearing
37 C.F.R. § 42.71(d)

I. BACKGROUND

Yantai AusBio Laboratories Co., Ltd. (“Patent Owner”) timely filed a request for rehearing (Paper 28, “Reh’g Req.” or “Request”) of our Decision granting institution of post-grant review (Paper 26, “Decision”) of claims 1, 3–5, 7, 10–12, and 14–20 of U.S. Patent No. 10,338,063 B2 (“the ’063 Patent”) based on alleged public use of a machine referred to as the “Gyro Washer,” among other asserted grounds.

For the reasons that follow, we deny Patent Owner’s request for rehearing.

II. STANDARD OF REVIEW

The party challenging a decision in a request for rehearing bears the burden of showing the decision should be modified. 37 C.F.R. § 42.71(d). A request for rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed.” *Id.* Upon a request for rehearing, the decision on a petition will be reviewed for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co. Inc.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988).

III. ANALYSIS

The Request challenges our determination as to the sufficiency of Petitioner’s evidence offered to show that the Gyro Washer meets the limitation of claim 1 that recites “a wind is generated which drives the expelled liquid on the inner surface of the housing to the drain.”

*A. The Board did not Overlook or Misapprehend the Evidence in the
Petition or Patent Owner's Rebuttal Arguments*

Patent Owner contends that we overlooked or misapprehended a lack of evidence in the Petition, including “what is and is not being shown in the video” of Petitioner’s first experiment (Ex. 1012). Reh’g Req. 3, 6. Patent Owner argues that “Petitioner did not allege or provide any evidence that the liquid seen on the plexiglass cover in the video is ‘at least the main part’ of the expelled liquid, nor did Petitioner present evidence that such liquid is driven into the drain.” *Id.* at 7 (quoting Patent Owner’s claim construction, which the Board adopted).

Patent Owner is correct that Petitioner and its declarants did not explicitly apply Patent Owner’s claim construction when presenting the video evidence. Nevertheless, Patent Owner does not show that we overlooked or misapprehended a deficiency in Petitioner’s evidence. The Decision relies not only on Petitioner’s video (Ex. 1012), but also Dr. Yagi’s observations of how the Gyro Washer operates (Ex. 1005 ¶¶ 73–79) and Dr. Slocum’s opinion based on the video (Ex. 1006 ¶ 116). *See* Dec. 23–24 (discussing Petitioner’s first experiment). Dr. Yagi testified that he placed filled microplates into the Gyro Washer with the openings directed radially outward and started a cleaning cycle. Ex. 1005 ¶¶ 76, 77. According to Dr. Yagi, the liquid contents of the microplates were expelled from the microplate onto the inner cylindrical surface of the drum. *Id.* ¶ 78. Dr. Yagi further testified that the liquid moved along the arced inner surface of the plexiglass cover downward to the lower section of the drum. *Id.* ¶ 79. Dr. Slocum testified that the video (Ex. 1012) shows “that a circular airstream drives the liquid on the inner surface of the housing along the inner surface toward the drain at the bottom.” Ex. 1006 ¶ 116. After considering

Patent Owner's rehearing arguments, we remain persuaded that Petitioner's evidence is sufficient to show, for purposes of institution, that at least the main part of the liquid expelled from the reaction vessel unit is driven into the drain of the Gyro Washer. Dec. 26 (citing Ex. 1005 ¶¶ 78, 79; Ex. 1012).

Patent Owner argues that Petitioner's video "confirms that all of the liquid expelled onto the plexiglass cover enters [the] discontinuity between the cover and housing, trapping the liquid and preventing it from being driven to the drain." Reh'g Req. 12–13. In our view, Patent Owner's argument is new. In the Preliminary Response (Paper 23, "Prelim. Resp."), Patent Owner did not assert that all or even most of the expelled liquid becomes trapped in the discontinuity. Instead, Patent Owner argued that "drops of liquid expelled onto the plexiglass door" are trapped in the gap or pocket between the plexiglass door and the housing. Prelim. Resp. 36. Patent Owner presented video clips to show "how one droplet is trapped in the gap or pocket" and "numerous other droplets can be readily seen following similar paths." *Id.* at 40. "Numerous droplets" is not the same as all or most of the expelled liquid, as Patent Owner now asserts.

Relying on its claim construction for "the expelled liquid," Patent Owner argues that "where Patent Owner argued [in the Preliminary Response] that 'the expelled liquid' was prevented from being driven to the drain, Patent Owner argued that 'at least the main part of the liquid expelled from the reaction vessel' was prevented from being driven to the drain." Reh'g Req. 20 (citing Prelim. Resp. 31, 44). We disagree. Aside from the above-quoted statements about "one droplet . . . trapped in the gap or pocket" and "numerous other droplets . . . following similar paths" (Prelim.

Resp. 40), Patent Owner made no other argument in the Preliminary Response about how much of the expelled liquid was prevented from reaching the drain. To the extent Patent Owner now argues that Petitioner's video shows "the main part" of the expelled liquid was prevented from being driven to the drain, Patent Owner's rehearing argument is inconsistent with its interpretation of Petitioner's video as presented in the Preliminary Response and Katz Declaration. Prelim. Resp. 40; Ex. 2016 ¶ 97.

After considering Patent Owner's rehearing arguments, we are not persuaded that we misapprehended or overlooked either a deficiency in Petitioner's evidence or Patent Owner's rebuttal arguments. Nor are we persuaded that we abused our discretion in determining that the Petition meets the threshold for institution of *inter partes* review.

B. The Board did not Improperly Shift the Burden of Proof to Patent Owner

Patent Owner challenges the following statements from our Decision as improper burden-shifting: (1) "Patent Owner does not assert, however, that the volume of trapped water droplets is so large that the main part of the liquid expelled from the reaction vessel unit does not flow into the drain." Reh'g Req. 15 (quoting Dec. 26); and (2) "Although Dr. Katz testifies that 'too large of a gap will result in instability in the airflow or insufficient wind,' he does not say that the Gyro Washer's 14 mm gap is too large." *Id.* at 16 (quoting Dec. 27).

We disagree with Patent Owner's characterization of these statements as improper burden-shifting. Our statements identify arguments that were not made by Patent Owner in the Preliminary Response or by Dr. Katz in his declaration. After reviewing the record again, we determine that the statements are accurate. We did not shift the burden of persuasion or the

burden of production to Patent Owner. Immediately following the first sentence quoted above, the Decision states: “[o]n this record, Petitioner’s video (Ex. 1012) is sufficient to show that at least the main part of the liquid expelled from the reaction vessel unit is driven into the drain of the Gyro Washer.” Dec. 26. Following the second sentence quoted above, the Decision states:

We are mindful that the burden of proof is on Petitioner, not Patent Owner. We have considered Patent Owner’s criticisms of Petitioner’s evidence, and although they cast some doubt on Petitioner’s contentions, we determine that, on this preliminary record, Petitioner’s experimental and testimonial evidence is sufficient to meet the threshold for institution of post-grant review.

Dec. 27. The Decision correctly placed the burden on Petitioner to show that the claim limitations are met by the Gyro Washer.

IV. CONCLUSION

For the foregoing reasons, we are not persuaded that Patent Owner shows that we misapprehended or overlooked arguments or evidence or that we abused our discretion in granting institution.

V. ORDER

For the foregoing reasons, it is hereby:

ORDERED that Patent Owner’s request for rehearing is *denied*.

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