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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte WIESLAW MACIEJCZYK

Appeal 2019-006274
Application 15/851,862
Technology Center 3600

Before MICHELLE R. OSINSKI, ERIC C. JESCHKE, and
AMANDA F. WIEKER, *Administrative Patent Judges*.

JESCHKE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ seeks review, under 35 U.S.C. § 134(a), of the Examiner's decision, as set forth in the Final Office Action dated November 26, 2018, and as further explained in the Advisory Action dated February 8, 2019, rejecting claims 8–14. Claims 1–7 have been allowed. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies Britax Childcare Pty Ltd as the real party in interest. Appeal Br. 1.

BACKGROUND

The disclosed subject matter “relates to an impact energy dissipating device.” Spec. ¶ 1. Claim 8, the sole independent claim on appeal, is reproduced below:

8. An impact energy absorbing device for a child safety seat comprising a shell with a pair of opposing surfaces, wherein one of the surfaces comprises at least one energy absorbing element in the form of a recess extending into the shell toward the other surface, wherein the at least one energy absorbing element comprises a hollow, gas, liquid, gel, or foam material and is configured to absorb energy in response to plastically or elastically deforming, cushioning, crushing, rupturing, deflating or bursting as a result of an impact.

REJECTIONS

1. Claims 8, 9, 11, 13, and 14 stand rejected under 35 U.S.C. § 102(a)(1) as anticipated by Buehrig (US 3,171,691, issued Mar. 2, 1965).
2. Claim 10 stands rejected under 35 U.S.C. § 103 as unpatentable over Buehrig and Gale (US 3,441,310, issued April 29, 1969).
3. Claim 12 stands rejected under 35 U.S.C. § 103 as unpatentable over Buehrig.

DISCUSSION

Rejection 1

Appellant argues the patentability of claim 8 and does not separately argue claims 9, 11, 13, and 14, which depend from claim 8. Appeal Br. 2–6. Thus, we address claim 8, with claims 9, 11, 13, and 14 standing or falling

with claim 8. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2018). In the Final Office Action, the Examiner found that Buehrig anticipated claim 8:

Note the impact energy absorbing device capable of use with a child safety seat comprising a shell (11) with a pair (17 and 18) of opposing surfaces, wherein one (17) of the surfaces comprises at least one energy absorbing element in the form of a recess (21) extending into the shell toward the other (18) surface, wherein the at least one energy absorbing element comprises a hollow (see Figures 2-4), gas, liquid, gel, or foam material and is capable of absorbing energy in response to plastically or elastically deforming (see Figures 3 and 4), cushioning, crushing (see Figures 3 and 4), rupturing, deflating or bursting as a result of an impact.

Final Act. 3.

First, Appellant argues that “Buehrig relates to a seat cushion for bucket seats of a vehicle” and that “seat cushion 11 is disposed in a seat shell 12 of a vehicle.” Appeal Br. 4, 5. Thus, according to Appellant, “seat cushion 11 of Buehrig is not an energy absorbing device for a child safety seat” as recited at the beginning of claim 8. *Id.* at 5.

In response, the Examiner states that the disclosure at column 1, lines 9–11 of Buehrig “supports Buehrig’s device as being an impact energy absorbing device.” Ans. 5. The Examiner also states that claim 8 “does not positively claim a child safety seat” and that, “[a]s can be seen in the preamble of independent claim 8, a child safety seat is set forth merely as an article that the invention (an energy absorbing device) is intended to be used with.” *Id.* Appellant does not respond to these positions. *See* Reply Br.

The beginning of claim 8 recites: “[a]n impact energy absorbing device for a child safety seat.” Appeal Br. 8 (Claims App.). We agree with the Examiner that “for a child safety seat” merely sets forth an intended use of the claimed “impact energy absorbing device,” and does not limit the

scope of the claim. *See Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 952 (Fed. Cir. 2006) (“Preamble language that merely states the purpose or intended use of an invention is generally not treated as limiting the scope of the claim.”). Appellant does not direct us to, nor do we find, evidence suggesting that the preamble is limiting. For example, “child safety seat” is not recited anywhere else in the claim language. *Cf. Eaton Corp. v. Rockwell Int’l Corp.*, 323 F.3d 1332, 1339 (Fed. Cir. 2003) (“When limitations in the body of the claim rely upon and derive antecedent basis from the preamble, then the preamble may act as a necessary component of the claimed invention.”). Thus, that Buehrig does not explicitly disclose the use of the relied-upon structure in “a child safety seat” does not apprise us of error. Moreover, the record supports the Examiner’s finding that element 11 in Buehrig is an “impact energy absorbing device.” *See* Buehrig 1:9–11 (“This invention relates to seat cushions and more particularly to seat cushions in which the resistance to deflection under load increases as the load is increased.”), *cited at* Ans. 5.

Second, Appellant presents several arguments as to why “seat shell 12” in Buehrig does not satisfy certain requirements of the “shell” recited in claim 8. Appeal Br. 5. For example, Appellant contends that “the alleged energy absorbing elements (i.e., pockets 21) of the seat cushion 11 do not extend into the seat shell 12 at all.” *Id.*

With these arguments, Appellant does not address the rejection as articulated. As made clear in the Final Office Action, the Examiner identified *element 11* in Buehrig—not element 12—as the “shell” recited in claim 8. *See* Final Act. 3 (discussing “shell (11)”). Element 12 of Buehrig has never been identified for any aspect of claim 8. *See, e.g.*, Ans. 6 (“The seat cushion of Buehrig is a shell (11) having a pair (17 and 18) of opposing

surfaces, as described in the rejection, and as shown in Figures 2, 3 and 4. The seat shell 12 provides no part of the impact energy absorbing device of Buehrig, as described in the above rejection.”).

Third, in the Reply Brief, Appellant argues that one of ordinary skill in the art would not consider element 11 in Buehrig to fall within the scope of the broadest reasonable construction of the term “shell.” *See* Reply Br. 3–5. We first address whether this argument is timely. Appellant alleges that, in the Appeal Brief, “Appellant disagree[d] that the seat cushion 11 of Buehrig is analogous to the claimed shell.” *Id.* at 4. With this, Appellant appears to refer to this statement in the Appeal Brief:

As an initial matter, the only possible construction of the disclosure of Buehrig as including “a shell with a pair of opposing surfaces” would necessitate that the top and bottom surfaces of the seat shell 12 be considered as opposing surfaces.

Appeal Br. 5. This statement, however, does not explain why element 11 is *not* a “shell” under the broadest reasonable construction; it only states the conclusion that element 12 is the “only possible” “shell.” *Id.* Thus, we do not agree that the scope of “shell” was raised in the Appeal Brief.

Moreover, the Examiner did not discuss the scope of the term “shell” for the first time in the Answer, thereby “opening the door” to a response in the Reply Brief. Instead, the claim construction argument in the Reply Brief as to the scope of the term “shell”—i.e., that “shell” does not include element 11 in Buehrig—should have been made in the Appeal Brief, immediately following the Examiner’s *clear* identification of element 11 as the “shell” in claim 8. *See* Final Act. 3; *see also* 37 C.F.R. § 41.41(b)(2) (“Any argument raised in the reply brief which was not raised in the appeal brief, or is not responsive to an argument raised in the examiner’s answer, including any designated new ground of rejection, will not be considered by

Appeal 2019-006274
Application 15/851,862

the Board for purposes of the present appeal, unless good cause is shown.”); *In re Durance*, 891 F.3d 991, 1002 (Fed. Cir. 2018) (stating that “an applicant’s reply may not respond to grounds or arguments raised in the examiner’s answer if they were part of the Final Office Action and the applicant did not address them in the initial appeal brief”). Although this argument is untimely, in order to develop a complete record on this issue, we address the merits below.

Appellant contends that “one of ordinary skill in the art, having the specification as a guide, would give the ordinary and customary meaning to the term ‘shell’” to construe that term “as a ‘hard protective outer case’ (see Oxford Dictionary definition of ‘shell’).” Reply Br. 4. According to Appellant, “seat cushion 11 [in Buehrig] is not a ‘hard protective outer case’” because it “has a soft outer layer to serve its fundamental purpose of being placed over a hard surface to provide comfort.” *Id.* (citing Buehrig 2:11–18; discussing Buehrig 1:18–22 (disclosing how “[s]uch a cushion has to be comfortable to sit on for relatively long periods of time”)).

The record does not support the proposed requirement that the recited “shell” must be “hard.” As an initial matter, we note that Appellant identifies only one piece of evidence in support of the proposed requirement—specifically, one dictionary definition. *See* Reply Br. 4. Appellant does not identify any intrinsic evidence to support the proposed requirement. *See id.* And, although we do not have the Examiner’s perspective on these issues, which were raised for the first time on Reply, having reviewed the intrinsic evidence, we identify no support for the proposed requirement that the “shell” must be “hard.” *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005) (en banc) (“[W]hile extrinsic evidence ‘can shed useful light on the relevant art,’ we have explained that it

is ‘less significant than the intrinsic record in determining “the legally operative meaning of claim language.”’) (quoting *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 862 (Fed. Cir. 2004)).

Turning to extrinsic evidence, definitions of “shell” in *other* dictionary sources do not include the requirement proposed by Appellant (relying on an unidentified edition of the “Oxford Dictionary” (Reply Br. 4)). For example, the online version of the Oxford English Dictionary defines “shell” as “[a]n exterior or enclosing cover or case” and as “[a] mere exterior or framework.” *See* Appendix A at 11 (Section III), 13 (Section IV). And the online version of the Merriam-Webster Dictionary defines “shell” as “a framework or exterior structure” and “an external case or outside covering.” *See* Appendix B at 1 (definitions 4(a) and 4(b)(1)).

Considering the intrinsic and extrinsic evidence together, we determine that the broadest reasonable interpretation of “shell” as recited in claim 8 does not include a requirement that the structure be “hard.” *See In re Trans Texas Holdings Corp.*, 498 F.3d 1290, 1299 (Fed. Cir. 2007) (construing a claim term under the broadest reasonable interpretation in accordance with the broader of certain dictionary definitions). Because the identified “shell” in Buehrig need not be “hard,” we are not apprised of error based on this argument by Appellant.

For the reasons above, we sustain the rejection of independent claim 8. Claims 9, 11, 13, and 14 fall with claim 8.

Rejections 2 and 3

Claims 10 and 12 depend from claim 8. *See* Appeal Br. 8 (Claims App.). For these rejections, Appellant argues that claims 10 and 12 are allowable based on their dependence from claim 8. *See id.* at 6. Appellant does not provide additional arguments for claims 10 and 12. For the reasons

above, we are not apprised of error in the rejection of claim 8. *See supra*
Rejection 1. As such, we sustain the rejection of claims 10 and 12.

CONCLUSION

We *affirm* the Examiner's rejection of claims 8–14.

More specifically, we (1) *affirm* the decision to reject claims 8, 9, 11, 13, and 14 under 35 U.S.C. § 102(a)(1), and (2) *affirm* the decision to reject claims 10 and 12 under 35 U.S.C. § 103.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
8, 9, 11, 13, 14	102(a)(1)	Buehrig	8, 9, 11, 13, 14	
10	103	Buehrig, Gale	10	
12	103	Buehrig	12	
Overall Outcome			8–14	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED