UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

Case CBM2013-00009
Patent 8,140,358

Before the Honorable JAMESON LEE, JONI Y. CHANG, and MICHAEL R. ZECHER, *Administrative Patent Judges*.

PETITIONER'S RESPONSE TO PATENT OWNER'S OBSERVATIONS ON TESTIMONY OF MARY L. O'NEIL

Petitioner, Liberty Mutual Insurance Co., has the following responses to each of Patent Owner's observations on the September 13, 2013 cross-examination testimony of Mary L. O'Neil:

In its observations 1-3, Progressive quotes three portions of the Mary L. O'Neil's testimony and states that they all refute the same sections of Liberty Mutual's Reply brief and Ms. O'Neil's Rebuttal Declaration dealing with the Risk Classification Statement of Principles, which was introduced by Mr. Miller in his declaration, but never attached by Progressive as an exhibit in this proceeding. *See* Petitioner's Motion to Exclude, Paper 40, p. 10. However, as pointed out by Ms. O'Neil in her testimony, "these statements of principles and the standards of practice are guidelines for actuaries in their professional practice," from which actuaries may "deviate," as long as such deviations are "documented." Ex. 1047, p. 9, line 22 to p. 10, line 5. Further, Ms. O'Neil clarifies that the Statement of Principles notes that "the three statistical considerations, homogeneity, credibility and predictive stability" are "conflicting" and "decision[s] as to the relative weights of these three considerations are left to the professional judgment" of the actuary. Ex. 1047, p. 185, line 24 to p. 186, line 16.

As Ms. O'Neil explains in great detail in both her Rebuttal Declaration and her cross-examination testimony, she disagrees with Mr. Miller's testimony that a POSITA would "adhere" to this Statement of Principles, and instead asserts that they would be "treated as considerations and guidelines, not rules that must be strictly

followed," and used "along with the rest of the body of actuarial literature." Ex. 1047, p. 10, lines 6-12; p. 21, lines 9-13. *See* Ex. 1031 ¶ 17-19. This is not merely a "semantic" difference as Progressive asserts, because it is a substantive difference as to how a POSITA would use the Statement of Principles.

In observation 3, Progressive asserts that Ms. O'Neil admitted that Mr. Miller took into consideration information other than actual claims data in generating actuarial classes. However, as Ms. O'Neil explained, the section of Mr. Miller's declaration referenced by Progressive that mentions factors other than actual claims data, actually "refers to overall rate level" for providing that "an insurer's rates comply with the statutory rate standards" and not the creation of actuarial "classifications." Ex. 1047, p. 33, line 24 to p. 34, line 19. Thus, contrary to Progressive's statements, this testimony is consistent with Ms. O'Neil's previous testimony regarding Mr. Miller's insistence on the use of actual claims data to generate actuarial classes. *See* Ex. 1031 ¶ 19 (citing Ex. 2013 ¶¶ 17-19, 40-41, 43).

In its observations 4-6, Progressive cites three portions of Ms. O'Neil's testimony that it asserts refute Ms. O'Neil's statements and bolster Progressive's arguments relating to fuzzy logic. However, Progressive is once again misunderstanding the concept behind a POSITA. In patent law, a POSITA is a hypothetical person that is tasked with having knowledge of all relevant pieces of prior art. Obviously no real person can meet every aspect of that standard. Ms. O'Neil never claimed to be an expert in fuzzy logic or even the telematics aspects of

the '358 patent. Instead, she is a POSITA in the insurance aspects of the '358 patent. A telematics expert, on the other hand, would have had more experience studying and using fuzzy logic systems in the relevant time period. *See* Ex. 1048, p. 196, lines 11-16; p. 198, lines 20-25.

As Ms. O'Neil explained in both her Rebuttal Declaration and her cross-examination testimony, "one would not even have to know anything about fuzzy logic" in order to use the teachings in Kosaka to supplement RDSS because it is "not necessary" to use fuzzy logic and one "could utilize a lookup table" instead. Ex. 1047, p. 66, line 23 to p. 67, line 7. *See also* Ex. 1031 ¶ 40.

Additionally, Ms. O'Neil makes it clear in her testimony that "[n]ot every actuary has experience in every aspect and every possible application." Ex. 1047, p. 51, lines 2-6. "A person of ordinary skill in the art would have been aware of many techniques" and just because they did not have personal experience using every single one of them does not mean they are not a POSITA, and does not mean that a POSITA would not have been able to use that technique. Ex. 1047, p. 53, lines 3-12. As stated above, actuaries can still qualify as POSITAs because they can consult prior art that a POSITA is deemed to know. As Ms. O'Neil pointed out, a POSITA would have been aware of the use of fuzzy logic in classification rating and underwriting based on the plethora of articles written on the subject. *See* Ex. 1031 ¶ 35. Certainly, just because some actuaries who were "not totally familiar with fuzzy logic" would thus "do their own research and education on that" does not mean that

such a POSITA would need to combine Kosaka with other references in a new alleged ground for patentability, as proposed by Progressive. Ex. 1047, p. 67, line 23 to p. 68, line 7. Instead, that simply means that an individual actuary may need to become educated in order to obtain the level of the hypothetical POSITA, who is presumed to know all relevant prior art.

Ms. O'Neil's testimony makes clear that although she is not "an expert in fuzzy logic," she understands that the "final risk evaluation value" outputted from the fuzzy logic system of Kosaka is "a crisp answer." Ex. 1047, p. 76, lines 20-21; p. 70, lines 10-11; p. 82, lines 19-20. Ms. O'Neil, as an insurance expert, understands this because that crisp value is multiplied by the base premium in order to obtain an insurance premium, a mathematical calculation that requires a single crisp value, not a fuzzy value. *See* Ex. 1048, p. 222, line 23 to p. 225, line 1.

Thus, Ms. O'Neil's testimony is consistent with her statements that a POSITA with respect to all aspects of the '358 patent would be knowledgeable about fuzzy logic, even if an individual actuarial expert might not have personal experience implementing such a system.

In its observation 7, Progressive quotes a portion of Mary L. O'Neil's testimony and states that it authenticates Ex. 1014, which Progressive argues refutes sections of Liberty Mutual's Reply brief and Mary L. O'Neil's Rebuttal Declaration dealing with rating factors. However, as pointed out repeatedly by Ms. O'Neil, the book chapter related to classification "relativities," which are sometimes referred to as

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