

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MAKO SURGICAL CORP.,
Petitioner,

v.

BLUE BELT TECHNOLOGIES, INC.,
Patent Owner.

IPR2015-00629

U.S. Patent No. 6,757,582

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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Patent Trial and Appeal Board
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Patent Owner Blue Belt Technologies, Inc. moves to exclude certain portions of the cross-examination testimony of Patent Owner’s expert, Dr. Cleary. Specifically, two of the questions asked by Petitioner Mako Surgical Corp. were confusing and ambiguous, and referred to subject matter outside the scope of Dr. Cleary’s Declaration. Accordingly, Dr. Cleary’s answers to those questions should be excluded under Fed. R. Evid. 403 and 37 C.F.R. § 42.53(d)(5)(ii).

On cross-examination, Dr. Cleary was asked the following:

- “In general in robot-assisted surgery, redundant systems for safety are important, aren’t they?” (Cleary Dep.¹ at 65:22–24) (“Question 1”); and
- “And using a tracker could be one way to ensure that the bone -- that you would detect any motion of the bone, wouldn’t it?” (*id.* at 66:21–23) (“Question 2”).

Patent Owner objected to Questions 1 and 2 as to form and scope. *Id.* at 66:1–2; 66:25–67:1. Nevertheless, Petitioner relied on Dr. Cleary’s answers to Questions 1 and 2 in its Reply. Petitioner’s Reply, Paper No. 13 (Feb. 19, 2016) (“Petitioner’s Reply”) at 7.

¹ Transcript of Deposition of Dr. Kevin Cleary, Ex. 1016.

Question 1—referencing robot-assisted surgery “[i]n general”—provides no context for important criteria, including: timeframe (before or after the filing date of U.S. Patent No. 6,757,582 (“the ’582 Patent”)); the type of surgery (involving the hip or another body part); and the type of system (autonomously executing or a lesser degree of robot assistance). Nor does Question 1 provide any metric by which Dr. Cleary was to assess the “importance” of redundant systems for surgery. Dr. Cleary’s answer to Question 1 should therefore be excluded as confusing the issues and ambiguous to the extent that Petitioner relies on it to support the allegation that the strain gauges described in Taylor² output tracking data. *See* Petitioner’s Reply at 7. Dr. Cleary’s answer provides no indication whether he meant for his answer to be applied in that context. *See* Cleary Dep. at 66:4–11. Moreover, Dr. Cleary’s Declaration makes no mention of robot-assisted surgery “in general” or “redundant systems for safety.” Thus, Dr. Cleary’s answer to

² Russell H. Taylor et al., *An Image-Directed Robotic System for Precise Orthopaedic Surgery*, IEEE Transactions On Robotics And Automation, Vol. 10, No. 3, June 1994, Ex. 1008.

Question 1 should further be excluded as being outside the scope of his Declaration testimony.

Question 2 is similarly problematic as it references a “tracker” used to “detect any motion of the bone” without providing context for the term “tracker.” Independent claim 1 of the ’582 Patent recites a “tracker,” “at least one first marker,” and “at least one second marker.” And although Question 2 refers to a “tracker,” Dr. Cleary’s answer refers to a “marker,” reflecting confusion about how “tracker” was used in Question 2. Cleary Dep. at 67:3–6. Nor does Dr. Cleary’s Declaration testimony describe whether a “tracker” *could* be used in Taylor’s system. Instead, Dr. Cleary’s Declaration testimony establishes that Taylor does not disclose a “tracker” or “at least one first marker,” as recited in claim 1. Declaration of Dr. Kevin Cleary, Ex. 2004, ¶¶ 43–49.

Accordingly, Patent Owner respectfully requests that the Board exclude Dr. Cleary’s answers to Questions 1 and 2 as confusing and ambiguous, as well as outside the permissible scope under Fed. R. Evid. 403 and 37 C.F.R. § 42.53(d)(5)(ii).

Dated: March 9, 2016

Respectfully submitted,

By: /Brian M. Buroker/

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