

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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C.R. BARD, INC.,  
Petitioner,

v.

MEDICAL COMPONENTS, INC.,  
Patent Owner.

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Case IPR2015-01660  
Patent 8,257,325 B2

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Before LYNNE E. PETTIGREW, DANIEL N. FISHMAN, and  
KERRY BEGLEY, *Administrative Patent Judges*.

BEGLEY, *Administrative Patent Judge*.

DECISION  
Denying Request for Rehearing  
*37 C.F.R. § 42.71*

C.R. Bard, Inc. (“Petitioner”) timely filed a request for rehearing (“Rehearing Request” or “Request”) of our decision on institution of *inter partes* review (“Institution Decision” or “Decision”). Paper 10 (“Req.”). The Request seeks rehearing of our determination to deny institution of *inter partes* review of claims 1, 2, 5–13, 15–19, 21, and 22 (collectively, “the challenged claims”) of U.S. Patent No. 8,257,325 B2 (Ex. 1001, “the

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'325 patent”) on the asserted grounds of obviousness over (1) PORTS,<sup>1</sup> Powers,<sup>2</sup> PowerPort,<sup>3</sup> and Hickman,<sup>4</sup> (2) PORTS, Powers, Sayre,<sup>5</sup> and Hickman, and (3) PORTS, Powers, Meyer,<sup>6</sup> and Hickman. Paper 9 (“Inst. Dec.”). For the reasons given below, we deny the Rehearing Request.

### LEGAL STANDARDS

When rehearing a decision whether to institute *inter partes* review, we review the decision for an “abuse of discretion.” 37 C.F.R. § 42.71(c). “The burden of showing [the] decision should be modified lies with the party challenging the decision.” 37 C.F.R. § 42.71(d). The 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 in” the petition. *Id.*

### ANALYSIS

In the Institution Decision, we denied institution of *inter partes* review based on our determination that the Petition does not “provide[] adequate reasoning with rational underpinning for combining the asserted references to reach the venous access port recited” in each challenged claim. Inst. Dec. 9, 11, 14; *see id.* at 14–19. We found the Petition’s proffered multi-step obviousness analysis to reach the limitation of independent claim 1 reciting “the flange further comprising X-ray discernable indicia

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<sup>1</sup> BARD ACCESS SYSTEMS, PORTS (2003) (Ex. 1002, “PORTS”).

<sup>2</sup> U.S. Patent No. 7,785,302 B2 (Ex. 1003, “Powers”).

<sup>3</sup> BARD ACCESS SYSTEMS, POWERPORT: GUIDELINES FOR CT TECHNOLOGISTS (2007) (Ex. 1004, “PowerPort”).

<sup>4</sup> BARD ACCESS SYSTEMS, HICKMAN® SUBCUTANEOUS PORTS & HICKMAN®/BROVIAC® CATHETERS (1992) (Ex. 1017, “Hickman”).

<sup>5</sup> U.S. Patent No. 6,826,257 B2 (Ex. 1007, “Sayre”).

<sup>6</sup> French Patent No. 1,509,165 (Ex. 1005, “Meyer”).

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configured to indicate, under X-ray examination, that the port assembly is rated for power injection” and the corresponding limitations of independent claims 12 and 17 to be deficient for several reasons. *See id.* at 8–19.

In particular, “[f]irst, we agree[d] with Patent Owner that the Petition does not provide adequate reasoning with rational underpinning for why it would have been obvious in view of Powers to modify the Titanium Implanted Port of PORTS—which Petitioner does not allege is indicated for power injection—to be rated for power injection,” according to the first step of Petitioner’s proposed obviousness analysis. *Id.* at 11–12. “Second, we also” found that “the Petition fails to explain sufficiently why it would have been obvious to modify the flange of the Titanium Implanted Port of PORTS to have X-ray discernable indicia in the form of voids configured to indicate that the port assembly is rated for power injection, as alleged in the Petition.” *Id.* at 12–14. Specifically, “[w]e agree[d] with Patent Owner that Petitioner has not shown sufficiently that the suture slots and orientation holes in the flange of the Titanium Implanted Port of PORTS function as X-ray discernable indicia.” *Id.* at 12–13. Moreover, “we agree[d] with Patent Owner that Petitioner has not provided adequate reasoning based on Powers and [either] PowerPort[, Sayre, or Meyer] for modifying the Titanium Implanted Port of PORTS to include X-ray discernable indicia of power injection capability *in the flange.*” *Id.* at 13–14, 16–19.

A.

In the Rehearing Request, Petitioner challenges our determination in the Institution Decision that “the Petition does not provide adequate reasoning with rational underpinning” for the first step of Petitioner’s proffered obviousness analysis, namely “modify[ing] the Titanium Implanted Port of PORTS . . . to be rated for power injection.” *Id.* at 11; *see*

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Req. 1–8. Petitioner’s arguments focus on our underlying reasoning and findings, which found the Petition’s assertion and the cited testimony of Petitioner’s declarant, Mr. Steven J. Tallarida, alleging that one of ordinary skill would have known that the Titanium Implanted Port “could be” constructed and would have been modified to handle power injection to be conclusory and unsupported. Inst. Dec. 11–12; *see* Req. 1–8. Petitioner also objects to our reasoning that the Petition and the cited testimony “do not explain how the Titanium Implanted Port of PORTS would have been modified so as to be rated for power injection, nor do they point to any disclosure in Powers that would have suggested how such a modification would have been made.” Inst. Dec. 12; *see* Req. 1–8.

In the Request, Petitioner argues that power injectable ports, as well as rating of ports as power injectable, “were clearly known at the time the application for the [’]325 patent was filed” and, thus, “it was well within the knowledge of a [person of ordinary skill in the art] how to construct” such a port. Req. 2–3, 5. According to Petitioner, the ’325 patent provides evidence that the construction of power injectable ports was within the skill of the art, because the specification does not disclose how to construct access ports or power injectable ports, and does not distinguish between power and non-power injectable ports other than explaining that it is desirable to identify a port as rated for power injection. *Id.* at 4–6. As support, Petitioner cites to the written description and enablement requirements of 35 U.S.C. § 112 and precedent holding that a patent need not teach what was well known in the art. *Id.* at 2, 4–6. In addition, Petitioner—citing paragraph 165 of Mr. Tallarida’s declaration—argues that a person of ordinary skill would have known that the Titanium Implanted Port of PORTS could be constructed to handle power injection, because

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power and non-power injectable ports comprise “similar structures” and “the Titanium Implanted Port has the same structural elements as a power injectable port.” *Id.* at 3–4, 8. Thus, according to Petitioner, the Board overlooked and misapprehended the limited disclosure of the ’325 patent and the knowledge of a person of ordinary skill in the art. *Id.* at 3, 6. Petitioner further argues that the Board erred in giving Mr. Tallarida’s testimony little to no weight and quotes testimony from paragraphs 148, 149, 151, 165, 196, 198, and 199 of his declaration. *Id.* at 6–7.

Petitioner’s assertions of error are not persuasive. The only evidence cited in the Petition to support Petitioner’s assertion that a person of ordinary skill would have known that the Titanium Implanted Port of PORTS “could be” constructed and “would” have been modified in view of Powers to handle power injection—the first step of Petitioner’s proposed obviousness analysis—are paragraphs 147 and 148 of Mr. Tallarida’s declaration. *See* Pet. 31 (citing Ex. 1009 ¶¶ 147–48), 41–42 (no citation), 51 (no citation), 56 (no citation). In paragraph 147 of the declaration, Mr. Tallarida acknowledges that the Titanium Implanted Port is not power injectable—but does not explain how or why it would have been modified to be power injectable. *See* Ex. 1009 ¶ 147. As to paragraph 148, the Institution Decision expressly addressed this paragraph, finding it conclusory and lacking adequate explanation and any supporting citations. Inst. Dec. 11–12. The Rehearing Request shows no error in our determinations regarding the defects in the Petition’s reasoning and the cited portions of Mr. Tallarida’s declaration testimony. Nor does the Request show that we overlooked arguments made, or supporting evidence cited in, the Petition, as required on rehearing. *See* 37 C.F.R. § 42.71(d).

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