Trials@uspto.gov
571-272-7822

Paper 17
Entered: March 5, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HAMILTON TECHNOLOGIES LLC,
Petitioner,

v.

FLEUR TEHRANI,
Patent Owner.

IPR2020-01199
Patent 7,802,571 B2

Before LINDA E. HORNER, KEVIN W. CHERRY, and JAMIE T. WISZ, *Administrative Patent Judges.*

HORNER, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request on Rehearing of
Decision Granting Institution of *Inter Partes* Review
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Hamilton Technologies LLC ("Petitioner") filed a Petition (Paper 2, "Pet.") seeking *inter partes* review of claims 1–6, 9–12, 29–33, and 41 of U.S. Patent No. 7,802,571 B2 (Ex. 1001, "the '571 patent"). Fleur Tehrani ("Patent Owner") filed a Preliminary Response. Paper 5 ("Prelim. Resp.").

On January 6, 2021, we determined that Petitioner established a reasonable likelihood that it would prevail with respect to at least one of the challenged claims and granted institution (Paper 6, "Dec.") of an *inter partes* review of claims 1–6, 9–12, 29–33, and 41 of the '571 patent. Dec. 2, 57.

Patent Owner filed a Request for Rehearing (Paper 9, "Req. Reh'g") seeking reconsideration of our decision granting institution. For the reasons stated below, we *deny* the Request for Rehearing.

II. ANALYSIS

When reconsidering a decision on institution, we review the decision for an abuse of discretion. *See* 37 C.F.R. § 42.71(c). An abuse of discretion may be determined if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *See Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000). The party requesting rehearing has the burden of showing the decision should be modified, which includes specifically identifying all matters the party believes were misapprehended or overlooked. *See* 37 C.F.R. § 42.71(d).

In our Decision Denying Institution, we found that Petitioner failed to show, on the preliminary record, a reasonable likelihood of prevailing on

grounds 1 and 2. Dec. 28–36. We found, however, that Petitioner had shown a reasonable likelihood of prevailing on establishing unpatentability of at least one challenged claim under grounds 3 and 4. *Id.* at 36–56. In reaching this decision, we confined our review to the arguments presented in the Petition and the Preliminary Response and the evidence cited in support of specific arguments and assertions presented in the papers.

Patent Owner argues in its Request for Rehearing that the Board made "erroneous fact findings" because it did not consider two claim charts attached to the Tehrani Declaration. Req. Reh'g 2 (citing Ex. 2002). We address below the evidence considered in reaching our Decision and the Patent Owner's specific assertions of error in the Board's findings as to Grounds 3 and 4.

A. Evidence Considered

Patent Owner asserts that the claim charts appended to the Tehrani Declaration (Ex. 2002) are responsive to the claim chart appendices attached to the Imbruce Declaration (Ex. 1002) provided by Petitioner. Req. Reh'g 2. Patent Owner does not, however, explain why it was error for the Board to decline to consider these arguments presented in the claim chart appendices to the Tehrani Declaration.

To the extent Patent Owner argues that we acted unfairly by considering arguments presented in the claim charts appended to the Imbruce Declaration and refusing to consider rebuttal arguments presented in the claim charts appended to the Tehrani Declaration, we take this opportunity to clarify the evidence we considered in reaching our decision to grant institution. We did not rely on the claim charts appended to either declaration in our Decision. As noted in our Decision, general citations to

appendices in a party's principal brief amount to an improper incorporation by reference. *See* 37 C.F.R. § 42.6(a)(3) ("Arguments must not be incorporated by reference from one document into another document."); *Cisco Sys., Inc. v. C-Cation Techs., LLC*, Case IPR2014-00454, Paper 12, 10 (Aug. 29, 2014) (informative) ("[W]e will not consider arguments that are not made *in the Petition*, but are instead incorporated by reference to the cited paragraphs and claims charts of [Petitioner's declarant]." (emphasis added)).[1]

In view of the rule against improper incorporation by reference, we did not rely on the arguments presented in the appendices to the Imbruce Declaration in our Decision. Instead, the Decision relied on only the specific paragraphs in the Imbruce Declaration that were cited in the Petition in support of arguments presented in the Petition. *See, e.g.*, Dec. 33 (referring to the evidence cited on pages 29–30 of the Petition in support of assertions therein, including paragraphs 119–123 of the Imbruce Declaration).

Likewise, we considered the arguments presented in Patent Owner's Preliminary Response, and the evidence specifically cited in support of Patent Owner's arguments. For instance, we considered the arguments presented in the Preliminary Response on pages 23–64 as to the scope and content of the prior art and the arguments presented on pages 65–83 of the Preliminary Response rebutting the positions presented in the Petition. And

[1] *See generally DeSilva v. DiLeonardi*, 181 F.3d 865, 866–67 (7th Cir. 1999) (Incorporation "by reference amounts to a self-help increase in the length of the [] brief[,]" and "is a pointless imposition on the court's time. A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record.").

we considered the paragraphs of the Tehrani Declaration cited in the Petition in support of these arguments. *See, e.g.*, Dec. 45 (referring to the paragraphs of the Tehrani Declaration cited in support of arguments presented on page 43 of the Preliminary Response).

The Preliminary Response also included a general invitation for the Board to read through 78 pages of appendices for further contentions presented in claim charts comparing the claimed subject matter to the prior art. Prelim. Resp. 23 ("For each of the references discussed in this section, please also see Appendix 1 to Ex. 2002, for the claims charts comparing the limitations of claims 1 and 29 of the Patent with the references and Appendix 2 to Ex. 2002 for the claims charts in regard to the challenged dependent claims of the Patent."). We did not accept Patent Owner's invitation to play archeologist with the record, and hunt for any other arguments that may have been contained in the claim charts appended to the Tehrani Declaration. Dec. 9, n.4. Notably, in the Request for Rehearing, Patent Owner does not point to any specific evidence in these claim charts that would have changed the outcome in our Decision.

Instead, in its Request for Rehearing, Patent Owner points to arguments presented in its Preliminary Response and asserts that "the Board has made many clear fact finding errors" in analyzing Grounds 3 and 4 in the Decision. Req. Reh'g 3. Patent Owner identifies five allegedly erroneous findings of fact as to Ground 3. Req. Reh'g 3–11. Patent Owner identifies three additional allegedly erroneous findings of fact as to Ground 4. Req. Reh'g 11–15. We address each allegation in turn below.

B. Ground 3

Beginning with Ground 3, as to the first asserted error, Patent Owner argues the Board erred in finding that "the assist/control mode in Carmichael [is] an automatic ventilator." Req. Reh'g 5 (citing Dec. 41). Patent Owner repeats in the Rehearing Request essentially the same argument raised in the Preliminary Response. Specifically, Patent Owner argues that "[i]n the assist/control mode, all the main outputs of a ventilator including PEEP and F_{IO2} are set manually by an operator, and in the reported results by Carmichael, PEEP and F_{IO2} are adjusted manually and several hours apart." Req. Reh'g 5 (citing Prelim. Resp. 25; Ex. 1004, Figures 4 and 7). Patent Owner argues that "[a]n automatic ventilator cannot have manually set main outputs that are adjusted intermittently by an operator." *Id.* at 5.

In our Decision, we found, "Petitioner has shown a reasonable likelihood that Carmichael discloses it was known in the art at the time of the invention to use volume-cycled ventilation in the assist/control mode to implement treatment protocols for treatment of ARDS patients through automatic control of a ventilator." Dec. 41 (citing Pet. 29–30; Ex. 1004, 9 (first & second cols.), 11 (first col.); Ex. 1002 ¶¶ 119–123). We based this finding on Petitioner's evidence in support of its assertion that "Carmichael's 'assist-control mode' is the automatic control of a ventilator." Pet. 30 (citing Ex. 1002 ¶¶ 119–123).

As noted in the portions of Dr. Imbruce's Declaration relied on in the Decision, Carmichael describes, with reference to Figure 2, "favored modes of *mechanical ventilation* in ARDS." Ex. 1002 ¶ 121 (emphasis added). Carmichael discusses that "mechanical ventilation can be both life-preserving as well as potentially harmful" and that some in the art "suggest

the need to build a consensus view on the use of mechanical ventilation in patients with acute lung injury." Ex. 1004, 13 (referring to Ex. 1012 in footnote 17); Ex. 1002 ¶ 120 (discussing Carmichael's footnote 17 and Ex. 1012). The paper cited in footnote 17 of Carmichael discusses mechanical ventilation and describes that "[o]ver the past several decades, [mechanical ventilators] have evolved from simple pressure and flow generators into highly sophisticated microprocessor-controlled systems capable of very high gas outputs, complex monitoring." Ex. 1012, 334; Ex. 1002 ¶ 120.

This evidence presented in the Petition supports a finding that at the time of the invention, automatically controlled ventilators were known in the art. Based on this background knowledge of one skilled in the art at the time of the invention, Dr. Imbruce further testifies that Carmichael's disclosure that "ventilation in ARDS patients" was "supported by a volume cycled ventilator using assist-control or intermittent-mandatory mode" is disclosure of an automatic control of a ventilator. Ex. 1002 ¶¶ 122, 123. This evidence sufficiently supports, at this stage of the proceeding, a finding that Carmichael discloses automatic control of a ventilator.

Patent Owner's argument on rehearing refers to arguments presented on page 25 of the Preliminary Response. In the Preliminary Response, Patent Owner argued:

> Automatic ventilation, in the context of the '571 Patent, is **automatic control of some** (PEEP and F_{IO2} for the independent claims) **or all of the main outputs** (claim 14 and claims depending on claim 14) of **the ventilator for a next breath of the patient**. As any POSITA would understand, in the assist-control and IMV modes, all the main outputs of a ventilator are

> **set manually by an operator and are not automatically controlled**.

Prelim. Resp. 24–25 (citing Ex. 2007, 1032).

Exhibit 2007, cited by Patent Owner, is a 1992 paper presented during a conference on the "Essentials of Mechanical Ventilators." Ex. 2007, 1026. This paper describes that "Assist/control ventilation (A/C) is a mode of ventilator operation in which mandatory breaths are delivered at a set [frequency], pressure or volume, and inspiratory flow. Between machine-initiated breaths, the patient can trigger the ventilator and receive a mandatory breath at the volume or pressure set on the ventilator." *Id.* at 1032.

We disagree with Patent Owner's premise that an apparatus "for automatically controlling a ventilator" must provide automatic control of some of the outputs "for a next breath of the patient." The preamble of the challenged independent claims does not recite "for a next breath of the patient." Ex. 1001, 12:48–49, 15:15–16. Our finding that Carmichael discloses automatic control of a ventilator is based on our understanding that Carmichael discloses a ventilator that allows an operator to select a desired PEEP and F_{IO2}, and the ventilator controls the output to deliver machine-initiated breaths at these desired values. This understanding is supported by Petitioner's evidence and is consistent with the description of "assist/control ventilation" provided in Exhibit 2007.

Further, Ground 3 is based on the *modification* of Carmichael's assist-control ventilator with Anderson's automated ventilator architecture to provide automated control for a next breath of the patient. Pet. 46–48. As noted above, highly sophisticated microprocessor-controlled ventilator

systems capable of very high gas outputs, complex monitoring were known in the art at the time of the invention. Thus, Petitioner has not identified, in this first asserted error, that the Board misapprehended or overlooked facts in reaching the Board's finding as to Carmichael's disclosure.

As to the second asserted error, Patent Owner argues the Board erred in finding that "Carmichael discloses a treatment protocol of increased F_{IO2} and incremental application of PEEP at the F_{IO2} level to achieve a desired oxygen saturation level." Req. Reh'g 5 (citing Dec. 41). Patent Owner repeats in the Rehearing Request essentially the same argument raised in the Preliminary Response. Specifically, Patent Owner argues that the Petitioner "makes up the protocol" that is not disclosed in Carmichael, and that this "made-up protocol is restricted to and based on manual, intermittent, trial and error adjustments of PEEP and FIO2, and has no applicability to an automatic closed loop system." Req. Reh'g 5 (emphasis omitted) (citing Prelim. Resp. 29–30). Patent Owner argues that an operator following guidelines and changing parameters by "trial and error" in the hope of achieving a desired oxygen saturation "is quite different from defining an error function based on a desired oxygen level and a patient's measured oxygen value and systematically reducing that error function automatically for a next breath of a patient through an algorithm." *Id.* at 5–6 (emphasis omitted) (citing Prelim. Resp. 28–29).

In our Decision, we considered Patent Owner's arguments, but we ultimately determined that Petitioner met its threshold burden of demonstrating a reasonable likelihood of prevailing:

> Petitioner has shown a reasonable likelihood that Carmichael discloses a treatment protocol of increased F_{IO2} and incremental application of PEEP at the F_{IO2} level to achieve a desired oxygen

> saturation level. Pet. 30–31; Ex. 1004, 11 (second col.) (referencing Figure 4 showing level of F_{IO2} at which oxygen toxicity begins), 12 (second col.) (referencing Figure 7 showing the maximum PEEP used at various levels of F_{IO2} before increasing to the next higher level of F_{IO2}), 13 (bottom of second col.) – 14 (top of first col.) (conventional teaching was that "a PaO2 > 60 mmHg was desirable and should be achieved through the use of increased FiO2s and incremental application of PEEP"); Ex. 1002 ¶¶ 124–127. Petitioner has shown that Carmichael discloses "[t]o many, the 'best PEEP' is the least PEEP at which hemoglobin-oxygen saturation is considered adequate on nontoxic concentrations of inspired oxygen." Id. at 14 (second col.). Thus, Petitioner has shown a reasonable likelihood that Carmichael discloses a relationship between F_{IO2} and PEEP used to achieve a desired oxygen saturation. Petitioner also has shown a reasonable likelihood that Carmichael's treatment protocol determines F_{IO2} to reduce the difference between the measured oxygen level of the patient and a desired value. Pet. 32; Ex. 1004, 13–14 (describing selection of F_{IO2} to achieve a desired oxygen saturation (PaO2 > 60 mmHG)); Ex. 1002 ¶ 136.

Dec. 41–42.

Patent Owner argues on rehearing that Carmichael's "protocol" identified by Petitioner is limited to manual ventilators. Patent Owner has not explained persuasively, for purposes of this institution decision, why a programmer of ordinary skill would not be capable of implementing Carmichael's protocol in an automated closed loop system, such as the system described in Anderson, to achieve predictable results with a reasonable expectation of success. Further, based on our findings in the Decision that Carmichael teaches: (1) to adjust PEEP and F_{IO2} to reach a desired oxygen saturation level, (2) that too high a level of F_{IO2} can lead to oxygen toxicity, and (3) that to reach a desired oxygen saturation level an operator should use maximum PEEP at a given level of F_{IO2} before moving

the next higher level of F_{IO2} (Dec. 41–42), Petitioner has shown a reasonable likelihood that a programmer implementing these teachings in an automated closed loop system, and based on the disclosure of such a system in Anderson, would have been led to design the program to define an error function based on a desired oxygen level and a patient's measured oxygen value and systematically reduced that error function automatically for a next breath of a patient through an algorithm. Dec. 42 (citing Pet. 46–48). Thus, Patent Owner has not identified, in this second asserted error, that the Board misapprehended or overlooked facts in reaching the Board's finding as to Carmichael's disclosure.

As to the third asserted error, Patent Owner argues the Board erred in finding that "Carmichael discloses a relationship between PEEP and F_{IO2} to achieve a desired oxygen saturation and the Carmichael protocol determines F_{IO2} to reduce the difference between the patient's measured oxygen level and a desired value." Req. Reh'g 6 (citing Dec. 43). Patent Owner argues that "Carmichael discloses manual adjustment of PEEP and F_{IO2} by trial and error and does not disclose any system for continuous and systematic reduction of the difference between a patient's measured oxygen level and a desired value." Req. Reh'g 6. Patent Owner argues that "[n]o prescribed range of PEEP/F_{IO2} is disclosed or used in Carmichael and the Decision does not point to a prescribed range that is applicable to a continuous system in Carmichael." *Id.* (citing Prelim. Resp. at 29–31). Patent Owner argues that the Board "overlooks and completely ignores the most important difference between a reference and the '571 patent claims" because the Board opted not to address Patent Owner's arguments as to Carmichael, relying instead on

Petitioner's reason to modify Carmichael's disclosed system to make it automatically controlled. *Id.* (emphasis omitted) (citing Dec. 42–43).

In our Decision, we found that Petitioner had provided adequate reasoning as to why a person having ordinary skill in the art would have been led to modify Carmichael's protocol to implement it using Anderson's automated, closed loop system in the manner claimed based on the teachings in the prior art. Dec. 42–43. Patent Owner's arguments on rehearing as to the shortcomings of Carmichael alone do not address these findings as to the combination of Carmichael and Anderson.

Further, as to Patent Owner's argument that Carmichael does not disclose adjusting PEEP to maintain a ratio of PEEP/F_{IO2} within a prescribed range, we addressed this argument in our Decision. *Id.* Specifically, we found, with reference to Figure 7 of Carmichael, that Carmichael discloses the relationship of PEEP and F_{IO2} within prescribed ranges. Patent Owner's argument that the Decision does not point to a prescribed range "that is applicable to a continuous system in Carmichael" (Req. Reh'g 6) fails to address the proposed combination of the teachings of Carmichael and the system of Anderson.

As to the fourth asserted error, Patent Owner argues the Board erred in finding that "Anderson used a look up table in combination with PID, and provides continuous closed loop control of PEEP and F_{IO2} for a next breath of a patient" and that "Anderson's claimed PID method for controlling PEEP is 'safe.'" Req. Reh'g 8–9 (citing Dec. 44–46). Patent Owner repeats in the Rehearing Request essentially the same arguments raised in the Preliminary Response. Specifically, Patent Owner argues the Board's finding that "Anderson's claimed PID method for controlling PEEP is 'safe'" is

"unsupported by the facts." Req. Reh'g. 9; *id.* at 7–9 (arguing that Anderson "is not a refereed paper," Anderson's PID equations "can be easily seen by a person of ordinary skill in the art to be incorrect," the '571 patent claims do not use PID control for PEEP, and that "PID control of PEEP can be quite hazardous" and the "FDA has never approved PID control of PEEP."). Patent Owner asserts that "Anderson could not use a look up table and PID control simultaneously for a next breath of the patient." *Id.* at 9 (citing Prelim. Resp. 45).

We addressed these arguments in our Decision based on the evidence presented at this stage of the proceeding. Dec. 44–46. For instance, we noted the lack of evidence to support Patent Owner's argument that Anderson's use of a PID controller would be hazardous to a patient, and we credited Anderson's explicit disclosure that its clinical results shows that its system was safe. *Id.* at 45–46 (citing Ex. 1013, 293). Ultimately, we determined that Petitioner met its threshold burden of demonstrating a reasonable likelihood of prevailing at trial with respect to at least one claim. *Id.* Patent Owner's disagreement with our analysis or that determination is not a proper basis for rehearing.

As to the fifth asserted error, Patent Owner argues the Board erred in finding that "it would have been obvious to employ Anderson's automated system to implement Carmichael's treatment protocol for adjustment of PEEP and F_{IO2} in ARDS patients." Req. Reh'g 9–10 (citing Dec. 46). Patent Owner repeats in the Rehearing Request essentially the same arguments raised in the Preliminary Response. Specifically, Patent Owner argues that Anderson's system could not be combined with Carmichael because "Carmichael is all about manual trial and error adjustments of PEEP

and FIO2 several hours apart and the scheme made up by Petitioner is strictly applicable to manual adjustments and is not applicable to any continuous closed-loop system." Req. Reh'g 10 (emphasis omitted) (citing Prelim. Resp. 69). Patent Owner asserts that "attempting to combine the method made up by the Petition based on Carmichael, with Anderson" would render Anderson "inoperable." *Id.* (emphasis omitted) (citing Prelim. Resp. 69, 75–76).

We addressed these arguments in our Decision. Dec. 46. To the extent Patent Owner is arguing that Carmichael's system based on manual adjustments to PEEP and F_{IO2} could not be bodily incorporated into Anderson's automated ventilator system, this is not the proper inquiry to determine obviousness of claimed subject matter. "The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference," *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). *See also In re Mouttet*, 686 F.3d 1322, 1332 (Fed. Cir. 2012) (citing *In re Keller*, 642 F.2d at 425), but rather whether "a skilled artisan would have been motivated to combine the teachings of the prior art references to achieve the claimed invention," *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1361 (Fed. Cir. 2007). "A person of ordinary skill is also a person of ordinary creativity, not an automaton." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). Patent Owner's disagreement with our analysis or that determination is not a proper basis for rehearing.

For these reasons, we are not persuaded we misapprehended or overlooked any of Patent Owner's arguments or abused our discretion in our analysis of Ground 3.

C. Ground 4

Turning to Ground 4, as to the first asserted error, Patent Owner argues that the Board erred in finding that "Carmichael can be combined with Taube," Req. Reh'g 13 (citing Dec. 53), and specifically, that "'Carmichael's treatment protocol for adjustment of PEEP and FIO2' can be implemented in 'Taube's automated system,'" Req. Reh'g 14 (citing Dec. 55). Patent Owner repeats in the Rehearing Request essentially the same arguments raised in the Preliminary Response. Specifically, Patent Owner argues that because there is no desired level of oxygen in Taube, the proposed combination of Taube and Carmichael "is not possible." *Id.* at 13–14 (citing Dec. 53; Prelim. Resp. 70–72). Patent Owner argues that "the scheme made up by the Petitioner and imposed on Carmichael has no applicability to any continuous closed loop system" and "[a]ny attempt to implement that scheme in Taube will render Taube inoperable." *Id.* at 14 (citing Prelim. Resp. 76).

We addressed these arguments in our Decision. Dec. 54–55 (specifically addressing Patent Owner's arguments as to the proposed combination raised on pages 70–71 and 76 of the Preliminary Response). To the extent that Patent Owner is arguing that Carmichael's system based on manual adjustments to PEEP and F_{IO2} could not be bodily incorporated into Taube's automated system, as discussed above, this is not the proper inquiry to determine obviousness of claimed subject matter. *Keller*, 642 F.2d at 425; *Mouttet*, 686 F.3d at 1332; *Pfizer*, 480 F.3d at 1361. Patent Owner's disagreement with our analysis or that determination is not a proper basis for rehearing.

As to the second asserted error, Patent Owner argues that the Board erred in finding that "Taube does not maximize patient's oxygen level if that level increases." Req. Reh'g 14 (citing Dec. 54). Patent Owner repeats in the Rehearing Request essentially the same arguments raised in the Preliminary Response. Specifically, Patent Owner argues that "[t]he equations of Taube . . . are linear equations that show if the patient's oxygen level (PaO2) increases, PEEP and F_{IO2} increase pushing it higher. There can be no doubt about that." Req. Reh'g 14. Patent Owner asserts that the Board's decision that Taube does not maximize a patient's oxygen level if that level increases is "against the evidence." *Id.* (citing Dec. 54).

We addressed these arguments in our Decision based on the evidence presented at this stage of the proceeding. Dec. 54. For instance, we considered Taube's equations in Figure 3 within the context of the entire disclosure in Taube, including Taube's description that the computer chooses the values of the parameters "to maintain a desired level of the patient's blood oxygen level" and Taube's recognition of the problem of oversaturation. *Id.* (citing Ex. 1005, 5:30–33). Thus, Taube's entire disclosure informed our understanding of Figure 3. As such, we disagree with Patent Owner's assertion that our finding as to Taube is "against the evidence." Patent Owner's disagreement with our analysis or that determination is not a proper basis for rehearing.

As to the third asserted error, Patent Owner argues that the Board erred in finding that "Clemmer. . . can be combined with Taube." Req. Reh'g 14 (citing Dec. 55). Patent Owner argues that it is "impossible" to combine "Clemmer, which is for implementation of medical protocols and is based on intermittent adjustments," with Taube. *Id.*

Patent Owner's argument of error is not persuasive because it does not address the finding in our Decision specifically pointing to Clemmer's teaching of an alternative embodiment that uses continuous monitoring and adjustment. Dec. 55 (citing Ex. 1008, 18:53–63). Thus, we do not find any reason at this stage in the proceeding to change our Decision.

For these reasons, we are not persuaded we misapprehended or overlooked any of Patent Owner's arguments or abused our discretion in our analysis of Ground 4.

III. CONCLUSION

For the reasons stated above, we conclude that we did not abuse our discretion in determining that Petitioner has shown a reasonable likelihood of prevailing on a ground of unpatentability as to at least one claim of the '571 patent, and, thus, granting *inter partes* review. Therefore, we *deny* Patent Owner's request to deny institution of this proceeding.

IV. ORDER

Accordingly, it is

ORDERED that Patent Owner's Request for Rehearing is *denied*.

FOR PETITIONER:

Patrick C. Keane
Ralph G. Fischer
Matthew L. Fedowitz
BUCHANAN INGERSOLL & ROONEY PC
patrick.keane@bipc.com
ralph.fischer@bipc.com
matthew.fedowitz@bipc.com

FOR PATENT OWNER:

Mark Kendrick
KENDRICK INTELLECTUAL PROPERTY LAW
mkendrick852001@gmail.com