United States District Court,
W.D. Washington, at Seattle.

Thomas C. GRAY, et al,
Plaintiff.
v.
RED DEVIL, INC,
Defendant.

No. C02-2200P

Aug. 25, 2003.

Paul T. Meiklejohn, Dorsey & Whitney LLP, Seattle, WA, for Plaintiff.

John Alan Knox, Williams Kastner & Gibbs, Seattle, WA, Robert A. Rowan, Nixon & Vanderhye, Arlington, VA, for Defendant.

MARSHA J. PECHMAN**, District Judge.**

This matter comes before the Court on cross motions for construction of terms in Claims 1, 5 and 8 of U.S. Patent No. 5,010,647 ("the '647 patent"). Having considered the parties' Briefs for Claims Construction and supporting papers, and having heard oral argument on the issues, the Court interprets the disputed language as explained below.

BACKGROUND

Specifically at issue before the Court is the construction of terms in Claims 1, 5 and 8 of the '647 patent.

The '647 patent relates to an "impact scraping tool," a device with a handle and a blade which is used for scraping materials from surfaces. The controversy currently before the Court concerns the construction of three terms within the claim: "shoulder," "groove" and "barrier means." The language occurs in the '647 patent in the following passages:

"A blade support plate which has a lateral *groove* in each of its opposing planar surfaces is clamped by a pair of T-shaped clamp members each having a laterally extending *shoulder* adapted for insertion into the *grooves*. By clamping the blade support member through the use of a *shoulder* and groove, material removed from a surface is prevented from forming a build-up between the support member and the clamp." (2:6-14; italics supplied)

"Riveting of the T-shaped clamp members to the blade support plate causes the *shoulders* of the clamp members to engage the *grooves* of the base support plate and thereby form a barrier to the build-up of material." (2:20-24; italics supplied)

"T-shaped clamp members **18** and **19** have laterally extending *shoulders* **21** and **22** which insert into lateral *grooves* contained in the surface of blade support plate **23.** The under surface **25** of blade support plate **23** is symmetrical to the upper surface **25** of blade support plate **23.** The *groove* **24** in the upper surface of blade support plate **23** laterally extends in part across the upper surface; similarly on the under surface, a *groove* laterally extends in part across the under surface (not shown in the drawing, but is identical in location and symmetrically serves the same purpose as *groove* **24**)." (3::35-45; italics supplied)

"An improved impact tool for scraping material from surfaces of the type having a cutting blade, a ramming member having a longitudinal axis for transmitting thrust forces externally applied to said ramming member, a thrust member telescopically mounted to said ramming member for slidable relative axial movement therewith, *barrier means* responsive to relative axial thrust movement between said ramming member and said thrust member for stopping said relative axial movement ..." (5:5-15; italics supplied)

"A pair of clamp members oppositely mounted to said thrust member and having a laterally extending *shoulder* adapted for insertion into said lateral *grooves* where said clamp members are mounted to said thrust member such that material scraped from said surfaces is precluded from buildup between the clamp members and the blade support plate." (6:1-8; italics supplied)

"The improved impact scraping tool recited in claim 7 where said *barrier means* comprises a discontinuity in cross-section of said ramming member." (6:15-17, italics supplied)

ANALYSIS

1. Sources to which the Court may look in the claims construction process

The first step in determining whether an accused device infringes a patent claim is to construe the claims to determine their scope. CAE Screenplates, Inc. v. Heinrich Fiedler GMBH & Co. KG, 224 F.3d 1308, 1316 (Fed.Cir.2000). Claim construction is an issue of law for the Court to decide. Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed.Cir.1995), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996).

In construing the claims, intrinsic evidence is considered before extrinsic evidence. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996). Intrinsic evidence includes 1) the claim itself, 2) the patent specification, and 3) the prosecution history. *Id*. The specification includes the patentee's description of the best embodiment of the invention, not every possible embodiment. Claims are not limited to the embodiment disclosed in the specification. "It is well established that the preferred embodiment does not limit broader claims that are supported by the written description." Toro Co. v. White Consol. Indus. Inc., 199 F.3d 1295, 1301 (Fed.Cir.1999). The prosecution history includes the communications between the patentee and the United States Patent and Trademark Office ("PTO") during examination, including reasons for rejection by the PTO, and reasons for amendments to the claims by the patentee. Where the plain language of the claim resolves the claim construction, this Court does not need to turn to extrinsic evidence. Markman, 52 F.3d at 980.

In the instant case, the Court will only be considering intrinsic evidence. As plaintiffs themselves have stated, "[t]he case at bar is one in which the scope of the patented invention is defined by plain, unambiguous claim recitations." (Plaintiffs' Claim Construction Brief, p. 1)

Claim construction starts with the language of the claim itself. CAE, 224 F.3d at 1316; Vitronics, 90 F.3d at 1582. In construing claims, all words of a claim must be given meaning. Exxon Chem. Patents, Inc. v. Lubrizol Corp., 64 F.3d 1553, 1556 (Fed.Cir.1995). This prevents patent holders from reading language out of a claim that was intended to function to limit the scope of the claim. Further, in construing a patent claim, the plain and ordinary meaning of claim language controls unless a different meaning is expressly stated in the specification or prosecution history. Vitronics, 90 F.3d at 1582. A patentee may choose to be his or her own lexicographer to alter the ordinary meaning of a term (*Id.*), but no such choice has been claimed by the patentee here.

2. The Court's construction of the disputed claim language

a. "Shoulder": plaintiffs have previously asked for, and received, a construction of this term from the Court. In the Court's Order of July 22, 2003, it was found that " ' *adapted for insertion* into lateral grooves' calls for a part which has been fabricated with a lip or curved portion on its leading edge "for insertion into lateral grooves.' " July 22 Order, p. 2 (emphasis in original).

That construction is now the law of this case and, as indicated at the Markman hearing, the Court intends to stand by that construction.

b. "Groove": plaintiffs' proposed construction of this term is "[a] narrow channel or furrow that extends at least part way across the blade support plate designed to be engaged by the shoulder of the clamps and thereby form a barrier." Plaintiffs' Brief, p. 3. What they are particularly desirous of avoiding is any construction which suggests that the groove must be "machined or otherwise fabricated;" i.e., that it must exist prior to the time that the blade clamps are attached. It is plaintiffs' contention that an indentation in the support plate caused by the process of riveting the clamps to the plate qualifies as a "groove" pursuant to the claim language.

Defendant's proposed construction of this term is a little more involved (to say the least):

Symmetrical machined or otherwise fabricated lateral indentations on both sides of the blade support plate, intended to be and capable of receiving and engaging laterally extending lips or curved portions of the leading edge of the blade holder clamps so as to prevent any material removed from a surface from building up between a blade support member and the clamps. To accomplish this, each "groove" must "laterally extend" substantially the full width of the clamps and the depth of the "groove" must exceed, by a physically meaningful amount, e.g., by at least a significant multiple, the manufacturing tolerance of the material from which the accused tool is fabricated. Defendant's Brief, p. 2.

The Court agrees with defendant's contention that the language of the claim clearly restricts the term "groove" to an indentation which exists prior to the joining of the clamp and the support plate. There is simply no other logical interpretation of the claim language "[r]iveting of the T-shaped clamp members to the blade support plate causes the shoulder of the clamp members *to engage* the grooves of the base support plate and thereby form a barrier to the build-up of materials." ('647 Patent, 2:20-24; emphasis supplied) The groove cannot "engage" the shoulder of the clamp member unless it exists prior to the insertion of the shoulder into the groove; an indentation which is created by the pressure of riveting the clamp to the support plate cannot be said to "engage" anything.

However, the construction of the claim term need not be as convoluted as that proposed by defendant.

Defendant devotes considerable argument to the width and depth of the indentation. While it is hard to see how the groove will function as an effective barrier to build-up if it does not extend the entire width of the clamp, there is nothing in the claim language that seems to require it to do so. And while a certain depth would seem to be necessary in order for the shoulder to "engage" sufficiently to function as a barrier to build-up, there is nothing in the claim language to suggest that any particular depth is required. The fact that the groove must be fabricated presupposes that the indentation have some depth prior to the riveting of the clamp member and that is all that the claim language supports.

The Court adopts the following construction of "groove:"

Symmetrical fabricated lateral indentations on both sides of the blade support plate, intended to engage the laterally extending shoulders at the leading edge of the blade holder clamps so as to prevent any material removed from a surface from building up between a blade support member and the clamps.

In making this construction, the Court looks to the claim language read in light of the specification.

c. "Barrier means": Plaintiffs concede that the claim language concerning this feature ("barrier means ... for stopping said relative axial movement") presumptively invokes the means-plus-function analysis of 35 U.S.C. s. 112 para. 6. Such an analysis would require the Court to find the structural correspondence for the means in the '647 patent specification, essentially limiting plaintiffs to the descriptions contained in their claim.

The '647 patent specification describes these descriptions of structural "barrier means ... for stopping said axial movement:"

To transfer the momentum of the ramming member to the thrust member, the ramming member has an abrupt change in cross-section which prevents continued axial movement of the ramming member during a thrust movement. (1:67-68-2:1-7)

Impact section 5 [of the ramming member] has an axially extending rectangular passage 7 which in conjunction with tubular member 3 forms a continuous structure having a discontinuity in cross-section which forms a barrier 4 to the axial movement of thrust member 6. (2:65-3:2)

"In another embodiment, the ramming member may be a continuous tube where the discontinuity of cross section results from crimping the ramming member to form the barrier." (3:7-11)

s. 112 para. 6 requires the Court to construe the literal meaning of this "barrier means ... for" claim language to include only the structures which have been described above and any equivalents thereof; other structures, even if they achieve similar ends, cannot be included. Chiuminatta Concrete Concepts Inc. v. Cardinal Indus. Inc., 145 F.3d 1303, 1309-10 (Fed.Cir.1998).

Plaintiffs argue that the presumption of the means-plus-function rule can be rebutted by a showing of "sufficient structure" in the claim recitation. They cite to Cole v. Kimberly-Clark Corp., 102 F.3d 524 (Fed.Cir.1996) for the argument that "[a]n element with ... a detailed recitation of its structure, as opposed to its function, cannot meet the requirements of [s. 112 para. 6]." *Id.* at 531. But whereas the term "perforation means ... for tearing" contained in the *Cole* patent completely described the structure (i.e., there is only one type of "perforation") and described its location on the device, the term "barrier means ... for stopping"

neither completely describes the structure (i .e., there are many kinds of barriers) nor describes its location with sufficient specificity. The Court finds that "barrier means" does not describe a "sufficient structure" and that a mean-plus-function analysis is applicable.

Plaintiffs also argue that, under the "claims differentiation doctrine," the Court cannot adopt defendant's proposed construction. However, there is no citation to any authority which would suggest that the "claims differentiation doctrine" somehow invalidates or overrides the requirements of s. 112 para. 6, and the Court will not so find.

The Court adopts a modified version of defendant's proposed construction of "barrier means:"

A discontinuity in the cross section of the ramming member (1) created by either a change in cross-sectional diameter in the ramming member or a crimping in the continuous tube which forms the ramming member (2) to form a barrier to the axial movement of the thrust member.

CONCLUSION

The Court construes to disputed terms in the claims language as follows:

Shoulder: A part which has been fabricated with a lip or curved portion on its leading edge for insertion into lateral grooves.

Groove: Symmetrical fabricated lateral indentations on both sides of the blade support plate, intended to engage the laterally extending shoulders at the leading edge of the blade holder clamps so as to prevent any material removed from a surface from building up between a blade support member and the clamps.

Barrier means: A discontinuity in the cross section of the ramming member (1) created by either a change in cross-sectional diameter in the ramming member or a crimping in the continuous tube which forms the ramming member (2) to form a barrier to the axial movement of the thrust member.

The Clerk is directed to provide copies of this order to all counsel of record.

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