United States District Court,
N.D. Iowa, Cedar Rapids Division.

HIGHWAY EQUIPMENT COMPANY, INC., an Iowa Corporation,
Plaintiff.
v.
FECO, LTD., an Iowa Corporation; Doyle Equipment Manufacturing Company, an Illinois Corporation; Stan Duncalf, an individual,
Defendants.

Feb. 10, 2005.

David A. Hacker, Gregory G. Williams, Stephen J. Holtman, Simmons Perrine Albright Ellwood, Cedar Rapids, IA, for Plaintiff.

David A. Tank, Debra Rectenbaugh Pettit, Kent A. Herink, Davis Brown Koehn Shors & Roberts, Des Moines, IA, for Defendants.

ORDER ON FECO'S MOTION FOR PARTIAL SUMMARY JUDGMENT and HELO'S MOTION TO EXTEND DEADLINES, POSTPONE SUMMARY JUDGMENT HEARING, AND RESET TRIAL

JOHN A. JARVEY**, Magistrate Judge.**

I. INTRODUCTION

This matter comes before the court pursuant to defendant FECO, Ltd.'s May 21, 2004 motion for partial summary judgment (docket number 40) and plaintiff Highway Equipment Company, Inc.'s August 26, 2004 motion to extend deadlines, postpone summary judgment hearing, and reset trial (docket number 63). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. s. 636(c) (docket number 33). A hearing on the defendant's motion for summary judgment was held on September 27, 2004, at which the plaintiff was represented by Steve Holtman and David Hacker and the defendant was represented by David Tank and Emily Harris. For the reasons set forth below, the defendants' motion for summary judgment is granted in part and denied in part and the plaintiff's motion to extend deadlines, postpone summary judgment hearing, and reset trial is denied as to the motion to postpone summary judgment hearing and granted as to the motion to extend deadlines and reset trial as set forth in the court's order dated January 20, 2005 (docket number 105).

A. Procedural Background

In this case, the plaintiff, Highway Equipment Company, Inc. (HECO), filed suit against the defendants, FECO, Ltd. (FECO), Doyle Equipment Manufacturing Company, and Stan Duncalf for infringement of a United States patent relating to a spreader device for agricultural and road maintenance application, and

lawn care. The patent-in-suit is known as the Adjustable Spinner for a Particulate Material Spreader patent, U.S. Patent 6,517,281 B1 (the '281 patent). FECO now moves for partial summary judgment finding no infringement under literal infringement or under the doctrine of equivalents regarding claims 1, 8, 13, 14, 17, and 20 of the '281 patent. FECO asserts that as to each of said claims the FECO lever device does not literally infringe the ' 281 patent, that HECO should be estopped from using the doctrine of equivalents to prove infringement, and that the FECO lever device does not infringe the '281 patent under the doctrine of equivalents. The plaintiff argues that as to claims 1, 8, 13, 14, 17, and 20 of the '281 patent there is a genuine issue of material fact concerning whether FECO's lever device literally infringes, that HECO should not be prevented under any theory from demonstrating that the FECO lever device infringes the '281 patent under the doctrine of equivalents, and that there is a genuine issue of material fact as to whether the FECO lever device infringes the '281 patent under the doctrine of equivalents.

B. Factual Background

On June 17, 2003, HECO filed suit asserting a patent infringement claim against the defendants. The '281 patent, entitled "Adjustable Spinner for a Particulate Material Spreader," was issued on February 11, 2003 to Matthew W. Rissi. HECO alleges infringement of the '281 patent by FECO under literal infringement as well as under the doctrine of equivalents.

Patent Application No. 574,600, originally (original application claim(s)) and as amended on May 2, 2002 (amended application claim(s)), matured into the '281 patent. Patent Application No. 574,600 as originally filed included 26 claims, and as amended included 30 claims.

Claim 1 of the '281 patent resulted from the combination of original application claims 1, 2, and 5. Original application claims 1, 2, and 5 provide as follows:

(Application claim 1): A truck for spreading particulate matter comprising:

a truck chassis;

a material storage box mounted on the chassis for holding particulate material, the box having a conveyor for moving particulate material through a discharge opening and off a conveyor end, thereby creating a stream of particulate material exiting said discharge opening;

a spreader mounted to the box with rotating spinner apparatus incrementally and translatably adjustable fore and aft with respect to said stream in a plurality of operating positions with respect to said stream; and

a main support frame on the box for supporting the spreader and spinner apparatus.

(Application claim 2): the truck of claim 1 wherein the spreader with rotating spinner apparatus includes a moveable subframe mounted to the storage box, and at least one spinner rotatably mounted on the subframe for receiving particulate material and distributing the material in a broadcast swath.

(Application claim 5): the truck of claim 2 wherein the spreader spinner apparatus includes a rotatable screw connected between the main supporting frame and subframe whereby manual rotation of the screw incrementally adjusts the position of the moveable subframe and spinner.

The patent examiner initially rejected original application claims 1 and 2 as unpatentable over the prior art. The prior art identified by the Patent and Trademark Office (PTO) was the Cowell patent (GB2120914A). In regard to original application claim 1, the patent examiner noted that the Cowell patent discloses a truck chassis, a material storage box, a conveyor, and a spreader which is indirectly mounted to the material storage box. The patent examiner further noted that the Cowell patent also disclosed that the spinner on the spreader "is incrementally and translatably adjustable fore and aft with respect to the stream of material in a plurality of positions," disclosed three operating positions in which the spreader "moves via link rods relative to the lower chute" and disclosed that the material storage box "forms a support frame which supports the [spreader]." In regard to original application claim 2, the patent examiner noted that the Cowell patent discloses a "moveable subframe mounted to the storage box, seen as link rods ... indirectly mounted to the [storage box]." In response, HECO combined application claims 1, 2, and 5 to produce claim 1 of the '281 patent.

Claim 8 of the '281 patent consists of a combination of amended application claim 12 and original application claim 13. Amended application claim 12 and original application claim 13 provide as follows:

(Amended application claim 12): A particulate material spreader for spreading particulate material from a material storage box, comprising:

a spreader frame adapted to be mounted to the material storage box for discharging a stream of material;

a rotating spinner apparatus, including a moveable subframe, mounted to the spreader frame in a manner to accept said stream of material from the storage box; and

a means for the rotating spinner apparatus to be incrementally and translatably adjustable fore and aft in a plurality of operating positions relative to said stream of material.

(Original application claim 13): The spreader of claim 12 wherein the spinner apparatus includes a rotatable screw connected between the spreader frame and moveable subframe whereby manual rotation of the screw incrementally adjusts the position of the moveable subframe and spinner.

The patent examiner initially rejected amended claim 12 of Patent Application No. 574,600 as unpatentable over the prior art. FN1 In response, HECO combined amended application claim 12 with original application claim 13 to produce claim 8 of the ' 281 patent. Claim 8 of the ' 281 patent provides as follows:

FN1. The patent examiner's comments as to application claim 1 applied equally to application claim 12, and the identified prior art was the Cowell patent.

A particulate material spreader for spreading particulate material from a material storage box, comprising:
a spreader frame adapted to be mounted to the material storage box for discharging a stream of material;

a rotating spinner apparatus, including a moveable subframe, mounted to the spreader frame in a manner to accept said stream of material from the storage box;

a means for the rotating spinner apparatus to be incrementally and translatably adjustable fore and aft in a plurality of operating positions relative to said stream of material; and

wherein the spinner apparatus includes a rotatable screw connected between the spreader frame and moveable subframe whereby manual rotation of the screw incrementally adjusts the position of the moveable subframe and spinner.

Claims 13 and 14 of the '281 patent resulted from a combination of amended application claim 12, as set forth above, and original application claims 14 and 15. Original application claims 14 and 15 provide as follows:
(Original application claim 14): The spreader of claim 12 wherein a divider placed between the conveyor discharge end and spinner to distribute material onto the spinner.

(Original application claim 15): The spreader of claim 14 wherein the divider is fixed relative to the conveyor end.

Claims 13 and 14 of the '281 patent thus provide as follows:
(Claim 13): A particulate material spreader for spreading particulate material from a material storage box, comprising:

a spreader frame adapted to be mounted to the material storage box for discharging a stream of material;

a rotating spinner apparatus, including a moveable subframe, mounted to the spreader frame in a manner to accept said stream of material from the storage box;

a means for the rotating spinner apparatus to be incrementally and translatably adjustable fore and aft in a plurality of operating positions relative to said stream of material; and

wherein a divider placed between the conveyor discharge end and spinner to distribute material onto the spinner.

(Claim 14): The spreader of claim 13 wherein the divider is fixed relative to the conveyor end.

Claim 17 of the '281 patent is comprised of a combination of amended application claim 22 and original application claim 24. Amended application claim 22 and original application claim 24 provide as follows:
(Amended application claim 22): A method of spreading particulate material from a truck, the truck having a material storage box for holding particulate material; the material box having a discharge opening and discharge means for discharging material from the box onto a spreader, the spreader having at least one rotatable spinner to broadcast the material over the desired area, the method comprising: translatably adjusting the position of the spinner fore or aft relative to the discharge of material of material so that the material is discharged onto one of a plurality of drop points on the spinner and thereby adjusting the broadcast of material from the spinner.

(Original application claim 24): The spreader of claim 22 wherein the adjustment of the position of the spinner is accomplished by a rotatable screw connected between a fixed frame and moveable spreader spinner apparatus.

Claim 17 of the '281 thus provides as follows:
A method of spreading particulate material from a truck, the truck having a material storage box for holding

particulate material, the material box having a discharge opening and discharge means for discharging material from the box onto a spreader, the spreader having at least one rotatable spinner to broadcast the material over desired area, the method comprising:

translatably adjusting the position of the spinner fore or aft relative to the discharge of material so that the material is discharged onto one of a plurality of drop points on the spinner and thereby adjusting the broadcast of material from the spinner; and

wherein the adjustment of the position of the spinner is accomplished by a rotatable screw connected between a fixed frame and moveable spreader spinner apparatus.

Claim 20 of the '281 patent resulted from a combination of amended application claims 27 and 30, and provides as follows:
A material spreader comprising:

a frame, having a longitudinal axis;

a rotating plate having a plurality of radial members disposed thereon, said rotating plate configured to spin about a first axis which is substantially orthogonal to a plane of said plate;

means, coupled to said frame, for providing a stream of material having a predetermined flow edge;

means, coupled to said rotating plate, for moving said rotating plate, so that said predetermined flow edge of said stream of material is selectively incident upon varying drop points on said rotating plate;

said means, coupled to said rotating plate, for moving said rotating plate, and said means, coupled to said frame, for providing a stream are further configured, so that, for each incremental unidirectional adjustment of location of one of said rotating plate and said means for providing a stream, said predetermined flow edge of said stream of material is moved to a different drop point on said rotating plate.

II. LEGAL ANALYSIS

A. Summary Judgment Standard

The Federal Circuit Court of Appeals has recognized the general proposition that "[s]ummary judgment is appropriate in a patent case, as in other cases...." Nike Inc. v. Wolverine World Wide, Inc., 43 F.3d 644, 646 (Fed.Cir.1994). Summary judgment on a patent claim is governed by the same standards as for other types of claims. Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc., 853 F.2d 1557, 1560-61 (Fed.Cir.1988). A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir.1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir.1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, ... to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must

not be such as merely to create a suspicion.' " Metge v. Baehler, 762 F.2d 621, 625 (8th Cir.1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir.1983)). The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir.2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Id*.

When the question of non-infringement is involved, summary judgment is only appropriate if, after resolving reasonable inferences in favor of the patentee, "no reasonable jury could find infringement." Ishada Co., Ltd. v. Taylor, 221 F.3d 1310, 1315 (Fed.Cir.2000) (citation omitted). Infringement, either literal or by equivalents, is a question of fact. RF Del., Inc. v. Pac. Keystone Techs., Inc., 326 F.3d 1255, 1266 (Fed.Cir.2003) (citation omitted). Prosecution history estoppel as a limit on the doctrine of equivalents presents a question of law. Glaxo Wellcome, Inc. v. Impax Labs., Inc., 356 F.3d 1348, 1351 (Fed.Cir.2004) (citing Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc., 103 F.3d 1571, 1578 (Fed.Cir.1997)). "This standard [for summary judgment of non-infringement] sets a high hurdle which th [e] court does not lightly attempt to surmount." Vehicular Techs. Corp. v. Titan Wheel Int'l, Inc., 212 F.3d 1377, 1381 (Fed.Cir.2000).

B. Claim Construction

It is the responsibility of the court to determine the "acquired meaning" of the claim language at issue. *See* Markman v. Westview Instruments, 517 U.S. 370, 388 (1996). The inquiry centers on the words actually used in the claims. Interactive Gift Express v. Compuserve, 231 F.3d 859, 865 (Fed.Cir.2000). The court should begin its inquiry by analyzing the language of the claim from the perspective of an ordinary person skilled in the art. *See* Hoescht Celanese Corp. v. BP Chems. Ltd., 78 F.3d 1575, 1578 (Fed.Cir.1996). There is a presumption that the word in the claim has its full ordinary or accustomed meaning. K-2 Corp. v. Salomon S.A., 191 F.3d 1356, 1362-63 (Fed.Cir.1999). The court may in part rely on dictionary definitions to construe claim terms. 3M Innovative Properties Co. v. Avery Dennison Corp., 350 F.3d 1365, 1371 (Fed.Cir.2003) (citing Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1584 (Fed.Cir.1996)). "A term's ordinary meaning, however, must first be considered in the context of all intrinsic evidence, namely the claims, the specification, and the prosecution history." *See 3M Innovative Properties, supra,* at 1371 (citing Rexnord Corp. v. Laitram Corp., 274 F.3d 1336, 1342-43 (Fed.Cir.2001)). While the court may consider the specification in construing the meaning of the claim, "limitations appearing in the specification will not be read into claims," because "interpreting what is *meant* by a word *in* a claim is not to be confused with adding an extraneous limitation appearing in the specification." Laitram Corp. V. NEC Corp., 163 F.3d 1342, 1348 (Fed.Cir.1998) (citations omitted) (emphasis in original). Similarly, while the prosecution history may assist the court in its claim interpretation, as a general rule the prosecution history may not be used to "enlarge, diminish or vary the limitations in the claims." *Markman v. Westview Instruments, Inc.,* 52 F.3d 967,980 (Fed.Cir.1995) (internal citations omitted).

1. "Incrementally"

In the present case, the court must first construe the term "incrementally." The term "incrementally" is found in claims 1, 8, 13, 14, and 20 of the '281 patent. In the context of these claims, FECO urges the court to construe "incrementally" as follows:

The proper construction of the term 'incrementally' as used in the '281 patent is that the spinner assembly be moveable fore and aft through a series of minute additions or imperceptible augmentations, ie. that it be infinitely adjustable (adjustable to any position between full extension and full retracted positions).

HECO essentially agrees with FECO's proposed construction of "incrementally" to the extent that it requires "a screw that adjusts the spinner apparatus through an essentially infinite series of minute adjustments," as compared with "a spinner that translates or moves only to a very small number of discrete locations where it is fixed for use." HECO disagrees, however, with FECO's construction of "incrementally" to the extent that FECO urges the court to include a limitation that "the screw must adjust the spinner to any position between full extension or full retraction." In support of its position that such a limitation should be included in the court's construction of "incrementally," the defendant points out that "[t]he specification does indicate ... that the spinners can be adjusted to any position between full extension and full retracted positions." After considering the parties respective recommendations as to the term "incrementally," the court construes the term to require that the spinner assembly be moveable fore and aft through an essentially infinite series of minute adjustments.

FECO, however, states that the infinite series of minute adjustments must cause the device to be adjustable to any position between "full extension and full retracted positions." FECO Brief at 11. However, absolutely nothing in the claim language supports this additional limitation on the claim construction. The claim language simply identifies a rotatable screw between the main supporting frame and subframe whereby manual rotation of the screw incrementally adjusts the position of the moveable subframe and spinner. It is obvious that in plaintiff's preferred embodiment, the screw jack performs this function as the primary method by which the device moves fore and aft. It is equally obvious that the relatively small screw in the accused device is not the primary mechanism for moving the device fore and aft (the lever does not) but, rather, the rotatable screw in the accused device performs relatively minor or "fine-tune" adjustments. Nothing in the claim language for claim 1 limits the protection for the use of a rotatable screw based on whether the screw is primarily or secondarily responsible for the fore and aft movement.

2. Means and Function of Claims 13 and 14

The court must next construe the means and functions of claims 13 and 14. FN2 In order to construe a means plus function claim, the court must first define the particular function of the claim limitation, or determine the claimed function. *See* Budde v. Harley-Davidson, Inc., 250 F.3d 1369, 1376 (Fed.Cir.2001). The court's second inquiry in construing a means-plus-function claim is to look to the specification and identify the corresponding structure for the identified function. A structure disclosed in the specification is a corresponding structure if the specification or prosecution history clearly links or associates the structure to the function recited in the claim. Med. Instrumentation & Diagnostics Corp. v. Elekta AB, 344 F.3d 1205, 1210 (Fed.Cir.2003) (quoting B. Braun Med. Inc. v. Abbott Labs, 124 F.3d 1419, 1424 (Fed.Cir.1997)). Claim 13, and by its dependancy claim 14, requires:

FN2. Claim 14 is a dependent claim and is dependent on claim 13.

means for the rotating spinner apparatus to be incrementally and translatably adjustable fore and aft in a plurality of operating positions relative to said stream of material.

The parties are in agreement as to the function required by claim 13. In short, the function is that of moving the spinner assembly fore and aft to enable many different operating positions for releasing various types and streams of material. The parties disagree, however, as to the means for performing the identified function. FECO contends that the only structure necessary to perform the identified function is a screw jack. HECO argues that there are a variety of means for adjusting the spinner apparatus, not just a rotatable

screw. In support of its contention, HECO cites the specification for the '281 patent, which states in relevant part:
[adjusting the spinner apparatus may be accomplished] by any number of means such as mechanical, electrical, pneumonic ... the screw jack is replaced with any number of actuating means such as mechanical electrical actuators....

The court finds that structures including but not limited to a screw jack are necessary to perform the function of moving the spinner assembly fore and aft in claims 13 and 14.

3. Means and Function of Claim 20

Claim 20 requires as follows:

means, coupled to said rotating plate, for moving said rotating plate and said means, coupled to said frame, for providing a stream are further configured, so that, for each incremental unidirectional adjustment of location of one of said rotating plate and said means for providing a stream....

The parties essentially are in agreement as to the function required by claim 20. The function is that of providing a stream which changes for the material being spread, or in other words, providing a stream edge. In regard to the means for performing the identified function, the parties agree that the function of providing a stream corresponds to the structure of a divider. The parties disagree, however, as to whether claim 20 requires a fixed divider, a moveable divider, or both a fixed and moveable divider. FECO asserts that the function of providing a stream edge corresponds to a moveable divider only. In support of its contention, FECO points to the phrase " ... of one of said rotating plate and said means for providing a stream," asserting that the word "and" signifies that the divider undergoes incremental unidirectional adjustment, and thus must be moveable only. HECO contends that the drop point will change for the material being spread if either the plate or the divider is adjusted. In support of its contention, HECO points to the word "one" in claim 20, arguing that the word is consistent with both (1) a moveable divider and rotating plate in a fixed position; or (2) a fixed divider and rotating plate that moves in order to create different drop points. In support of its contention, HECO further argues that there is nothing in the specification which suggests that the divider must be a moveable divider, and in fact, the specification makes reference to a fixed divider, as follows:

... is a somewhat diagrammatic longitudinal section view ... showing material falling from the conveyor ... onto the front surface ... of a fixed divider....

HECO points out that such language appears in at least four instances within the specification. In sum, HECO asserts that the structure for providing a stream edge must include, but not necessarily be limited to, a fixed divider.

The court finds that a moveable or fixed divider is the structure which corresponds with the function of providing a stream edge in claim 20.

C. Literal Infringement

A claim is literally infringed if each properly construed claim element reads on the accused product or process. *See* Jeneric/Pentron Inc. v. Dillon Co., 205 F.3d 1377, 1382 (Fed.Cir.2000). Accordingly, the determination of literal infringement requires a two-step analysis:

(1) a proper construction of the claim to determine its scope and meaning; and (2) a comparison of the properly construed claim to the accused device or process.

Conroy v. Reebok International, Ltd., 14 F.3d 1570,1572 (Fed.Cir.1994) (citing *Carroll Touch, Inc. v. Electro Mechanical Sys., Inc.,* 3 F.3d 404, 407 (Fed.Cir.1993)). "[T]he patentee must prove that the accused device embodies every limitation in the claim, either literally or by a substantial equivalent." *Conroy, supra,* at 1573 (citing *Carroll Touch, supra,* at 407). At the summary judgment stage, therefore, the patentee must show that a genuine issue of material fact exists as to whether the accused device infringes the claim or claims at issue. When no issue of material fact is raised, infringement may be resolved on summary judgment. Martin v. Barber, 755 F.2d 1564, 1566 (Fed.Cir.1985). "Infringement raises the legal issue of claim construction and the factual issue of whether the accused device infringes properly interpreted claims." *Martin, supra,* at 1566 (citing Fromson v. Advance Offset Plate, Inc., 720 F.2d 1565 (Fed.Cir.1983)).

1. Literal Infringement of Claims 1, 8, and 17

FECO contends that its lever spreader does not literally infringe claims 1, 8, and 17 of the '281 patent. First, FECO argues that the lever spreader does not literally infringe claims 1, 8, and 17 of the '281 patent because the lever spreader does not utilize a rotatable screw to adjust the position of the spreader spinner apparatus as called for in the claims. Instead, FECO asserts, the lever spreader employs a lever which allows for limited movement of the spreader spinner apparatus, fore and aft, into five distinct positions. Second, FECO argues that the lever spreader does not literally infringe claim 1 because claim 1 requires manual rotation of the screw and the lever in the lever spreader "is not operated through any kind of manual rotation." Third, FECO argues that its lever spreader does not literally infringe claims 1, 8, and 17 because FECO's spinner cannot be adjusted "incrementally" when "incrementally" is properly construed to mean that the spinner is infinitely adjustable. Instead, FECO contends, the lever spreader only allows limited adjustment to five pre-determined positions.

HECO contends that the FECO lever spreader literally infringes claims 1, 8, and 17 of the '281 patent in that the connecting rod in the lever device is comprised of a rotatable screw which is used for, or capable of being used for, adjusting the position of the spinner assembly as described in claims 1 and 8. FN3 Specifically, HECO contends that manual rotation of the connecting rod in the lever spreader incrementally and translatably adjusts the position of the spinner apparatus fore and aft through a potentially infinite series of positions with regard to the flow of material to be spread as required by the ' 281 patent. Put simply, HECO contends that FECO uses the threaded screw comprising the connecting rod in its lever spreader to move the spinner assembly fore and aft in relation to a stream of particulate material, thus making it incrementally adjustable, as described in claims 1, 8 and 17 of the ' 281 patent. In support of its contention that the FECO lever spreader literally infringes claims 1, 8, and 17 of the ' 281 patent, HECO offers the deposition testimony of Alan Grimm, and the affidavit testimony of John Williams and Matthew Rissi. Mr. Grimm is an employee of FECO and testified in his June 16, 2004 deposition in relevant part as follows:

FN3. HECO also contends that the lever spreader exhibited at the September 27, 2004 summary judgment hearing is not the same lever spreader as previously viewed and described in prior discovery, and that the lever spreader presented at the summary judgment hearing is only the latest version of several devices produced by FECO, all of which HECO contends infringe the '281 patent. FECO represented that the device shown at the summary judgment hearing is the only one that it currently makes or desires to make in the future.

Q: So you can move [the lever] in both directions a little-to fine-tune, it I mean, it would fine-tune both ways, foreward and aft?
A: Yes.

Q: ... What is the amount of movement that you could achieve fine tuning with this turnbuckle? Do you know in terms of the-you know, an inch-

A: I would say a half ... half to an inch.

Q: It could be moved that far one way or another?

A: Yes.

Q: If the user of the [lever spreader]-and let's talk fertilizer-put it in the fertilizer hole, put the pin in there and then did this adjustment one way or another to fine-tune it to try to get an ideal spot for its particular application, could you drill another hole and permanently fix it then in a new location?

A: I'm sure you could.

Q: Okay. I mean, this is capable of being used in that way, correct?

A: It's not intended to be used that way, but it could be used that way.

Q: ... how far does [the lever] move the spinner assembly? What is the range of motion there? Do you understand my question?

A: Yes. I'd say it would probably be 3-1/2-4 inches maybe tops.

Mr. Williams is an expert retained by HECO in this matter and testified by affidavit on June 24, 2004, in relevant part, as follows:
In connection with my retention as an expert, I traveled to FECO's facilities ... and photographed what I was told was the frame for the FECO spreader presently being manufactured and sold by FECO. This frame had a lever that could be used to move the spinner assembly.... The FECO lever spreader incorporates a threaded screw device ("screw") in the linkage between the lever and the moveable spinner assembly. The screw device is threaded at both ends, with the threads at each end running in opposite direction.... Based on my observations, the screw in the FECO lever spreader operates (or is capable of operating) to move the spreader assemble relative to the fixed frame-ie. to move the spreader assemble relative to the flow of the material to be spread.

Mr. Rissi is the patentee in the present case and testified by affidavit on June 24, 2004, in relevant part, as follows:
... I have reviewed pictures of spreader currently being sold by FECO ... [b]ased on [these pictures], Grimm's testimony, and my knowledge of spinner spreaders, I conclude that the FECO lever spreader incorporates a threaded screw device ... [t]his screw is the part of the linkage between the lever and the moveable spinner frame. The screw device is threaded at both ends, with the threads at each end running in

opposite direction.... The screw in the FECO lever spreader operates (or is capable of operating) to move the spreader assemble relative to the fixed frame ... [s]uch movement of the spreader assembly would be accomplished by manually rotating the screw.... The rotation of the screw in the FECO lever spreader would incrementally adjust the position of the spinner assemble for and aft into an essentially infinite number of positions ... [t]he total range of motion of the spinner assembly that could be accomplished by the screw in the FECO lever spreader is dependent on the total length of the screw rod....

HECO argues that based on this evidence, there is a genuine issue of material fact as to whether the FECO lever spreader "embodies every limitation in the claim[s], either literally or by a substantial equivalent." *Conroy, supra,* at 1573 (citing *Carroll Touch, supra,* at 407). Specifically, HECO contends that the threaded screw comprising the connecting rod in the lever spreader allows the rotating spinner apparatus to be incrementally and translatably adjustable fore and aft, and the manual rotation of the threaded screw comprising the connecting rod incrementally and translatably adjusts the position of the moveable subframe and the spinner. Therefore, according to HECO, there is a material question of fact as to whether the FECO lever spreader embodies every limitation in claims 1, 8, and 17 by substantial equivalence.
The question before the court, therefore, is whether the threaded screw comprising the connecting rod in the FECO lever spreader "incrementally adjusts the position of the moveable subframe and the spinner" through manual rotation of it. It is clear that it does, although not for precisely the same purpose as set forth in plaintiff's preferred embodiment. Accordingly, summary judgment as to literal infringement of claims 1, 8, and 17 is denied as there is a genuine issue of material fact concerning whether the accused device infringes those properly construed claims.

2. Literal Infringement of Claims 13 and 14: Means Plus Function

Literal infringement of a means-plus function claim requires that the relevant structure in the accused device (1) perform the identical function recited in the claim; and (2) be identical or equivalent to the corresponding structure in the specification. Caterpillar Inc. v. Deere & Co., 224 F.3d 1374, 1380 (Fed.Cir.2000) (citing Odetics, Inc. v. Storage Tech. Corp., 185 F.3d 1259, 1267 (Fed.Cir.1999). "Equivalent" means that when comparing the claim to the accused device, there is an insubstantial change which adds nothing of significance to the structure, material, or acts disclosed in the patent specification. Valmont Industries v. Reinke Mfg. Co., Inc., 983 F.2d 1039, 1043 (Fed.Cir.1993). In determining whether a change is insubstantial, the inquiry centers upon whether the accused device performs the claimed function in substantially the same way with substantially the same result. *Caterpillar Inc., supra,* at 1379 (citing IMS Technology, Inc. v. Haas Automation, Inc., 206 F.3d 1422 (Fed.Cir.2000)). "The first step in construing a means-plus-function claim limitation is to define the particular function of the claim limitation." Engineered Products Co. v. Donaldson Co., Inc., 313 F.Supp.2d 951, 979 (N.D.Iowa 2004) (citing Budde v. Harley-Davidson, Inc., 250 F.3d 1369, 1376 (Fed .Cir.2001)). "The court must construe the function of a means-plus-function limitation to include the limitations contained in the claim language, and only those limitations." *Engineered Products* Co., supra, at 979 (quoting Cardiac Pacemakers, Inc. v. St. Jude Med., Inc., 296 F.3d 1106, 1113 (Fed.Cir.2002)). "Ordinary principles of claim construction govern interpretation of" the claim language, and the court construes the "function according to its ordinary meaning." *Id.*

FECO contends that the only structure disclosed in the '281 specification for moving the spinner assembly fore and aft is a screw jack. FECO further argues that the screw jack claimed in the '281 specification is not identical to the means for adjusting the spinner assembly in the lever spreader. Moreover, FECO contends that although the lever spreader performs the same function of moving fore and aft, the lever spreader is not the equivalent of the function in claim 13, specifically that of adjusting the spinner apparatus fore and aft,

because the lever spreader does not perform that function in substantially the same way or with substantially the same result as the screw jack claimed in the '281 specification. Specifically, FECO contends that the screw jack in claim 13 and the lever in FECO's lever spreader do not perform in substantially the same way or achieve substantially the same result.

HECO argues that there are a variety of means contemplated in the '281 patent and specification for adjusting the spinner apparatus fore and aft, not simply a screw jack. HECO further contends that the connecting rod in the FECO lever spreader performs the same function as recited in claim 13 and is thus equivalent in all essential aspects to the corresponding structure in the ' 281 patent specification. Specifically, HECO contends that the threaded screw comprising the connecting rod in the FECO lever spreader is a means for the rotating spinner apparatus to be incrementally and translatably adjustable fore and aft and so performs in substantially the same way achieving substantially the same result. The structure in the accused device performs the identical function recited in the claim; translatably adjusting the fore and aft movement of the rotating spinner apparatus. The screw jack is not the only means contemplated by the claims for accomplishing this result.

However, the accused device is not identical or equivalent to the corresponding structure in the specification. The court cannot say that FECO's lever and screw method of adjusting fore and aft movement constitutes an insubstantial change which adds nothing of significance to the structure, material, or acts disclosed in the patent specification. It does not perform the claimed function in substantially the same way. As noted above, FECO's screw is only a fine tuning device, with clearly only secondary importance in determining fore and aft movement. Accordingly, summary judgment is granted to FECO as to literal infringement of Claims 13 and 14.

3. Literal Infringement of Claim 20

In regard to claim 20, FECO first contends that claim 20 requires a moveable divider only and that because the FECO lever spreader has a fixed divider, it does not contain an element claimed in claim 20 and therefore cannot be found to literally infringe that claim. Second, FECO contends that the spinner assembly in the lever spreader cannot undergo incremental adjustment through a series of minute adjustments, but rather can only be adjusted to five pre-determined positions and accordingly, the element of incremental adjustment is not found in the lever spreader and it cannot be found to literally infringe. Finally, FECO contends that under the means-plus function analysis, the lever spreader does not contain the equivalent of the following element claimed in claim 20:

means, coupled to said rotating plate, so that predetermined flow edge of said stream of material, is selectively incident upon varying drop points on said rotating plate.

In regard to the above-described function, FECO argues that the only corresponding structure for performing the function as described in the '281 specification is a screw jack. FECO argues, therefore, that because a screw jack and a lever are not equivalents, the lever spreader cannot be found to literally infringe claim 20.

HECO argues first that claim 20 is not limited to spreaders with moveable dividers but also includes fixed dividers. Accordingly, HECO argues that because claim 20 includes both fixed and moveable dividers, the FECO lever spreader includes every element of claim 20. Second, HECO argues that the spinner assembly in FECO's lever spreader can indeed undergo incremental adjustment through a series of minute adjustments when the lever is removed and as such, the FECO lever spreader embodies that element of claim 20. Finally,

HECO argues that the threaded screw comprising the connecting rod in the FECO lever spreader is the equivalent of the "means" described in claim 20, and that such "means" should be found to include but not necessarily be limited to a screw jack.

The court finds first that claim 20 includes no limitations for a moveable divider. There is no language within the claim or specification to indicate that claim 20 is limited to spreaders with a moveable divider only. The word "and" must be read in conjunction with the words "one of" that precede it. Second, the court finds that the threaded screw comprising the connecting rod in the lever spreader can be incrementally adjusted as described in claim 20 when the lever is removed. The court further finds that, as with the means and function of claims 13 and 14, the "means" in claim 20 can include but is not limited to a screw jack. Finally, for the same reasons that the court found that there was no genuine issue of material fact as to whether the accused device literally infringes the means and function claims in claims 13 and 14, the court finds that there is no genuine issue of material fact as to whether the threaded screw comprising the connecting rod in the FECO lever spreader is equivalent to the "means" described in claim 20. Accordingly, because the court finds that not every element of Claim 20 is embodied in the accused device, summary judgment for FECO is appropriate as to literal infringement of claim 20.

D. The Doctrine of Equivalents

The test for infringement under the doctrine of equivalents is whether the accused device performs substantially the same function, in substantially the same way, and achieving substantially the same result as the relevant element of the claim. Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1330 (Fed.Cir.2001).

Specific to a claim of infringement under the doctrine of equivalents for a means-plus-function claim, if the court determines that the patentee has failed to establish a genuine issue of material fact as to whether the accused device literally infringes under the means-plus-function literal infringement analysis, then the doctrine of equivalents is only available for the means-plus-function claim if the accused device represents new technology developed after the issuance of the patent. *See* Ballard Medical Products v. Allegiance Healthcare Corp., 268 F.3d 1352, 1363 (Fed.Cir.2001) (citing Chiuminatta Concrete Concepts, Inc. v. Cardinal Indust., Inc., 145 F.3d 1303, 1311 (Fed.Cir.1998)).

1. Doctrine of Prosecution History Estoppel

The Doctrine of Prosecution History Estoppel states that a party is estopped from claiming infringement under the doctrine of equivalents if (1) a claim amendment filed in the PTO has narrowed the literal scope of the claim under examination; and (2) the narrowing amendment was made for a substantial reason related to patentability. *See* Engineered Products Co. v. Donaldson Company Inc., 313 F.Supp.2d 951, 963-64 (N.D.Iowa 2004) (citing Pioneer Magnetics, Inc. v. Micro Linear Corp., 330 F.3d 1352, 1356 (Fed.Cir.2003)). A claim amendment is a narrowing amendment if it has narrowed the literal scope of the claim. *Engineered Products, supra,* at 965 (citing Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki, 344 F.3d 1359, 1366 (Fed.Cir.2003)). In determining whether a claim amendment is a narrowing amendment, the court may compare the original claims and the amendment(s) with the resulting claim and determine whether the terms of the claim were claimed with ever increasing specificity. *See* Id. at 967.

If the court determines that the claim amendment was a narrowing amendment, the court then looks to the prosecution history of the claim and determines whether a reason for the claim amendment is apparent. "When the prosecution history reveals no reason for the narrowing amendment," the United States Supreme

Court holding of *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.* controls and "presumes that the patentee had a substantial reason relating to patentability" and consequently, the patentee "must show that the reason for the amendment was not one relating to patentability if it is to rebut that presumption." *Engineered Products Co., supra,* at 964 (citing *Pioneer Magnetics,* Inc., supra, at 1356; Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 30-32 (1997)). The patentee's rebuttal of the *Warner-Jenkinson* presumption is restricted to the evidence in the prosecution history record. *Id.* (citing *Pioneer Magnetics, Inc., supra,* at 1356). If the patentee can successfully establish that the narrowing amendment was not for a substantial reason related to patentability, then prosecution history estoppel does not apply and the patentee may proceed in proving infringement under the doctrine of equivalents. *See Id.*

However, if the court determines that the narrowing amendment has been made for a substantial reason related to patentability, whether based on the prosecution history record or on the patentee's failure to overcome the *Warner-Jenkinson* presumption, the court must then address the scope of the subject matter surrendered by the narrowing amendment. *Id.* (citing *Pioneer Magnetics, supra,* at 1357). At that point, a presumption arises that the patentee has surrendered all territory between the original claim limitation and the amended claim limitation. *Id.* (citing Festo Corp. v. Shoketsu Kinzoku Kabushiki Co. Ltd., 535 U.S. 722, 740 (2002)).

In order to rebut the presumption of total surrender, the patentee must demonstrate that "it did not surrender the particular equivalent in question." *Id.* There are three ways for a patentee to rebut the total surrender presumption:

(1) if the equivalent in question was unforeseeable at the time of the narrowing amendment; (2) if the rationale underlying the amendment has only a tangential or peripheral relationship to the equivalent in question; or (3) if the patentee could not have reasonably been expected to describe the insubstantial substitute in question.

Engineered Products, Inc., supra, at 963 (citing Festo Corp. v. Shoketsu Kinzoku Kabushiki Co. Ltd., 535 U.S. at 740-41). If the patentee is successful at rebutting the presumption of total surrender, then "prosecution history estoppel does not apply and the question whether the accused element is in fact equivalent to the limitation at issue is reached on the merits." *Id.* (citing Festo, 344 F.3d at 1366-67).

FECO contends that HECO should be estopped from alleging infringement under the doctrine of equivalents for claims 1, 8, 13, 14, and 17. First, FECO asserts that HECO amended those claims in the course of prosecuting the '281 patent and amended the claims for a reason substantially related to patentability. Specifically, FECO asserts that HECO made the narrowing amendments in response to the patent examiner's rejection of the claims based on the prior art disclosed by the Cowell patent; a reason which is thus substantially related to patentability. FECO further asserts that all territory between HECO's application claims and the resulting claims of the '281 patent was surrendered by HECO. HECO responds by simply stating that there is literal infringement here and that the arguments are based on the premise that the existence of a level means there is no rotatable screw.

The court finds that HECO made narrowing amendments to claims 1, 8, 13 and 17 in the course of prosecuting the '281 patent and that those narrowing amendments were made for a substantial reason related to patentability. First, if the prosecution history does not provide a reason for the amendment, then it is presumed that the reason for the amendment was related to patentability, and the burden is on HECO to show the reason for the amendment was not related to patentability. *See* Warner-Jenkinson Co., supra, at 41.

Second, it is apparent from the prosecution history record of the '281 patent that the amendments HECO made to the claims were in response to the patent examiner's rejection of the application claims as unpatentable over the prior art and specifically the Cowell patent. The structures, processes and means described in claims 1, 8, and 17 were described with ever increasing specificity in an obvious effort to avoid the prior art cited by the patent examiner. *See Engineered Products Co., supra,* at 967. The element of "a means for the rotating spinner apparatus to be incrementally and translatably adjustable fore and aft in a plurality of operating positions relative to said stream of material," is found in claims 1, 8, and 13. In response to the patent examiner's rejection of the application claims as unpatentable over the prior art, HECO amended what became claims 1 and 8 to identify a structure, specifically a rotatable screw, for accomplishing the function cited above. Although HECO did not amend what became claim 13 to likewise identify a rotatable screw as accomplishing the function cited above, claim 13 may nevertheless be implicated by the doctrine of prosecution history estoppel because the relevant element found in claims 1 and 8 is also found in claim 13. *See* Builders Concrete, Inc. v. Bremerton Concrete Products Company, 757 F.2d 255, 260 (Fed.Cir.1985).FN4 Claim 17 includes the element of "translatably adjusting the position of the spinner fore or aft relative to the discharge of material." In response to the patent examiner's rejection of the application claim as unpatentable over the prior art, HECO amended that claim to include that the function cited above was accomplished by "a rotatable screw connected between a fixed frame and moveable spreader spinner apparatus."

FN4. In *Builders Concrete, Inc.,* the Federal Circuit Court of Appeals found that even though one claim is not amended and the prosecution history of that claim reflects no criticism by the examiner of the scope or words in the claim, the fact that such claim is not itself amended during prosecution does not mean that the claim can be extended by the doctrine of equivalents to "cover the precise subject matter that was relinquished in order to obtain allowance" of other claims. *Builders Concrete, Inc., supra,* at 260.

The court must next determine the scope of the subject matter surrendered by HECO as a result of the narrowing amendments. Because HECO has presented no evidence or argument in an attempt to rebut the presumption of total surrender, the court finds that all territory between the original and amended application claims and the resulting claims of the '281 patent is surrendered. The ground surrendered does not include the rotatable screw; however, it simply includes the defendant's lever. The presence of defendant's rotatable screw causes the defendant to be unable to prevail on this theory of prosecution history estoppel.

2. Prior Art Limitation

"Based on the fundamental principle that no one deserves an exclusive right to technology already in the public domain," courts have consistently limited application of the doctrine of equivalents to prevent the ensnaring of prior art. Marquip, Inc. v. Fosber America, Inc., 198 F.3d 1363, 1367 (Fed.Cir.1999) (citing Wilson Sporting Goods v. David Geoffrey & Assoc., 904 F.2d 677, 683 (Fed.Cir.1990)). The reason behind this limitation is to "prevent the patentee from obtaining under the doctrine of equivalents coverage it could not have obtained from the Patent and Trademark Office (PTO) by literal claims." *Marquip, Inc., supra,* at 1367. The court must determine the limitation based on the prior art, if any, on the scope of equivalents presently claimed. In order to do so, the court must (1) visualize a hypothetical claim, sufficient in scope to literally cover the accused device; and (2) examine whether the PTO would have allowed that hypothetical claim over the prior art at the time of the invention. *Id.* (citing Key Mfg. Group, Inc. v. Microdot, Inc., 925 F.2d 1444, 1449 (Fed.Cir.1991); *Wilson Sporting Goods, supra,* at 684). If the hypothetical claim would have been allowed in light of the prior art, then the prior art limitation is not a bar to the assertion of

infringement under the doctrine of equivalents. *Id*. Said another way, the court must determine whether the hypothetical claim reads on the prior art, in the present case the Cowell patent. The court makes this determination as a matter of law. *See* Id. at 1368. The burden is on the patentee to prove that the range of equivalents which it seeks to assert would not ensnare the prior art. *See Wilson Sporting Goods, supra,* at 685. FECO contends that HECO should be estopped from proving infringement under the doctrine of equivalents based on prior art limitation as to claims 1, 8, 13, 14, 17, and 20.

The court finds that the following hypothetical claim, derived from claims 1 and 8 of the '281 patent, is sufficient in scope to literally cover the FECO lever spreader:

A truck for spreading particulate material comprising:

a truck chassis;

a material storage box mounted on the chassis for holding particulate material, the box having a conveyor for moving particulate material through a discharge opening and off a conveyor end, thereby creating a stream of particulate material exiting said discharge opening;

a spreader mounted to the box with rotating spinner apparatus *adjustable to predetermined positions* fore and aft with respect to said stream in a plurality of operating positions with respect to said stream;

a main support frame on the box for supporting the spreader and spinner apparatus;

wherein the spreader with rotating spinner apparatus includes a moveable subframe mounted to the storage box, and at least one spinner rotatably mounted on the subframe for receiving the particulate material and distributing the material in a broadcast swath; and

wherein the spreader spinner apparatus *includes a threaded screw comprising a rod connected to a lever between the main supporting frame and subframe whereby operation of the lever adjusts the position* of the moveable subframe and the spinner.

(Relevant portions designated by underscore). The court must determine whether such a claim would be anticipated by a single prior art reference, in the present case the Cowell patent. Because it is HECO's burden to prove that the range of equivalents which it seeks to assert in this case would not ensnare the prior art and because HECO has not set forth any arguments addressing that burden, the court finds that HECO has failed to demonstrate that the hypothetical claim derived from claims 1 and 8 would not have been rejected as anticipated by the Cowell prior art. *See Wilson Sporting Goods, supra,* at 685. Accordingly, the court finds that HECO is estopped from asserting infringement of claims 1 and 8 under the doctrine of equivalents because of the prior art limitation.

The court finds that the following hypothetical claim, derived from claim 13 of the '281 patent, is sufficient in scope to literally cover the FECO lever spreader:

A particulate material spreader for spreading particulate material from a material storage box, comprising:

a spreader frame adapted to be mounted to the material storage box for discharging a stream of material;

a rotating spinner apparatus, including a moveable subframe, mounted to the spreader frame in a manner to accept said stream of material from the storage box;

a threaded screw comprising a connecting rod connected to a lever used to move the rotating spinner apparatus fore and aft into predetermined positions relative to said stream of material; and

wherein a divider placed between the conveyor discharge end and spinner to distribute material onto the spinner.

(Relevant portion designated by underscore). The court finds that HECO has failed to demonstrate that the hypothetical claim derived from claim 13 would not have been rejected as anticipated by the Cowell prior art. *See Wilson Sporting Goods, supra,* at 685. Accordingly, the court finds that HECO is estopped from asserting that the FECO lever spreader infringes claims 13 and 14 of the '281 patent under the doctrine of equivalents because of the prior art limitation.

The following hypothetical claim, derived from claim 17 of the '281 patent, is sufficient in scope to cover literally the FECO lever spreader:

A method of spreading particulate material from a truck, the truck having a material storage box for holding particulate material, the material box having a discharge opening and discharge means for discharging material from the box onto a spreader, the spreader having at least one rotatable spinner to broadcast the material over the desired area, the method comprising:

translatably adjusting the position of the spinner fore or aft relative to the discharge of material is discharged onto one of a plurality of drop points on the spinner and thereby adjusting the broadcast of material from the spinner; and

wherein the adjustment of the position of the spinner is accomplished *by a threaded screw comprising a rod connected to a lever connected* between a fixed frame and moveable spreader spinner apparatus.

(Relevant portion designated by underscore). As with claims 1, 8, 13 and 14, the court finds that HECO has failed to demonstrate that the hypothetical claim derived from claim 17 would not have been rejected as anticipated by the Cowell prior art. *See Wilson Sporting Goods, supra,* at 685. Accordingly, the court further finds that the prior art limitation bars a finding of infringement under the doctrine of equivalents as to claim 17.

The court finds that the following hypothetical claim, derived from claim 20 of the '281 patent, is sufficient in scope to literally cover the FECO lever spreader:

a frame, having a frame longitudinal axis;

a rotating plate having a plurality of radial members disposed thereon, said rotating plate configured to spin about a first axis which is substantially orthogonal to a plan of said plate;

means, coupled to said frame, for providing a stream of material having a predetermined flow edge;

a *lever,* coupled to said rotating plate, for moving said rotating plate, so that said predetermined flow edge

of said stream of material is selectively incident upon varying drop points on said rotating plate;

said *lever,* coupled to said rotating plate, for moving said rotating plate, and said means, coupled to said frame, for providing a stream are further configured, so that, for each *predetermined* adjustment of location of one of said rotating plate and said means for providing a stream, said predetermined flow edge of said stream of material is moved to a different drop point on said rotating plate.

(Relevant portions designated by underscore). The court finds that as with claims 1, 8, 13, 14, and 17, HECO has failed to demonstrate that the hypothetical claim derived from claim 20 would not have been rejected as anticipated by Cowell. *See Wilson Sporting Goods, supra,* at 685. Accordingly, the court further finds that the prior art limitation bars a finding of infringement as to claim 20 under the doctrine of equivalents.

3. Doctrine of Equivalents: Means Plus Function Claims

Finally, FECO argues that specific to means-plus function claims, the doctrine of equivalents is available only if the accused device represents new technology developed after the issuance of the patent in suit. In support of its contention, FECO cites to *Ballard Medical Products v. Allegiance Healthcare Corp.*. The court finds that the holding of *Ballard* is not as broad as FECO understands it to be. Specifically, the holding of *Ballard* was as follows:

where the claim of infringement under [literal infringement, means-plus function] fails on the ground that the accused device is not equivalent to the structure disclosed in the specification, the doctrine of equivalents is available only if ... the accused device represents new technology developed after the issuance of the patent.

Ballard Medical Products v. Allegiance Healthcare Corp., 268 F.3d 1352, 1363 (Fed.Cir.2001) (citing Chiuminatta Concrete Concepts, Inc. v. Cardinal Indust., Inc., 145 F.3d 1303, 1311 (Fed .Cir.1998)). The *Ballard* case therefore stands for the proposition that if the court determines that a patentee has failed to establish a genuine issue of material fact as to literal infringement of a means-plus function claim, the new technology rule of Ballard then comes into play and the patentee must demonstrate that the accused device represents new technology developed after the issuance of the patent. *See Ballard Medical Products, supra,* at 1363. Accordingly, it is only after the court finds that there is no genuine issue of material fact as to literal infringement for lack of an equivalent structure under a means-plus function limitation that a finding of equivalence under the doctrine of equivalence may be precluded. Because the court has found that there is no genuine issue of material fact as to literal infringement of the means-plus function claims, specifically claims 13, 14 and 20, the new technology rule of *Ballard* is applicable. As HECO has not pointed to any evidence which would indicate that the accused device, and more specifically the structures within the accused device, represent new technology, HECO is precluded from proving infringement of claims 13, 14, and 20 under the doctrine of equivalents due to the *Ballard* new technology rule. The court has further found that HECO is estopped from pursuing its claim of infringement under the doctrine of equivalents as to claims 13 and 14 due to prosecution history estoppel and the prior art limitation, and as to claim 20 due to the prior art limitation.

Upon the foregoing,

IT IS ORDERED

FECO's motion for summary judgment is granted as to HECO's claim of literal infringement of claims 13, 14, and 20, and as to HECO's claim of infringment under the doctrine of equivalents for all claims. FECO's motion for summary judgment is denied as to literal infringement of claims 1, 8, and 17. HECO's motion to postpone summary judgment hearing is denied. HECO's motion to extend deadlines and reset trial is granted as set forth in the court's order dated January 20, 2005 (docket number 105).

N.D.Iowa,2005.
Highway Equipment Co., Inc. v. FECO, Ltd.

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