

2019-1838, -1839, -1840

**United States Court of Appeals
for the Federal Circuit**

LIQUIDPOWER SPECIALTY PRODUCTS INC.,
fka Lubrizol Specialty Products, Inc.,

Appellant

– v. –

BAKER HUGHES, A GE COMPANY, LLC, fka Baker Hughes Incorporated,

Appellee.

*On Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Nos. IPR2016-01901,
IPR2016-01903 and IPR2016-01905*

**APPELLEE’S RESPONSE TO APPELLANT’S PETITION
FOR REHEARING AND REHEARING *EN BANC***

HERBERT D. HART III
GEORGE F. WHEELER
AARON F. BARKOFF
PETER J. LISH
BEN J. MAHON
MCANDREWS, HELD & MALLOY, LTD.
500 West Madison Street, Suite 3400
Chicago, Illinois 60661
(312) 775-8000
hhart@mcandrews-ip.com
gwheeler@mcandrews-ip.com
abarkoff@mcandrews-ip.com
plish@mcandrews-ip.com
bmahon@mcandrews-ip.com

Counsel for Appellee

SEPTEMBER 22, 2020

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2019-1838, -1839, -1840
Short Case Caption LiquidPower Specialty Products Inc. v. Baker Hughes Holdings, LLC
Filing Party/Entity Baker Hughes Holdings, LLC

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 09/22/2020

Signature: /s/ Herbert D. Hart III

Name: Herbert D. Hart

FORM 9. Certificate of Interest

Form 9 (p. 2)
July 2020

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p>
<p><input type="checkbox"/> None/Not Applicable</p>	<p><input type="checkbox"/> None/Not Applicable</p>	<p><input type="checkbox"/> None/Not Applicable</p>
<p>Baker Hughes Holdings, LLC,</p>	<p>Baker Petrolite LLC</p>	<p>General Electric Company;</p>
<p>f/k/a Baker Hughes, a GE Company,</p>		<p>Baker Hughes Company</p>
<p>f/k/a Baker Hughes Incorporated</p>		

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

None/Not Applicable Additional pages attached

Lubrizol Specialty Products Inc. v. Baker Hughes Incorporated, No. 4:15-cv-02915 (S.D. Tex. October 5, 2015);	Patent Trial and Appeal Board Case IPR2016-00734	

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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I. INTRODUCTION

LSPI's Petition rests on a fundamentally flawed representation of the Panel's decision. The Panel did not require, or even encourage, *any* "knockdown" approach, let alone an "extreme knockdown approach." Rather, the Panel's decision simply directs the Board on remand to consider and weigh the evidence, including the objective evidence, before reaching a conclusion of law on obviousness – exactly what is required under precedent of both the Supreme Court and this Court. Thus, to the extent that there is a need to address the appropriateness of a "knockdown" approach as LSPI contends, this case is not a proper vehicle for doing so.

Indeed, contrary to LSPI's characterization, the Panel did not instruct the Board to "cement" its prior obviousness conclusion as a *prima facie* showing of obviousness and limit the objective evidence to rebutting that conclusion. Rather, it instructed the Board to weigh all of the evidence *prior* to reaching *any* conclusion. The Panel further clearly stated that the burden remains on Baker Hughes to prove obviousness.

LSPI's sole complaint seems to be the Panel's rejection of LSPI's contention that the Panel should require the Board to "revisit all facets of the obviousness inquiry." But both (1) the issue actually raised in this appeal (which LSPI disregards) and (2) the relationship of this case with the remand of the Federal

Circuit in Appeal No. 2018-1141 demonstrate that the Panel correctly saw LSPI's ambiguous "all facets" request as an attempt to clear a path on remand to raise new arguments and resurrect those it waived.

More specifically, in Appeal No. 2018-1141, directed to the IPR of a related patent, LSPI challenged the Board's factual findings on issues such as the scope of the prior art, motivation to combine, and reasonable expectation of success as being unsupported by substantial evidence. This Court held that the Board's findings were supported by substantial evidence, but found that the Board had erred by failing to consider LSPI's objective evidence. Thus, this Court instructed the Board to consider on remand the amount of weight to give the objective evidence in its obviousness determination. Following that instruction, the Board on remand considered and rejected LSPI's secondary considerations narrative, now once again presented in the Petition, finding that LSPI's objective evidence was entitled to little weight.

In this appeal, however, LSPI *did not challenge* any of the Board's factual findings on the scope of the prior art, motivation to combine, or reasonable expectation of success. Not once did LSPI argue that any finding of fact by the Board on these issues lacked support by substantial evidence. Instead, LSPI's brief simply recounted the evidence it submitted to the Board, *sub silentio* asking this Court to reweigh the evidence. Baker Hughes therefore argued that, on any

remand, the objective evidence must be weighed in the context of the substantial evidence supporting the Board's findings of fact, *i.e.*, the same scope of remand as in Appeal No. 2018-1141. Baker Hughes expressed a concern that by its vague "all facets" argument, LSPI sought an opportunity to (i) present new arguments on remand as to un-appealed findings by the Board, and/or (ii) raise new challenges in a future appeal that it could have, but did not raise in this appeal – in short, obtain a second bite at the apple.

The Panel's rejection of LSPI's "all facets" request therefore simply reflects that the scope of remand must properly be limited to the single issue actually raised in LSPI's appeal – namely, whether the Board must consider and weigh the objective evidence before reaching any legal conclusion of obviousness. LSPI's brief omitted any challenge to whether substantial evidence supported the Board's factual findings on the scope of the prior art, motivation to combine, or reasonable expectation of success, and it has now mischaracterized the Panel's decision in an attempt to have this Court *en banc* provide it with its desired second bite at the apple.

There is no basis for granting LSPI's Petition. The Panel properly instructed the Board to consider and weigh all of the evidence and only then reach a conclusion of law on obviousness. That is precisely what the law requires.

II. ARGUMENT

Nothing in the Panel’s decision directs or authorizes the Board to apply a “knockdown” or “rebuttal” analysis. To the contrary, the Panel’s decision clearly states that the Board should consider *all evidence* before reaching a conclusion of obviousness. Slip op. at 3. Moreover, the Board has already demonstrated by its handling of the remand in Appeal No. 2018-1141 that it understands how to appropriately “weigh[] the objective indicia evidence” without resort to a “rebuttal” or “knockdown” approach. And nothing in the Panel’s decision here would suggest that the Board should depart from its handling of the objective evidence in the remand of Appeal No. 2018-1141. Finally, the Panel did not exceed its judicial function by remanding the case to the Board to consider and weigh the objective evidence before reaching its legal conclusion regarding obviousness.

A. **Nothing in the Panel’s decision directs the Board to apply a “knockdown” or “rebuttal” analysis**

LSPI seizes on the concerns expressed by members of the Court that some district courts apply a procedure in which they address all of the evidence of obviousness, reach a conclusion, and then shift the burden to the patentee to rebut, or “knockdown,” that conclusion with objective evidence. However, the appropriateness of such an approach is simply not implicated by the Panel’s

decision. The Panel *did not* instruct the Board to weigh the objective evidence against its prior legal conclusion of obviousness. Rather it “agree[d] with LSPI that all relevant evidence must be considered before any legal conclusion of obviousness can be reached” and acknowledged “that the burden of persuasion remains at all times with the patent challenger.” Op. at 3.¹

That is *precisely* what this Court’s precedent (relied on by LSPI) requires. *See In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1076 (Fed. Cir. 2012) (“this court’s precedent require[es] that a fact finder consider all evidence relating to obviousness before finding a patent invalid on those grounds, and the court imposed a burden-shifting framework in a context in which none exists.”); *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1328 (Fed. Cir. 2016) (“the strength of *each* of the *Graham* factors must be weighed in every case and must be weighted en route to the final determination of obviousness or non-

¹ Indeed, Baker Hughes’s briefing was clear that it did not seek a “rebuttal” or “knockdown” approach. *See Baker Hughes Br.* at 59 (“Baker Hughes is not asking this Court to shift the burden to LSPI to disprove a prior conclusion of obviousness.”), 60 (“[T]o the extent LSPI is arguing that the objective evidence must be weighed against the factual findings made by the Board, rather than against a conclusion of obviousness, Baker Hughes agrees.”).

obviousness.”); *Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, 98 F.3d 1563, 1570 (Fed. Cir. 1996) (objective evidence must be “considered together with all other evidence, in determining whether the invention as a whole would have been obvious to a person of ordinary skill in the field of the invention.”); *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1539 (Fed. Cir. 1983) (“En route to a conclusion on obviousness, a court must not stop until all pieces of evidence on that issue have been fully considered and each has been given its appropriate weight.”); *In re Rinehart*, 531 F.2d 1048, 1052 (C.C.P.A. 1976) (“Facts established by rebuttal evidence must be evaluated along with the facts on which the earlier conclusion was reached, not against the conclusion itself.”).

Nor, contrary to LSPI’s mischaracterization, did the Panel’s decision limit the role of the objective evidence to that of rebutting a *prima facie* case of obviousness. The Panel properly instructed the Board to consider and weigh *all relevant evidence* before reaching a final conclusion of obviousness. Op. at 3. It said nothing of using the objective evidence to rebut an intermediate *prima facie* conclusion, as LSPI now contends. Nor did the Panel direct the Board to apply such an approach by rejecting LSPI’s ambiguous request that it instruct the Board to “revisit all facets of the obviousness inquiry.” Accordingly, none of the concerns expressed in the Petition are present. See *Intercontinental Great Brands*

LLC v. Kellogg N. Am. Co., 869 F.3d 1336, 1357-58 (Fed. Cir. 2017) (Reyna, J. dissenting) (“I read Supreme Court and Federal Circuit precedent to require all factual analysis to occur prior to achieving a legal conclusion on non-obviousness. This should be done without resort to an intermediate prima facie conclusion.”); *Merck Sharp & Dohme Corp. v. Hospira, Inc.*, 874 F.3d 724, 732 (Fed. Cir. 2017) (Newman, J. dissenting) (“some Federal Circuit decisions appear to have sought a shortcut, and converted three of the four Graham factors into a self-standing ‘prima facie’ case, whereby the objective considerations must achieve rebuttal weight.”); *ZUP, LLC v. Nash Mfg., Inc.*, 896 F.3d 1365, 1380 (Fed. Cir. 2018) (Newman, J. dissenting) (“My colleagues hold that only three of the four Graham factors are considered in order to establish a prima facie case of obviousness, and that the fourth Graham factor is applied only in rebuttal, whereby the fourth factor must be of sufficient weight to outweigh and thereby rebut the first three factors.”).

LSPI’s Petition is an attempt to manufacture an error by the Panel and to create a legal dispute about the test for obviousness where none exists. There is no debate that the proper inquiry on remand is whether Baker Hughes has proved by the governing standard (a preponderance) that all of the evidence, including the objective evidence, considered together, supports a legal conclusion of obviousness.

B. Context further demonstrates that the Panel’s decision does not direct the Board to apply a “knockdown” or “rebuttal” analysis

1. The Petition disregards the Board’s handling of the objective evidence on remand in No. 2018-1141

Tellingly, the Board did not understand this Court’s decision in related Appeal No. 2018-1141 to require the use of a “rebuttal” or “knockdown” approach on remand, despite the fact that it addressed the same issue and instructed the Board on remand to “weigh” the same objective evidence. *See LiquidPower Specialty Prods. Inc. v. Baker Hughes, a GE Co. LLC*, 749 F. App’x 965, 969 (Fed. Cir. 2018).

In Appeal No. 2018-1141, LSPI raised three issues :

- First, whether substantial evidence supported the Board’s finding that all limitations were disclosed by the prior art;
- Second, whether substantial evidence supported the Board’s finding that a person of ordinary skill would have been motivated to modify the teachings of the prior art with a reasonable expectation of success; and,
- Third, whether the Board had erred in its nexus analysis and by not giving weight to LSPI’s objective evidence.

See LiquidPower ,749 F. App’x at 969 (Fed. Cir. 2018). There, this Court found that substantial evidence supported the Board’s findings on the first two issues, but not on the nexus issue, holding that the Board erred “in not weighing LSPI’s

objective evidence of non-obviousness.” *Id.* This Court therefore remanded with instructions to the Board “to consider the amount of weight to give this evidence.”

Id.

On remand of Appeal No. 2018-1141, the Board did not “st[i]ck to its prior decision.” Pet. At 19. Rather, the Board acknowledged that it needed to “balance all of the record evidence in making a final determination on remand as to whether Petitioner established by a preponderance of the evidence that claims 8-10 of the 118 patent would have been obvious.” Appx8696 (citing *Cyclobenzaprine*, 676 F.3d at 1075). The Board then considered and addressed all of LSPI’s objective evidence, in conjunction with the evidence of obviousness, before making any determination on obviousness. *See* Appx8699-8715. Notably, the Board *did not* make any *prima facie* conclusion of obviousness or require the objective evidence to “rebut” or “knockdown” any such conclusion. Instead, having considered the parties’ arguments and evidence, the Board “evaluate[d] all of the evidence together to make a final determination of obviousness.” Appx8715. Specifically, the Board found LSPI’s objective evidence “entitled to little weight,” and determined that “when [the objective evidence is] considered and weighed with the strong and substantial evidence as to the other three *Graham* factors,” the evidence as a whole supports a conclusion of obviousness. Appx8716.

Here, LSPI’s appeal was limited to the single issue of whether the Board had

erred in its nexus analysis and by not considering LSPI's objective evidence, *i.e.*, the same issue that necessitated a remand in No. 2018-1141. The Panel's decision in the present appeal even refers back to the opinion in No. 2018-1141, stating that "[f]or reasons analogous to those expressed in *LiquidPower Specialty Prods. Inc. v. Baker Hughes, a GE Co. LLC*, 749 F. App'x 965, 969 (Fed. Cir. 2018) ("*LiquidPower 2018*"), we conclude that the Patent Trial and Appeal Board ("Board") erred by reaching its obviousness conclusion without considering the evidence of secondary considerations proffered." Op. at 2. Following the lead of the opinion in Appeal No. 2018-1141, the Panel here once again instructed the Board to "weigh the objective indicia evidence." *Id.* at 4.

Notably, nothing in the present Panel decision requires or suggests that the Board deviate from the manner in which it handled the previous remand. Rather, the Panel's instructions to the Board are the same.

2. The Petition disregards the fact that the Panel's decision accounts for LSPI's failure to challenge the Board's findings of fact

The fundamental— and quite incorrect— premise of the Petition is that, by rejecting LSPI's contention that it should instruct the Board to "revisit all facets of the obviousness inquiry" the Panel was necessarily instructing the Board to employ a "rebuttal" or "knockdown" analysis. But there is no reasonable basis for interpreting the Panel's rejection of LSPI's argument in that manner. Indeed, there

is no reasonable concern that the Board would interpret the Panel's instruction as somehow inferring that it take a "rebuttal" or "knockdown" approach to weighing the objective evidence.

Rather, as the record in this appeal makes clear, the Panel's rejection of LSPI's requested "all facets" instruction properly addressed the parties' dispute as to whether LSPI had waived challenges to the Board's factual findings for lack of support by substantial evidence. Because LSPI's appeal in this case, unlike that in Appeal No. 2018-1141, challenged only the Board's finding of no nexus and its consequent decision not to consider LSPI's objective evidence of non-obviousness, Baker Hughes argued – and maintains – that LSPI had and has waived any other challenges that it could have, but did not, raise. See Appellant's Brief at 5; Baker Hughes Br. at 59-60. LSPI's Reply argued that it did not waive those challenges because the Board's failure to consider the objective evidence demanded that "all facets of the obviousness inquiry" be revisited anew. LSPI Reply Br. at 27. But having failed to challenge *any* of the Board's findings of fact as lacking support by substantial evidence, LSPI has plainly waived any such challenges.

By rejecting LSPI's proposed instruction, therefore, the Panel properly limited the issue on remand to the single one raised by LSPI on appeal; namely, whether the Board, having erred by finding a lack of nexus, is required to weigh the evidence of non-obviousness with the evidence of obviousness before reaching

its final conclusion of obviousness. That limitation is proper. *See, e.g., Power Integrations, Inc. v. Fairchild Semiconductor Intern., Inc.*, 711 F.3d 1348, 1381 (Fed. Cir. 2013) (finding that remand for a post-verdict accounting was not “an unlimited after-hours hunting license.”); *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83 (Fed. Cir. 1999) (“To hold otherwise would allow appellants to present appeals in a piecemeal and repeated fashion, and would lead to the untenable result that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.”).

The Petition mischaracterized the Panel’s decision as an instruction to the Board to adopt a “rebuttal” or “knockdown” approach, thus seeking to pursue challenges to the Board’s findings of fact that it held back from the Panel in an attempt to have a second chance to assert those challenges on remand.

C. The Panel’s decision does not violate principles of judicial review

Despite LSPI’s contrary characterization, the Panel’s decision did not “prohibit” or “bar” the Board from considering anything. Rather, it simply (and quite properly) denied LSPI’s request that the Panel instruct the Board to “reconsider all facets of its obviousness analysis on remand,” including those that LSPI did not challenge on appeal. *See Op. at 4; LSPI Reply Br. at 27.*

As LSPI itself argues, “the function of the reviewing court ends when an

error of law is laid bare.” Pet. at 17. But it is LSPI, and not Baker Hughes, that requested the Panel to provide additional instructions *mandating* that the Board reconsider unchallenged findings of fact, instructions that would have exceeded the Court’s function as a reviewing tribunal, rather than as a trier of fact. By rejecting LSPI’s requested instruction and remanding the case to the Board to consider all of the evidence, including the objective evidence, before reaching a conclusion regarding obviousness, the Panel in fact ensured that it did not exceed its appellate function.

III. CONCLUSION

To the extent LSPI is arguing that the Board should weigh the objective evidence against the substantial evidence of record, rather than a prior conclusion of obviousness, Baker Hughes agrees, and nothing in the Panel’s opinion is to the contrary. Indeed, that is what “weighing the evidence” involves. The Panel clearly instructed the Board to consider all of the evidence and to determine whether Baker Hughes met its burden to prove unpatentability. The Panel’s opinion merely prohibits LSPI from challenging the Board’s factual findings as lacking support by substantial evidence, either on remand or on any future appeal, because it failed to preserve any such challenges in this appeal.

Because the panel properly applied the law, neither rehearing nor rehearing *en banc* is warranted.

Dated: September 22, 2020

Respectfully submitted,
/s/ Herbert D. Hart III
HERBERT D. HART III
GEORGE F. WHEELER
AARON F. BARKOFF
PETER J. LISH
BEN J. MAHON
MCANDREWS, HELD & MALLOY,
LTD.
500 West Madison Street, Suite
3400
Chicago, Illinois 60661

(312) 775-8000
hhart@mcandrews-ip.com
gwheeler@mcandrews-ip.com
abarkoff@mcandrews-ip.com
plish@mcandrews-ip.com
bmahon@mcandrews-ip.com

Counsel for Appellee

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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Name: Herbert D. Hart III