

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re L'Nard Restorative Concepts, Inc.

Serial No. 74/375,406

Second Request for Reconsideration

Donald H. Zarley of Zarley, McKee, Thomte, Voorhees & Sease
for L'Nard Restorative Concepts, Inc.

Angela M. Micheli, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Simms, Cissel and Seeherman, Administrative
Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

On November 12, 1998, applicant filed a second request
for reconsideration of the Board's decision issued October
10, 1996. In that opinion, before finding applicant's
asserted mark primarily functional and lacking in acquired
distinctiveness, the Board determined that a 1989 decision
of the U.S. District Court for the Middle District of

Florida had no preclusive effect on the issues in this case. Applicant requested reconsideration of our decision and the Board, on October 30, 1998, denied applicant's request for reconsideration.

An applicant which has filed an appeal from a refusal of an Examining Attorney and received a final decision from the Board may file a request for reconsideration or modification. The request must be filed within one month from the date of the decision. See Trademark Rule 2.144. Here, applicant filed a request for reconsideration, and the Board then denied that request on October 30, 1998. There is no provision for the filing of a second request for reconsideration. Moreover, the record is closed once the appeal is filed (except as allowed by Rule 2.142), and evidence submitted thereafter, including with a request for reconsideration, is untimely. The Board's final decision will not be disturbed.¹

¹ In any event, we note that the court, both in its order on plaintiff's motion for preliminary injunction, and in its decision after final evidentiary hearing, repeatedly refers to the trade dress before it as consisting of a splint and an *anklet*. See page 3 of the court's order of October 7, 1988 and pages 2 and 5 ("plastic component part and accompanying anklet"), page 6 ("the L'Nard splint is brown and includes a yellow anklet with three straps designed to secure the splint to the patient's foot and ankle. Attached to the splint is a beige toe guard and stabilizer bar ..."), page 13 ("the plastic component, the anklet...") and page 15 ("the plastic component, the anklet...") of the court's final order issued July 10, 1989). Even if the court had reference to a padded or lined anklet, we note that there was

Applicant's second request for reconsideration is denied.²

no reference to the fleece lining attached to the back of the splint and the fourth strap designed to hold the leg in place against that soft lining. We cannot say that applicant has demonstrated that the same trade dress that was before the court is the subject matter of the instant application.

² The delay in acting on this request is regretted.

We decided that applicant's mark (below) was functional and, in any event, the evidence was not sufficient to permit registration under Section 2(f). We noted the utility of the soft fleece and anklet lining as well as the toe post. We noted that to the extent that the lining or padding covers only a portion of the leg, this may be less expensive than one that covers the entire leg. We also noted reasons for the particular height of the leg support (not too high and not too short). We also noted that applicant had admitted that its device was not designed arbitrarily since it must be useful, although applicant denied that the design was functional. Concerning 2(f), we said that mere sales alone as well as the fact that a photograph of the goods appeared in advertisements did not necessarily show promotion as a trademark or show purchaser recognition. We said that,

R. L. Simms

R. F. Cissel

E. J. Seeherman
Administrative Trademark
Judges, Trademark Trial and
Appeal Board

although applicant's design is somewhat different from competitive braces, applicant had not shown that potential purchasers would recognize these differences as indicating origin in applicant.

Along the way, we said that the foot orthosis device before the federal court on applicant's predecessor's claim of unfair competition was different from the one in this application. We noted that the court said that the trade dress before it was similar to the patented device. See the patented design shown below and the mark here sought to be registered.