

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB NOV. 29,99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re L'Nard Restorative Concepts, Inc.

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Serial No. 74/375,406

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Second Request for Reconsideration

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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).

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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.<sup>1</sup>

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<sup>1</sup> 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

Ser. No. 74/375,406

Applicant's second request for reconsideration is denied.<sup>2</sup>

R. L. Simms

R. F. Cissel

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

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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.

<sup>2</sup> The delay in acting on this request is regretted.