



## Attorney Argument, Without Record Evidence, Fails to Support Obviousness

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On appeal, HIMPP argued that the USPTO's failure to consider HIMPP's argument that certain claim elements were known in the prior art was contradictory to *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 41522 (2007), where the Supreme Court admonished the Federal Circuit for taking a rigid approach for determining obviousness based on record evidence without considering "the knowledge, creativity, and common sense" of one of skill in the art. The Federal Circuit rejected this argument, finding that HIMPP needed to support its obviousness assertion with more than mere conclusory statements and failed to "point to any evidence on the record." The Court further remarked that the USPTO cannot accept general conclusions about what is known in the art without documentary support, because to do so would create a slippery slope that would allow rejections to be made that were unsupported by any evidence.

Judge Dyk dissented, arguing that the majority's approach was inconsistent with KSR, which, in his opinion, allows examiners to rely on their knowledge and common sense in reviewing applications.

*K/S HIMPP v. HearWear Technologies, LLC*, 20131549 (Fed. Cir. May 27, 2014) [Lourie (opinion), Dyk (dissenting), Wallach]

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