

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>IN RE: SULZER HIP PROSTHESIS</b>	)	<b>Civil Action No.: 01-CV-9000</b>
<b>AND KNEE PROSTHESIS PRODUCT</b>	)	
<b>LIABILITY LITIGATION</b>	)	<b>ALL CASES</b>
	)	
<i>This document relates to:</i>	)	<b>(MDL No. 1401)</b>
<i>Raymond Butler</i>	)	
	)	<b>Judge Kathleen M. O'Malley</b>

**NOTICE OF SPECIAL MASTER DETERMINATION**

Class Member Raymond Butler, by and through his attorney Nelson Quinn, Esq. (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated April 19, 2004 on Appellant’s claim for Extraordinary Injury Fund (“EIF”) benefits from the Sulzer Settlement Trust.

Appellant appealed the decision of the Appellee, and contends that Appellee erred in his decision to deny Appellant’s claim for EIF Matrix Level III, IV and IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level III, IV, V and IX benefits.
2. Appellant has been deemed eligible for Matrix Level V benefits for permanent pain and weakness.
3. Appellant also seeks Matrix Level III benefits for his surgery of December 5, 2001; Matrix Level IV benefits for dislocations that occurred July 2, 2001, September 7, 2001, October 6, 2001 and November 14, 2001; and Matrix Level IX benefits for wage loss.
4. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level III benefits for his surgery of December 5, 2001; Matrix Level IV benefits for dislocations that occurred July 2, 2001, September 7, 2001, October 6, 2001 and November 14, 2001; and Matrix Level IX benefits for wage loss.

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After a thorough review of the appeal submitted by the Appellant and the response submitted by the Appellee, the Special Master finds as follows:

In his response to Appellant's appeal, Appellee indicates that Appellant is eligible for Matrix Level IX benefits for wage loss. Therefore, this Determination will not address that claim. The Special Master hereby directs the Claims Administrator, if he has not already done so, to immediately furnish Appellant with a revised benefit determination regarding that claim. Appellant retains his right to appeal that benefit determination in accordance with CAP 30.

The Special Master shall review Final Determinations only for an abuse of discretion by the Appellee, Claims Administrator. When an act of discretion is under review the reviewing party may not substitute its own notion of what is right for that of the Claims Administrator if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.

Appellant requests, for the first time upon appeal, that his claims be considered under Matrix Level IX if they are not eligible under the Matrix Levels that they were originally submitted.

Only claims that have been issued a Final Determination can be appealed and reviewed by the Special Master. Since Appellant did not submit a claim for Matrix Level IX benefits for his surgery of December 5, 2001 or dislocations of July 2, 2001, September 7, 2001, October 6, 2001 and November 14, 2001, a Final Determination was not issued regarding those Matrix Level IX claims. Therefore, they cannot be appealed or considered by the Special Master.

Appellant's request that his claims be considered under Matrix Level IX if they are not eligible under the Matrix Levels that they were originally submitted is DENIED.

By Order of the United States District Court, the Claims Administrator shall evaluate claims for EIF benefits according to the policies and procedures set forth in Claims Administrator Procedure ("CAP") 27.

Matrix Level III – Surgery of December 5, 2001

CAP 27 § 7(a) defines a Non-Affected Product as "a product that is not an Affected Product but which performs the same function as an Affected Product and which was implanted with the intention of replacing an Affected Product for a term not shorter than one year."

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CAP 27 § 7(b) states “If the product revised does not qualify as a Non-Affected Product pursuant to the requirements in 6(a) [sic] above, the Class Member is not eligible for payment under Matrix Level III.”

The operative report of Appellant’s December 5, 2001 procedure states “It was felt that the hip dislocated posteriorly and that the revision acetabular shell was in appropriate position and not causing the dislocation. It was also felt that it would be very difficult to remove the shell and that it would cause loss of bone stock and was not necessary.”

Appellant’s Non-Affected Product (acetabular shell) was not revised during his December 5, 2001 surgery. Therefore, Appellant did not undergo a NAPRS.

Appellee did not abuse his discretion in denying Appellant’s claim for Matrix Level III benefits for a surgery that was not a NAPRS.

Matrix Level IV – Dislocations of July 2, 2001, September 7, 2001, October 6, 2001  
and November 14, 2001

CAP 27 § 8 (c) states “Dislocations that occur more than ninety days from a CRS and dislocations that do not require a reduction under general anesthesia or intravenous sedation are not compensable under the EIF.”

There is no evidence that the July 2, 2001 and September 7, 2001 dislocations, or as Dr. Ravitch refers to them, subluxations, required reduction under general anesthesia or intravenous sedation.

The dislocations of October 6, 2001 and November 14, 2001 occurred more than 90 days following Appellant’s June 14, 2001 CRS.

Appellee did not abuse his discretion in denying these Matrix Level IV claims for dislocations / subluxations that are expressly barred by CAP 27.

By order of the Special Master, Appellee’s Final Determination of ineligibility for Appellant’s EIF Matrix Level III and IV claims is hereby AFFIRMED.

Appellant and Appellee have fifteen days from the date of this decision to submit a fact or principle they believe the Special Master did not consider in rendering a decision. **Such submissions may not be more than three pages in length. Exhibits are not to be attached to any such submission and will not be considered. Submissions are to be mailed to the following address:**

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Leo M. Spellacy, Sr., Esq.  
Special Master to the Sulzer Settlement Trust  
c/o Liaison Counsel  
1600 Midland Building  
101 Prospect Avenue West  
Cleveland, OH 44115

**SEP 01 2004**

If no response is received (postmarked) by \_\_\_\_\_, then the Special Master's Decision is final and may not be further contested or appealed.

**AUG 17 2004**

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Leo M. Spellacy, Sr., Esq.  
Special Master