

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

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

*This document relates to:
Lindsay Cropper*

) **Civil Action No.: 01-CV-9000**
)
) **ALL CASES**
)
) **(MDL No. 1401)**
)
) **Judge Kathleen M. O'Malley**

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Lindsay Cropper, by and through her attorney Anita Sherbanee, Esq. of the Law Firm Robinson, Calcagnie & Robinson ("Appellant"), appealed the decision of the Claims Administrator ("Appellee") in rendering a Final Determination dated January 29, 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 IV, V and IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level IV, V and IX benefits.
2. Appellant seeks Matrix Level IV benefits for loss of bone stock, Matrix Level V benefits for loss of bone stock, and Matrix Level IX benefits for living expenses, lost wages, loss of income from delay in start of career, increase in insurance rates, increased complications for future revision surgeries and loss of bone stock.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IV, V and IX benefits.

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

Notice of Special Master Determination

Lindsay Cropper

Page 2 of 4

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

Appellant has not appealed the Final Determination regarding her EIF Matrix Level IX claims for increase in insurance rates, increased complications for future revision surgeries, or loss of bone stock. Therefore, Appellee's Final Determination of ineligibility regarding those claims is final and may not be further contested or appealed.

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.

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 IV – Loss of Bone Stock

CAP 27 § 8(k) provides that "The Claims Administrator shall award [Matrix Level IV] Benefits in every case provided that he finds, in his discretion, and in the totality of the circumstances, that a Class Member suffered a Major Surgical Complication that was catastrophic and extraordinary. Catastrophic shall mean that the complication suffered prevented the Class Member from engaging in an activity of daily living. Extraordinary shall mean that the complication suffered by the Class Member was unique compared to other Class Members similarly situated."

Appellant has not proven that her bone loss prevented her from engaging in an activity of daily living and, therefore, it does not rise to the level of catastrophic as required by the Settlement Agreement and CAP 27. In addition, despite the Supplemental Declaration of John Lake, M.D., it is Appellee's opinion, based upon his review of thousands of claims, that bone loss is a common occurrence during hip replacement surgery; it is not unique compared to other Class Members similarly situated. Therefore, it does not rise to the level of extraordinary as required by the Settlement Agreement and CAP 27.

Because Appellant's bone loss does not rise to the level of catastrophic and extraordinary as defined by the Settlement Agreement and CAP 27, Appellee did not abuse his discretion in denying this claim for Matrix Level IV benefits.

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

Notice of Special Master Determination

Lindsay Cropper

Page 3 of 4

Matrix Level V – Loss of Bone Stock

In order to be eligible for Matrix Level V benefits, a Permanent Injury must be either Moderate or Severe, as defined by the Settlement Agreement and CAP 27 § 9(e), which state “To prove a Moderate injury, a Class Member must prove that he or she experienced pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker. To prove a Severe injury a Class Member must prove that he or she required the use of a wheelchair or underwent an amputation.”

Appellant has not submitted any evidence that her bone loss caused pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker; or that it required her to use a wheelchair or undergo an amputation.

Because Appellant’s bone loss does not satisfy the definition of Moderate or Severe, as required by CAP 27 and the Settlement Agreement, Appellee did not abuse his discretion in denying this claim for Matrix Level V benefits.

Matrix Level IX - Living Expenses

Section 4 of CAP 18 states “If a Class Member seeks compensation pursuant to Extraordinary Injury Fund Matrix Level IX, based on implantation of an Affected Product, he or she must file a Green Form within 180 days from the accrual of any injury for which the Class Member seeks Level IX benefits, if the Level IX claim does not arise from a Covered Revision Surgery, but in no event later than March 7, 2005.”

Appellant seeks EIF Matrix Level IX benefits for living expenses from August 1999 to April 2001, which is prior to her September 23, 2002 APRS. Therefore, this claim does not arise from a Covered Revision Surgery and, in accordance with CAP 18 § 4, the deadline for her to file a Green Form for this claim was the later of 180 days from the accrual of the injury or November 4, 2002. Appellant’s claim was not submitted until April 2003, well after the deadline.

Because it was not submitted within the timeframe prescribed by CAP 18, Appellee did not abuse his discretion in denying this claim for Matrix Level IX benefits.

Matrix Level IX – Lost Wages

In her appeal, Appellant does not indicate the amount of lost wages that she is claiming, or the period for which lost wages is being claimed. However, Appellee included with his response a copy of Appellant’s Green Form which indicates, on Attachment 1, that she is claiming \$5,626 in lost wages for work missed during revision recovery and \$75,000 for loss of income due to the delay in beginning her career.

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

Notice of Special Master Determination

Lindsay Cropper

Page 4 of 4

CAP 27 § 13(b)(1) states that "...a loss of income is "catastrophic" if...it results in direct economic loss, provable by *objective* evidence, of \$20,000 or more." [emphasis added]

Appellant's estimated lost income due to the delay in beginning her career is purely speculative and not supported by objective evidence. Therefore, it cannot be considered and Appellant's actual loss of income is \$5,626, well below the \$20,000 threshold require by CAP 27.

Because the amount of lost income supported by objective evidence is substantially less than \$20,000, Appellee did not abuse his discretion in denying this claim for Matrix Level IX benefits.

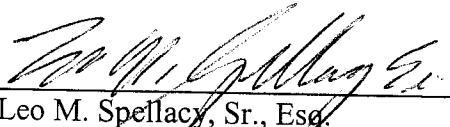
By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level IV, V and IX claims is hereby **AFFIRMED**.

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:**

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

If no response is received (postmarked) by **AUG 02 2004**, then the Special Master's Decision is final and may not be further contested or appealed.

JUL 16 2004
Date


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