

**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>John S. Cummins</i>	)	
	)	<b>Judge Kathleen M. O'Malley</b>

**NOTICE OF SPECIAL MASTER DETERMINATION**

Class Member Bishop John S. Cummins, by and through his attorney Stephen A. McFeely, Esq. of the Law Firm Foley & Lardner (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated May 26, 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 II benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level II benefits.
2. Appellant seeks Matrix Level II benefits for his surgery of June 30, 1999.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level II.

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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:

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.

A Preliminary Determination of ineligibility regarding Appellant's Orange Form claim for APRS benefits and Green Form claim for EIF Matrix Level II benefits was issued January 5, 2004 and a Final Determination was issued May 26, 2004. Both the Preliminary and Final Determinations indicate that Appellant's Orange Form claim was not timely and that his EIF Matrix Level II claim was deemed ineligible because "A timely Blue or Orange Form did not accompany the Green Form submission."

The Green Form itself specifically states "A timely *Blue* or *Orange Form* (whichever appropriate) must have been completed in addition to this EIF Benefits Form (*Green Form*)."

Since Appellant did not undergo an APRS, a Blue Form was the appropriate claim form that had to be filed in addition to his Green Form. Appellant did not submit a Blue Form. He alleges the "initial submission and any resultant confusion was the fault of the staff of Dr. Reynolds." However, even if Appellant believed he had undergone an APRS, rendering an Orange Form the appropriate claim form to submit, the deadline for submitting a timely Orange Form was November 4, 2002. Appellant's Orange Form was not submitted until July 23, 2003.

The Federal District Court has explained the importance of the deadlines prescribed in the Settlement Agreement [*In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, 01-CV-9000 at 1 through 20 (N.D.O. February 6, 2004) (Docket #1714)].

Because Appellant did not submit a timely Blue or Orange Form (whichever appropriate), in addition to his Green Form, Appellee did not abuse his discretion in denying Appellant's claim for EIF Matrix Level II benefits.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level II claim is hereby AFFIRMED.

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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:**

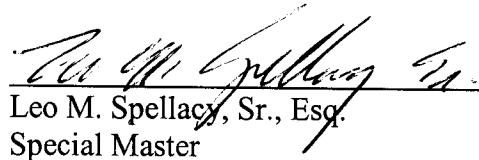
Leo M. Spellacy, Sr., Esq.  
Special Master to the Sulzer Settlement Trust  
c/o Liaison Counsel  
1600 Midland Building  
101 Prospect Avenue West  
Cleveland, OH 44115

**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