

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

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

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Diana Elsbree, by and through her attorney Steven M. Tindall, Esq. of the Law Firm Lieff, Cabraser, Heimann & Bernstein (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated February 2, 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 IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level IX benefits.
2. Appellant seeks EIF Matrix Level IX benefits for lost income.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IX benefits.

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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.

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.

CAP 27 § 13(b) (1) states, in pertinent part, that “...a loss of income is “catastrophic” if, in the judgment of the Claims Administrator, it results in direct economic loss, provable by objective evidence, of \$20,000 or more.”

With her initial Green Form submission, Appellant included a Declaration “based on facts known to me and could and would testify to them if called to do so, except where I make a statement on information and belief, in which case I am informed and believe the statement to be true.” In this Declaration, Appellant states that outside labor had to be hired because she was not able to work in the vineyard in her normal capacity from September 2000 through August 2002 because of her Affected Product, and the cost of said outside labor totaled \$17,336.50.

Appellant also submitted to the Claims Administrator a “summary of costs and facts for you to substantiate excessive losses” dated August 2, 2002 from Chuck Elsbree, which indicates that Appellant’s lost income totaled \$18,360.00

After receiving a Preliminary Determination requiring tax forms to support her claim for lost wages, Appellant submitted tax forms and alleged that the tax forms prove her lost wages are \$83,520.

The October 10, 2003 letter from Appellant’s tax preparer states labor is contained in the line item for repairs and maintenance for tax years 1998 and 1999, and in vineyard operations in the years 2000 through 2002. However, neither the tax preparer nor Appellant has proven or even alleged that the only thing included in those line items is labor. Obviously, expenses related to repairs and maintenance and vineyard operations, excluding the labor hired to replace Appellant who could not work due to her Affected Product, cannot be considered when calculating Appellant’s lost wages.

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Because the difference between Appellant's initial lost wages claim of \$17,336.50 is close to the \$18,360 estimation of lost wages calculated by Mr. Elsbree, but vastly less than the \$83,520 being claimed in her appeal, it would be logical to assume that the majority of that discrepancy relates to repairs and maintenance and/or vineyard operations, and not lost wages.

Appellee, Claims Administrator, did not abuse his discretion in denying Appellant's claim for Matrix Level IX benefits for lost wages because she did not submit sufficient objective evidence proving those lost wages exceed \$20,000.

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

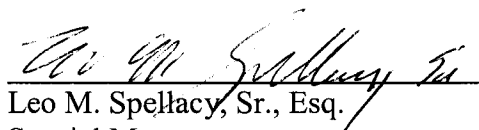
Appellant and Appellee have fifteen days from the date of this decision to submit a fact or principle they believe the Special Master did not consider in rendering a decision. **Such submissions may not be more than three pages in length. Exhibits are not to be attached to any such submission and will 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 MAY 11 2004, then the Special Master's Decision is final and may not be further contested or appealed.

APR 26 2004

Date


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