

**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>Kirk Kimmerling, D.D.S</i>	)	
	)	<b>Judge Kathleen M. O'Malley</b>

**NOTICE OF SPECIAL MASTER DETERMINATION**

Class Member Kirk Kimmerling, D.D.S., by and through his attorney Scott C. Commander, Esq. of the Law Firm Mayfield, Commander & Pound (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated March 5, 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 II and IX benefits.
2. Appellant has been deemed eligible for Matrix Level II benefits for his surgeries of January 19, 2000 and April 12, 2001.
3. Appellant also seeks Matrix Level IX benefits for income loss.
4. 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.

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 (N.D.O. February 6, 2004) (Docket #1714)].

Section 4.6(d) of the Settlement Agreement provides that Class Members and/or the Plaintiff's Counsel shall have forty-five (45) days from the date of the Preliminary Determination by the Claims Administrator to provide any additional information or documentation supporting his/her position. If the Class Member and/or Plaintiff's Counsel does not contest the Preliminary Determination in accordance with Section 4.6(d), **“such Preliminary Determination shall be deemed to be a Final Determination in accordance with Section 4.6(e) and such Class Member and/or Plaintiff's Counsel shall have no further right to contest such Final Determination.”** [emphasis added]

The fact that Appellant did not contest the Preliminary Determination regarding his EIF Matrix Level IX claim within forty-five (45) days of its issuance is not in dispute.

Appellant argues that he should be granted an extension of time in which to contest the Preliminary Determination because missing the deadline was the result of a mistake made by the paralegal assigned to this matter by Appellant's counsel.

CAP 29 explains how Appellee is to exercise discretion in granting extensions. An attorney's unawareness of a clearly articulated deadline, miscalculation of a deadline, or a Class Members reliance on the attorney are not a basis for an extension. CAP 29 follows the law and imputes the negligence of the attorney to the Appellants. To hold otherwise would create a situation wherein the attorney would be protected for his or her negligence.

Appellant has not submitted any evidence of circumstances giving rise to a permissible extension of time in accordance with CAP 29. Therefore, Appellee did not abuse his discretion in denying Appellant's request for an extension of time in which to contest his Preliminary Determination.

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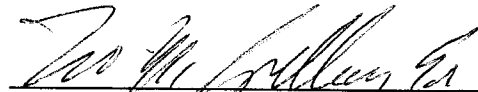
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In accordance with Section 4.6(d) of the Settlement Agreement, the Final Determination regarding Appellant's Matrix Level IX claim for income loss became final on December 2, 2003 and Appellant forfeited his right to further contest or appeal that decision. Therefore, by order of the Special Master, Appellant's appeal is hereby DISMISSED.

JUL 16 2004

Date

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