

**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>Patricia M. Kosters</i>	)	
	)	<b>Judge Kathleen M. O'Malley</b>

**NOTICE OF SPECIAL MASTER DETERMINATION**

Class Member Patricia M. Kosters, by and through her attorneys Ronald S. Goldser, Esq. and Stacy K. Hauer, Esq. of the Law Firm Zimmerman Reed (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated January 21, 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 Matrix Level IX benefits for an additional revision surgery, physical pain/reduction in quality of life, medical expenses, pain and suffering, and wage loss.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF Matrix Level IX benefits for an additional revision surgery, physical pain/reduction in quality of life, and medical expenses.
4. At the time of this appeal, Appellant had not been issued a Final Determination regarding her Matrix Level IX claim for pain and suffering, and wage loss. Those claims, therefore, are not subject to this appeal.

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

Notice of Special Master Determination

Patricia M. Kusters

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:

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.

Additional Revision Surgery

Appellant alleges that “she has been advised that she should undergo an additional revision surgery, but for the fact that she has so little hip bone remaining as a result of the first two surgeries that such a revision surgery would be devastating to her. As such, she not only will not, but cannot undergo an additional revision surgery at this time.”

CAP 27 § 13(a)(3) provides that “injuries contemplated by the Settlement Agreement or a CAP, but which are not compensable under the Settlement Agreement or the CAP in question, shall not be compensable pursuant to Matrix Level IX.”

Annex IV of the Settlement Agreement and CAP 27 anticipate and provide for Affected Product revision surgeries that are indicated but for a medical condition under Matrix Level I. Since Appellant’s claim is contemplated by Matrix Level I, Appellee did not abuse his discretion in denying this Matrix Level IX claim.

Not one of the medical records submitted by Appellant indicates that revision of her Reprocessed Shell is necessary or, if revision surgery were necessary, that there would be a medical condition to prevent her from undergoing such a surgery.

Because there is no evidence that an APRS is indicated at the present time, or that a medical condition would prevent Appellant from undergoing a revision surgery, she is not eligible for Matrix Level I benefits.

Physical Pain / Reduction in Quality of Life

In order to complete an application for EIF benefits under Matrix Level IX, the Green Form requires “A completed ‘Physician Declaration’ from your treating surgeon wherein he/she causally relates the injury/damage (for which compensation under Matrix Level IX I sought) to a CRS” be submitted.

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

Notice of Special Master Determination

Patricia M. Kusters

Page 3 of 4

CAP 30 § 3 states, in pertinent part, “No evidence, documentary or testimonial, real or illustrative, may be introduced during the course of the appeal if it was not first submitted to the Claims Administrator within 45 days of the issuance of the Preliminary Determination, the contest of which gave rise to the Appealed Final Determination.”

In accordance with CAP 30 § 3, the Physician Declaration Form signed by Dr. Benson on October 30, 2003 and included with her appeal cannot be considered because it was not submitted to the Claims Administrator by October 6, 2003 (47 days from the date of the Preliminary Determination since the 45<sup>th</sup> day fell on a Saturday). It should be noted that even if this Physician Declaration Form were to be considered it would not render Appellant eligible for benefits because it does not causally relate the injury/damage for which Appellant is seeking Matrix Level IX benefits to her CRS. In fact, it indicates that Dr. Benson believes the iliopsoas tendonitis is the result of the loosening of her acetabulum, not the result of her CRS.

The Physician Declaration Form signed by Dr. Benson on September 13, 2003 does not address this claim, which renders the claim incomplete and, therefore, invalid.

Appellee did not abuse his discretion in denying Appellant’s incomplete claim for physical pain / reduction in quality in life.

Medical Expenses

CAP 27 § 13(a)(3) provides that “injuries contemplated by the Settlement Agreement or a CAP, but which are not compensable under the Settlement Agreement or the CAP in question, shall not be compensable pursuant to Matrix Level IX.”

Section 3.9(c) of the Settlement Agreement anticipated and provided for medical expenses of an APR necessitated by an Affected Product.

Since medical expenses are contemplated by the Settlement Agreement, they are not compensable under Matrix Level IX in accordance with CAP 27.

Appellee did not abuse his discretion in denying Appellant’s Matrix Level IX claim for medical expenses; however, he shall review Appellant’s claim as a claim for subrogation benefits and make such payments as required by the Settlement Agreement.

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:**

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

Notice of Special Master Determination

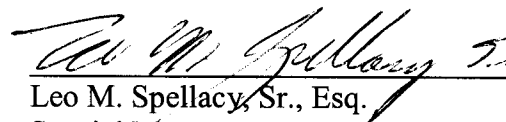
Patricia M. Kusters

Page 4 of 4

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 JUN 18 2004, then the Special Master's Decision is final and may not be further contested or appealed.

JUN 03 2004  
Date

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