

**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>Susan F. Kuhn</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Susan F. Kuhn, by and through her attorney Tommy Jacks, Esq. of the Law Firm Mithoff & Jacks (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated June 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 benefits.

The factual findings of this matter are as follows:

1. Appellant submitted an untimely claim for EIF Matrix Level IV, V and IX benefits.
2. Appellant seeks Matrix Level IV benefits for abductor weakness, Matrix Level V benefits for pain and gait alteration and acetabular bone loss and future complications, and Matrix Level IX benefits for emotional distress and altered quality of life.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for EIF 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 at 17 through 20 (N.D.O. February 6, 2004) (Docket #1714)].

The fact that Appellant's EIF claim was not submitted within the timeframe prescribed by the Settlement Agreement is not in dispute. Appellant admits the filing was untimely but argues that the neglect causing the untimely filing should be excused.

Appellant's counsel correctly calculated and calendared her EIF claim. However, an employee of Appellant's counsel "missed a reminder on the calendar and was absent from the office on the date the EIF claim was due."

CAP 29 explains how Appellee is to exercise discretion in granting extensions of filing deadlines. It 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.

The negligence of Appellant's counsel is not a permissible basis for the granting of a CAP 29 extension of time. Therefore, Appellee did not abuse his discretion in denying Appellant's request for a deadline extension and her claim for EIF benefits.

It should be noted that the merits of Appellant's EIF Matrix Level I claim were not reviewed because the untimeliness of her Green Form rendered her EIF claim invalid.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF 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:**

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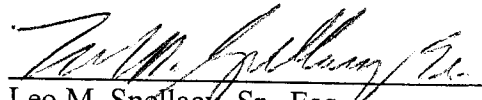
Leo M. Spellacy, Sr., Esq.
Special Master to the Sulzer Settlement Trust
c/o Liaison Counsel
1600 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115

SEP 29 2004

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

SEP 14 2004

Date



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