

**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>Lawrence M. Shall, M.D.</i>)	
)	Judge Kathleen M. O'Malley

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Lawrence M. Shall, M.D., by and through his attorney John L. Watts, Esq. of the Law Firm Breit, Drescher & Imprevento (“Appellant”), appealed the decision of the Claims Administrator (“Appellee”) in rendering a Final Determination dated January 21, 2004 on Appellant’s claim for 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 V and IX benefits.

The factual findings of this matter are as follows:

1. Appellant submitted a claim for EIF Matrix Level V and IX benefits.
2. Appellant seeks Matrix Level V benefits for saphenous vein phlebitis, and Matrix Level IX benefits for need for revision surgery, lost wages, wound breakdown, need for scar revision, and deep venous thrombosis.
3. Appellee issued Preliminary and Final Determinations that Appellant was not eligible for Matrix Level V benefits for saphenous vein phlebitis, and Matrix Level IX benefits for lost wages, wound breakdown, need for scar revision, and deep venous thrombosis.

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Appellant's Matrix Level IX claim for need for revision surgery is not subject to this appeal and will not be addressed in this Determination.

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.

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.

Matrix Level V – Saphenous Vein Phlebitis and
Matrix Level IX – Deep Vein Thrombosis

In his appeal, Appellant states "The saphenous phlebitis and deep vein thrombosis should be considered as a single extraordinary injury fund claim rather than two separate claims" and "Accordingly, pursuant to CAP 27 § 9(b) Dr. Shall has received a permanent vascular injury as a direct result of the corrective revision surgery."

Appellee reviewed these as two separate claims because Appellant's Green Form indicates they are two separate claims; a Matrix Level V claim for saphenous vein phlebitis and a Matrix Level IX claim for deep vein thrombosis.

The Special Master agrees that the saphenous vein phlebitis and deep vein thrombosis should be considered as one claim under Matrix Level V. Therefore, Appellee did not abuse his discretion in denying Appellant's Matrix Level IX claim for deep vein thrombosis that is part of his Matrix Level V claim.

CAP 27 § 9(e) provides "If, in the judgment of the Claims Administrator the permanent injury Claimed by a Class Member does not qualify as either Moderate or Severe the Class Member shall not be eligible for benefits from the EIF for that injury" and "To prove a Moderate injury, a Class Member must prove that he or she experienced pain, sensory loss or gait alteration that required narcotics and/or use of a cane or walker. To prove a Severe injury, a Class Member must prove that he or she required the use of a wheelchair or underwent an amputation."

Because there is no evidence that Appellant's saphenous vein phlebitis and deep vein thrombosis rise to the level of Moderate or Severe as required by CAP 27, Appellee did not abuse his discretion in denying Appellant's Matrix Level V claim for a permanent injury.

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Wound Breakdown

CAP 27 § 13(a)(1) states that “Injuries such as bone, tissue or muscle loss...*infection*, deformed hip, knee or femur...are properly classified as Permanent Injuries and/or Major Complications which must be Claimed under Matrix Level IV or V, and to be compensable must meet the criteria of Matrix Levels IV or V to qualify for EIF benefits.”

Appellee did not abuse his discretion in denying Appellant’s claim for Matrix Level IX benefits for a wound infection that must be claimed under Matrix Level IV in accordance with the terms of CAP 27.

In order to qualify for Matrix Level IV benefits, CAP 27 § 8(b) provides that a wound infection must require surgical debridement with prosthesis retention, resection arthroplasty, hip arthrodesis, or reimplantation. Appellant’s infection was treated with irrigation, dressing changes and antibiotics. Therefore, he is not eligible for Matrix Level IV benefits for a wound infection that did not require surgical debridement with prosthesis retention, resection arthroplasty, hip arthrodesis, or reimplantation, pursuant to the terms of CAP 27.

Need for Scar Revision

Compensation under Matrix Level IX for future surgery to improve the scar caused by the infection that occurred after Appellant’s CRS is specifically barred by CAP 27 § 13(a)(4) which provides that “Injuries or damages that have not occurred within the time periods allotted by the Settlement Agreement shall not be eligible for compensation.”

Wage Loss

Appellee’s argument that Appellant did not lose any income because “despite missing one month of work in 2001 as a result of APRS, Appellant’s income was approximately 105.5% of his average income over the preceding two years” is flawed.

The May 30, 2002 letter from Jane Summerlin proves that Appellant missed 22 days of work from January 4 (the date he was scheduled to return to work) through January 25 (he returned to work on January 26). The November 12, 2003 letter from Dr. Reynolds evidences that he was unable to work during this 22 day period due to his APRS. Even though Appellant’s income in 2001 was greater than in 1999 and 2000, it was less than it would have been had he been able to work for those 22 days in January 2001.

At issue, however, is the amount of lost wages that can be proven by objective evidence. Ms. Summerlin’s letter of November 13, 2003 is not objective evidence because the collections amount is an estimate and no documents supporting that calculation were provided. Appellant’s calculation dividing his 2001 income by 11 months is not accurate

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because Appellant did not miss an entire month of work, only 22 days. It is the Special Master's opinion that the most reasonable calculation to determine Appellant's lost wages would be to divide his 2001 income by 343 (the number of days worked in 2001) and multiply that daily rate by 22 (the number of days he was unable to work due to his APRS). That calculation results in lost wages totaling \$30,259.

By order of the Special Master, Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level V and IX claim for saphenous phlebitis and deep vein thrombosis, wound breakdown and scar revision is hereby **AFFIRMED**. Appellee's Final Determination of ineligibility for Appellant's EIF Matrix Level IX claim for lost wages is hereby **REVERSED** and that claim is remanded back to the Claims Administrator for further determination pursuant to 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:**

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 28 2004, then the Special Master's Decision is final and may not be further contested or appealed.

JUN 11 2004

Date


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