

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

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

*This document relates to:
Henry Shapiro*

) **Civil Action No.: 01-CV-9000**
)
) **ALL CASES**
)
) **(MDL No. 1401)**
)
) **Judge Kathleen M. O'Malley**

NOTICE OF SPECIAL MASTER DETERMINATION

Class Member Henry Shapiro, by and through his attorney Fabrice Vincent, Esq. ("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 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 that “...a loss of income is “catastrophic” if...it results in direct economic loss, provable by *objective* evidence, of \$20,000 or more.” [emphasis added]

Because of the type of business he engages in, Appellant alleges that “it is extremely difficult to arrive at a precise figure of how much the revision hip surgery cost me in lost income...a more accurate way of determining this would be to arrive at an amount that represents missed opportunities as a result of being incapacitated because of the revision surgery.”

Missed opportunities cannot be considered a direct economic loss because they cannot be proven by objective evidence.

The only objective evidence submitted by Appellant were his tax records for 2001 and 2002. Appellant indicates that he was unable to work for approximately 6 months following his June 26, 2001 APRS, and that is the period of time for which he is seeking EIF benefits for lost income. His tax records indicate that his adjusted gross income was more than 2.5 times greater in 2001 than 2002 and it is difficult for the Claims Administrator to speculate on the “missed opportunities.”

Appellee did not abuse his discretion in denying Appellant’s claim for EIF Matrix Level IX benefits for an alleged income loss that was not proven by objective evidence.

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

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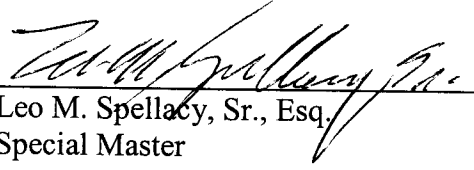
Appellant and Appellee have fifteen days from the date of this decision to submit a fact or principle they believe the Special Master did not consider in rendering a decision. **Such submissions may not be more than three pages in length. Exhibits are not to be attached to any such submission and will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

MAY 27 2004

Date


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