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Zimmer Durom Hip Settlement Essentially Unchanged After May 4 Hearing

(May 13, 2016, 4:47 PM ET) -- NEWARK, N.J. — Zimmer Inc. on May 9 submitted a case management order that essentially adopts a controversial state/federal settlement of Durom Cup hip claims (In Re: Zimmer Durom Cup Products Liability Litigation, MDL Docket No. 2158, No. 09-4414, D. N.J.). (Proposed order available. Document #28-160519-004X.)

The proposed case management order, submitted by Zimmer counsel Andrew L. Campbell of Faegre Baker Daniels in Indianapolis, requires that all plaintiffs and persons with unfiled claims participate in the settlement process by May 31 or face possible dismissal of their claims at Zimmer's request. All claimants must provide required documentation to Zimmer, after which the defendant will decide if the claim is for a base award or for a fixed award and make an offer based on settlement agreement criteria.

Claimants have a choice of accepting Zimmer's award or requesting mandatory mediation on their eligibility and claim categorization only. The parties will split the cost of mediation, and each is responsible for travel expenses.

The agreement says mediation will be conducted by mediators in Florida, Illinois and California.

When Case Discovery Resumes

The proposed order stays case-specific discovery "so long as the Settlement Agreement remains in effect." It may resume when an eligible plaintiff does not accept Zimmer's award amount and the plaintiff and Zimmer file a "Joint Notice of Unsettled Case."

The settlement agreement provides a base award of \$175,000 for plaintiffs who have undergone revision surgery. That can be reduced by \$20,000 to \$75,000 depending on when, over the course of eight years, the hip implant fails.

If the Durom Cup hip was implanted after July 22, 2008, the award will be reduced by \$25,000. For plaintiffs between ages 70 and 80, awards can be reduced by \$10,000 to \$30,000.

Plaintiffs who are not represented by counsel at the time their participation is executed will see a 29 percent reduction in their award.

Base Award Enhancements

Base award plaintiffs can have their award enhanced by \$75,000 if they have bilateral revision surgery. If they required additional revision surgery, they will receive a \$50,000 enhancement. If they suffered a dislocation, they will get an enhancement of \$5,000 per dislocation up to \$15,000.

Claimants may also receive compensation for "extraordinary injury or loss." That includes injury within three days of hospital discharge, permanent and severe disability and lost wages of at least 20 percent per year.

Claimants may also be offered a fixed award of \$25,000 that is not subject to reductions or enhancement except the 29 percent reduction if they are not represented by counsel. The maximum fixed award is \$50,000.

Claimants will be offered fixed awards if revision surgery occurred less than 180 days after implant, if the claimant died of unrelated causes, if the claim is otherwise barred by the applicable statute of limitations or if revision surgery was due to infection, trauma or causes unrelated to the Durom Cup.

Deadlines

The program establishes deadlines of May 31 for registration, Aug. 1 for Zimmer to notify claimants of award offers, Sept. 15 to accept Zimmer's award and Sept. 15 to seek mediation.

If 90 percent of registered eligible claims don't complete the categorization process and accept Zimmer's offer without mediation, Zimmer can terminate the agreement or "enforce it." Zimmer is obligated to make a payment if 67 percent of eligible claimants offered a mediation settlement accept their offer by Sept. 29.

Claimants must pay a common benefit fee of up to 4 percent of gross payments. Claimants are responsible for any third-party liens.

\$314.6M Liability

The settlement agreement says it is a private settlement and does not state its total value or how many cases it expects to settle. In its 2015 Form 10-K filed with the U.S. Securities and Exchange Commission, Zimmer said that as of Dec. 31, its remaining liability for all Durom Cup claims is \$314.6 million.

The proposed case management order followed a May 4 hearing before Judge Susan D. Wigenton. The judge told counsel to prepare a case management order after the hearing.

Some plaintiff attorneys objected to the process as a “forced settlement” that stalls the cases of nonparticipating plaintiffs for an indefinite time as long as the settlement agreement is in effect. The agreement does not have an expiration date, and settling counsel have said it could take up to 18 months.

Remand Motions Premature

A number of plaintiffs’ counsel filed motions to remand their cases, but Judge Wigenton said the motions are premature as long as the settlement agreement is in play.

Zimmer temporarily suspended distribution of the Durom Cup on July 22, 2008. The hip is a metal-on-metal design the plaintiffs say fails prematurely and creates metal debris that causes injury and requires replacement surgery.

Claimants’ liaison counsel, which negotiated the settlement, are represented in the settlement agreement by W. Mark Lanier of the Lanier Law Firm in Houston and Christopher A. Seeger of Seeger Weiss in New York.

Zimmer is represented by J. Stephen Bennett of Faegre Baker Daniels of Fort Wayne, Ind., and Campbell.

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