ATTACHMENT C

RESPONDENT'S ARGUMENT

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Attached is the RESPONDENT'S ARGUMENT

Ref. No. 2021-0533
AOH Case No. 2021100145
In re Dagmar WATERS

This is in response to the Proposed Decision of the Administrative Law Judge dated April 11, 2022, with Ref. No. 2021-0533. We would appreciate it if it could be attached to the case which will come before the CALPERS Board in June, 2022.

[redacted]

Anthony Waters

[redacted]

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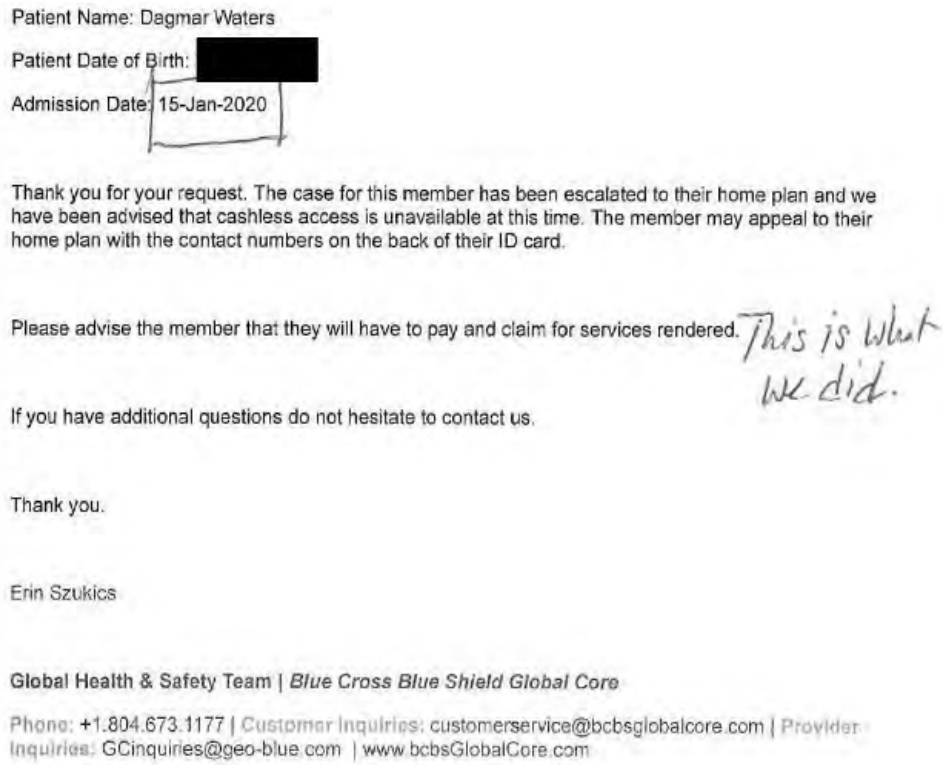
Ref. No. 2021-0533
AOH Case No. 2021100145
In re Dagmar WATERS

This is in response to the Proposed Decision of the Administrative Law Judge dated April 11, 2022, with Ref. No. 2021-0533.

1. *Precedent.* No part of the Proposed Decision should be designated as precedent, in whole or in part, if it is adopted.

2. *Background*. This case involves a hip replacement that was approved by Blue Shield (insurers are collectively referred to as Blue Shield) and then six weeks, according to Blue Shield, was denied. To elaborate, Blue Shield gave pre-approval for the operation to take place within a certain time period; however, due to an unforeseen infection, surgery was delayed. The respondent sought prior approval from Blue Shield again, after the infection was cured, and received the following email instructing them to "pay and claim for services rendered". What was received was not a denial as Blue Shield claims, and the judge In his opinion notes.



Patient Name: Dagmar Waters
Patient Date of Birth: [redacted]
Admission Date: 15-Jan-2020

Thank you for your request. The case for this member has been escalated to their home plan and we have been advised that cashless access is unavailable at this time. The member may appeal to their home plan with the contact numbers on the back of their ID card.

Please advise the member that they will have to pay and claim for services rendered. This is what we did.

If you have additional questions do not hesitate to contact us.

Thank you.

Erin Szukics

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In light of the fact that the surgery had already been approved, this would lead any reasonable person to believe that nothing had changed with regard to approval for the operation.
In fact, by not re-approving the surgery Blue Shield had cleverly turned a pre-approved "urgent" surgery into one that was not pre-approved – according to Blue – and thus could only be paid if

it were an "emergency". Blue Shield proposed this theory only at the time of the trial and not before. They produced no records indicating that a second review was ever undertaken by Blue Shield staff or doctors. An emergency is defined as “an unexpected medical condition . . .”. The patient had been suffering for a period of time so quite obviously it was not “unexpected”. The patient had been tricked by Blue Shield. Blue Shield was now in a position to decline payment because it had cleverly converted the claim from an urgent one to one for an emergency.

3. *Errors*. The Proposed Decision errors on several points of law and fact.

4. First, Blue Shield is either guilty of *fraudulent inducement* or should be subjected to *promissory estoppel*. It fraudulently induced the patient into believing that the claim would be paid if she proceeded with the surgery then submitted the claim, but knowing that it could now refuse the claim. Alternatively, with regard to promissory estoppel, it had given approval for the surgery – it had promised to pay. It should be estopped from now denying the claim.

5. Second, and again alternatively, Blue Shield breached the contract with the patient by refusing to pay a covered claim.

6. Third, the patient was denied the due process right to cross-examine Blue Shield’s witnesses. Blue Shield refused and refuses to produce records pursuant to a subpoena. These are the records in which it approved the surgery. In those records would be the medical opinion supporting the approval of the operation which would then allow respondent to effectively cross examine Blue Shield's expert. Blue Shield refused to produce those records asserting, contrary to law, that patient records are “proprietary.” There should be a presumption again Blue Shield as to the contents of those medical records that it refused to produce. That presumption would then contradict the new experts – who worked for Anthem Health, of which Blue Shield of California is a sub-unit. CALPERS also failed to provide the rationale for why they requested the hearing in the first place. The patient learned only from the judge’s ruling that on September 2, 2021, by Kimberly A. Malm, in her official capacity as Chief of CalPERS’ Strategic Health Operations Division, filed a Statement of Issues for purposes of the appeal.

7. Fourth, Blue Shield did not make these records available to expert witnesses hired by the Department of Managed Health Care, or CALPERS. This includes records from November 2019 to January 2020 when Blue Shield claims its experts reviewed the claim. This prejudiced respondent in the additional following ways. Blue Shield has records indicating that the respondent had therapy for the hip in 2018, and that the condition had deteriorated during 2019, leaving both expert witnesses with the impression that treatment was sought *only* during the five months preceding surgery. This impression is reflected in the opinion of Blue Shield Dr. Chen, the DMHC expert, and Dr. Jebson. Blue Shield allowed that misimpression and did not correct it before the court.

8. Fifth, the fact that the operation had been approved should have raised a presumption in favor of respondent, which then required Blue Shield to present evidence of improvement before reversing its decision.

9. Sixth, the judge failed to acknowledge that on the Evidence of Coverage (p. 28) it is written that coverage is extended when a condition is “likely to result in prolonged temporary

impairment…increase the risk of necessitating more complex or hazardous treatment [such as a broken hip]…could develop into a chronic illness or inordinate physical or psychological suffering of the patient." The treatment described in court by Dr. Jebson would have involved further use of opiates, and cortisone injections to facilitate a thirty-hour airplane trip, and then a wait in Chico, California, for 2-3 months to schedule an "elective" surgery during which the patient was at high risk for a fall, and a broken hip. Dr. Jebson then submitted academic articles to validate his position which had nothing to do with definitions of inordinate suffering, definitions, risks of a hip fracture, the dangers of opiate, or cortisone treatments. Those had not been submitted prior to hearing, thereby denying respondent an opportunity to effectively cross-examine

Respondent is asking that (1) Blue Shield be required to produce all medical records and documents in its possession according to the subpoena; (2) this matter be set for re-hearing after those records have been produced; (3) Blue Shield defense be estopped from denying the claim based on promissory estoppel or be found to have committed fraudulent inducement and likewise the claim should be allowed.