

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEE DELANEY,

Claimant,

vs.

NORDSTROM, INC.,

Employer,  
Self-Insured,  
Defendant.

**FILED**  
JUL 25 2019  
WORKERS' COMPENSATION

File No. 5068862

ALTERNATE MEDICAL

CARE DECISION

Head Note: 2701

On July 15, 2019, claimant Dee Delaney filed an application for alternate care under Iowa Code section 85.27(4) and 876 Iowa Administrative Code section 4.48. The defendant, Nordstrom, Inc. filed an answer denying liability for the injury giving rise to the care.

In a brief, Nordstrom states that it desires more time to conduct further review of Delaney's condition and the total knee replacement surgery recommended by Nicolas Noiseux, M.D., an authorized treating physician. Nordstrom admits liability for a meniscal tear to Delaney's right knee, but is not ready to concede liability for the symptoms relating to the osteoarthritis in Delaney's right knee, which are a factor in the recommendation of total knee replacement surgery. Nordstrom elaborates that "the issue is not whether [the d]efendant will authorize care—the issue is whether the need for total knee replacement is *causally connected* to the work injury." (emphasis in original)

Liability for the alleged injury is often a threshold issue when the agency considers an application for alternate care. See, e.g., *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 198–99 (Iowa 2007). Such an application cannot be filed "if the liability of the employer is an issue. If an application is filed where the liability of the employer is an issue, the application will be dismissed without prejudice." 876 IAC 4.48(7). The Iowa Supreme Court has "emphasize[d] that the commissioner's ability to decide the merits of a section 85.27(4) alternate medical care claim is limited to situations where the compensability of an injury is conceded, but the reasonableness of a particular course

of treatment for the compensable injury is disputed.” *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 197 (Iowa 2003).

Here, even though Nordstrom has conceded that Delaney sustained an injury to her right knee arising out of and in the course of employment that caused a meniscal tear, the defendant has not conceded that the injury caused an aggravation of Delaney’s osteoarthritis in the right knee. Thus, Delaney’s petition for alternate care must be dismissed with prejudice under Rule 876 IAC 4.48(7).

Nordstrom’s denial of liability means it loses the right to choose the care received by Delaney for the alleged injury. *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 575 (Iowa 2006) (citing *Trade Prof’ls, Inc. v. Shriver*, 661 N.W.2d 119, 124 (Iowa 2003)). Delaney may obtain reasonable medical care from any provider for the alleged injury, at her expense, and seek reimbursement for such care using regular claim proceedings before this agency. See *Trade Prof’ls*, 661 N.W.2d at 121–25 (affirming on judicial review an agency decision ordering the payment of medical expenses for unauthorized care because the defendants denied liability for the alleged injury and therefore lost the right to control care).

The denial of liability and resultant dismissal also limit Nordstrom’s ability to assert a lack-of-authorization defense with respect to care relating to the injury alleged by Delaney.

The authorization defense is applicable when the commissioner has denied a claimant’s petition for alternate care on its merits. But it is inapplicable where the claimant’s petition for alternate care was denied on procedural grounds such that the commissioner could not adjudicate the petition’s merits, as is the case when the employer disputes the compensability of the injury.

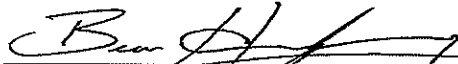
*Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 243–44 (Iowa 2018) (citing *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 97 (Iowa 2003)).

However, Nordstrom’s initial denial of liability does not necessarily forever bar the defendant from asserting an authorization defense in this case for care relating to the injury alleged by Delaney. See *id.* at 244. Nordstrom may change its position if new information provides sufficient proof to justify doing so. *Id.* And if Nordstrom changes its position to accept liability, the defendant may regain its “authorization defense and the statutory rights and obligations to provide and choose appropriate medical care pursuant to Iowa Code section 85.27” moving forward, unless it subsequently changes its position to once again deny liability or the commissioner grants a subsequent

application for alternate care by Delaney. *Id.* at 245; see also *Winnebago*, 727 N.W.2d at 575 (“There might, in some cases, be a significant change in the facts after the admission of liability that could justify a change of position by the employer . . .”).

It is therefore ordered that Delaney’s application is dismissed without prejudice under 876 Iowa Administrative Code section 4.48(7).

Signed and filed this 25<sup>th</sup> day of July, 2019.

  
BENJAMIN G. HUMPHREY  
DEPUTY WORKERS’  
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