WHEN CAN INJURED EMPLOYEES SEEK CARE FROM UNAUTHORIZED PROVIDERS UNDER THE WORKER'S COMPENSATION ACT?

William A. Ramsey*

A fundamental aspect of Indiana's Worker's Compensation system allows an employer (or its insurer[1]) to choose an injured employee's treating healthcare providers. The General Assembly granted employers control over who treats their employees so that employers can protect their interests by directing their employees to providers whom the employers know and trust to provide adequate, appropriate, and reasonably priced care.[2]

Employees, whether out of necessity or their own volition, sometimes disregard this general rule and seek care from healthcare providers whom their employers have not authorized. The consequences of seeking treatment without authorization are clear: "When an employee seeks treatment other than that provided by the employer or the Board, he or she does so at his or her own peril and risks not being reimbursed."[3]

These situations can give rise to disputes as to who must pay for the unauthorized care. If an employee can show that he sought the care based on an emergency, or because the employer was refusing to provide needed care, or other good cause, the employer must pay, despite the lack of preapproval. Otherwise, the employee (or the employee's personal health insurance) remains on the hook for the expenses.

This article reviews the case law regarding disputes over who should pay for unauthorized care, identifies the relevant or determinative factors that courts or the Worker's Compensation Board will examine when reviewing future disputes, and discusses in general the benefit employers enjoy through their statutory right to select treating physicians. This benefit is substantial, and employers should take care to exercise their rights carefully and prudently, so as to avoid losing the right or provoking a challenge to the current system.

* Mr. Ramsey is an associate at Barrett McNagny in Fort Wayne and is a member of the DTCI Worker's Compensation Law Section.

1 This article will use the term *employer* to refer to both employers and employers' worker's compensation carriers.

2 Washington Twp. Fire Dep't v. Beltway Surgery Ctr., 911 N.E.2d 590, 597-98 (Ind. Ct. App. 2009), *adopted*, 921 N.E.2d 825 (Ind. 2010).

3 Daugherty v. Industrial Contracting & Erecting, 802 N.E.2d 912, 917 (Ind. 2004).

I. IN GENERAL, EMPLOYERS CHOOSE THEIR EMPLOYEES' TREATING PHYSICIANS

A well-established principle of Indiana's worker's compensation system is that "the employer or the employer's insurer chooses the treating physician instead of the employee."[4] In other words, "Indiana's worker's compensation scheme . . . requires employees seeking compensation under the Act to put themselves under the direction and control of their employer's doctors."[5] In a similar vein, "an employee generally is not free to elect at the employer's expense additional treatment or other physicians than those tendered by the employer."[6] This system is one of three general approaches, although many variants exist throughout the country.[7] The majority of states allow employees primary say in which physicians they see.[8] A third approach gives both employers and employees some control by allowing employers to compile a list of approved physicians and employees to choose from this list.[9]

A. INDIANA'S SYSTEM BENEFITS EMPLOYERS

Employers and their insurers benefit from the ability to select treating physicians in several ways. For example, employers will usually select healthcare providers who are familiar with the employer and its employees' physical demands.[10] The right to select the treating physicians also allows employers to avoid those providers known for prescribing excessive or unnecessary care.

---

4 Young v. Marling, 900 N.E.2d 30, 36-37 (Ind. Ct. App. 2009) (citing Furno v. Citizens Ins. Co. of Am., 590 N.E.2d 1137, 1140 (Ind. Ct. App. 1992), *trans. denied*)).

5 Bowles v. General Elec., 824 N.E.2d 769, 775 (Ind. Ct. App. 2005).

6 *Daugherty,* 802 N.E.2d at 915.

7 *See generally* 2 MODERN WORKERS COMPENSATION § 202:35 (discussing various worker's compensation systems).

8 Workers' Comp. Guide § 6:40 ("In approximately 60% of states, the injured worker has primary control over choice of physician. In approximately 30% of the states, the employer chooses the provider for the employee. The remaining states have a shared selection focus."). For examples of cases describing systems in which employees can choose their treating physicians, *see* Smith v. S. Holding, Inc., 839 So. 2d 5, 10 (La. Ct. App. 2003) (recognizing that Louisiana statutes gives an injured employee "the right to select one treating physician in any field or specialty" (citing La. Rev. Stat. 23:1121(B)); State ex rel. McKenzie v. Smith, 569 S.E.2d 809, 822 (W. Va. 2002) (noting that West Virginia statute allows an employee to select his initial rehabilitation provider (citing W. Va. Code § 23-4-3(b))).

9 12 COUCH ON INSURANCE § 174:10 (noting that three general approaches exist to the choice of treating physicians for worker's compensation claimants).

10 Workers' Comp. Guide § 6:40.

B. INDIANA'S SYSTEM SHOULD NOT HARM EMPLOYEES, WHO SHARE COMMON GOALS WITH THEIR EMPLOYERS

Indiana's system is not without its critics.[11] Some have argued that allowing employees to choose their treating physician would protect employees treatment from physicians "beholden to the hidden agenda of an insurance company."[12] Others argue that employees "should be treated by providers they trust."[13]

Such concerns are likely misplaced. Employers, employees, and treating physicians should hold a common goal: providing reasonable and effective treatment so that employees can get back to work as soon as they are physically able. As courts have long recognized: "It is to the interest of the employer to furnish the very best medical and surgical treatment, so as to minimize the result of the injury and to secure as early a recovery as possible."[14] Employers have not only a humanitarian but also an economic incentive to provide quality medical care. "The more serious the result of the injury, the more the employer must pay."[15]

C. THE MOST EFFECTIVE CARE IS NOT NECESSARILY THE MOST EXPENSIVE CARE

Employers have an obvious incentive to control medical costs. Employees who have no responsibility for the medical bills have no such incentive. But controlling costs does not equate with ineffective care. In fact, oversight regarding the cost of medical care can help protect against unnecessary procedures or overtreatment, a problem in its own right.[16]

D. EMPLOYERS DO NOT DICTATE THE COURSE OF CARE

Worries that an employee will receive inadequate care from employer-chosen physicians based on an employer's desire to control expense are misplaced, as an employer's right to select healthcare providers does not include the right to micromanage the selected providers' care. Employers

---

[11] *See*, *e.g.*, *Young*, 900 N.E.2d at 37 n.3 (citing David Neumark, Peter S. Barth & Richard A. Victor, *The Impact of Provider Choice on Workers' Compensation Costs and Outcomes*, 61 INDUS. & LAB. REL. REV. 121, 121-22 (2007)); Jay Bernstein, *A Failed System of Health Care Delivery: The Workers Compensation System in New Jersey*, 28 RUTGERS L. REC. 3 (May 2004); Judge Anthony P. Calisi, *Avoid Workers' Compensation Doctors' Conflicts of Interest*, *available at* http://www.injuryclaimcoach.com/workers-comp-doctor.html# (last visited Sept. 27, 2016).

[12] Bernstein, *supra* note 11.

[13] *Young*, 900 N.E.2d at 37 n.3 (citing Neumark, *supra* note 11.)

[14] Gage v. Board of Control of Pontiac State Hosp., 206 Mich. 25, 34, 172 N.W. 536, 539-40 (1919) (quoting Milwaukee v. Miller, 154 Wis. 652, 144 N.W. 188 (1915)).

[15] *Id.*

[16] *See*, *e.g.*, Isaac D. Buck, *Enforcement Overdose: Health Care Fraud Regulation in an Era of Overcriminalization and Overtreatment*, 74 MD. L. REV. 259 (2015) ("[O]vertreatment occurs as a result of America's structural inefficiencies and upside-down incentives that encourage health care professionals to constantly provide more—and more expensive—health care.").

have no right to tell authorized physicians how to treat claimants. As the Indiana Court of Appeals has explained, "it is the physician, the Board, or both, rather than the employer or insurer, who decide whether medical treatment is authorized."[17]

Further, as provided by statute and discussed in this article, employees who are receiving inadequate care from an authorized provider are not without a remedy. Employees can seek care from their own physicians in certain circumstances if authorized physicians are unable or unwilling to provide needed care, provided the employer is first given the opportunity to provide a replacement or new physician.

E. ALLOWING EMPLOYERS CONTROL PROVIDES A CHECK ON EXCESSIVE CARE

Allowing some oversight by employers and control over the selection of treaters is a method to "hold to account providers at the edge of reasonably necessary treatment, or beyond it."[18] Indeed, even advocates for worker's compensation claimants point out that "doctors may order unnecessary or questionable tests hoping the insurance company will pay for them."[19] Employers will stop selecting physicians who provide unnecessary care that fails to benefit employees. Indiana's system thus allows employers to weed out providers who do not share the common goal of efficiently returning employees to a physical state at which they can work and earn a living.

F. A CHALLENGE OR CHANGE TO THE CURRENT SYSTEM IS POSSIBLE

Worker's compensation statutes are updated somewhat regularly to adjust payment schedules, and the amendments often touch on other issues as well.[20] The General Assembly has expressed interest in addressing a number of topics regarding worker's compensation administration in Indiana,[21] and the interim study committee on insurance has, in turn, urged the General Assembly to address issues including those related to inpatient versus outpatient care and reimbursements to healthcare providers.[22]

Given the regularity with which worker's compensation matters are before the General Assembly, employers should not take for granted that they will always retain the right to select their injured employees' health-

---

17 *Young*, 900 N.E.2d at 37 (citing IND. CODE § 22-3-3-4(a)); *see also* Virginia Workers' Compensation Commission, The Employer's Obligation to Provide Medical Care in Workers' Compensation Cases, p. 3, *available at* http://www.vwc.state.va.us/sites/default/files/documents/Employers-Obligation-To-Provide-Medical-Treatment.pdf ("Although the insurance carrier may take an active role in monitoring the claim, it cannot manage the claimant's medical care.")

18 *See* Sibbing v. Cave, 922 N.E.2d 594, 605 (Ind. 2010) (Shepard, C.J., dissenting).

19 Calisi, *supra* note 11.

20 *See*, *e.g.*, House Enrolled Act No. 1320 (Effective July 1, 2013).

21 *Id.*

22 Final Report of the Interim Study Committee on Insurance, Indiana Legislative Services Agency (Nov. 2013), *available at* http://www.in.gov/legislative/interim/committee/reports/ICINGB1.pdf.

care providers. Employers should make these selections carefully and in a manner that furthers the goals of the worker's compensation system.

II. Circumstances in Which Employees Can Choose Their Physician

The Worker's Compensation Act recognizes that the employer's right to choose treating physicians is not absolute and specifically identifies situations in which an employee can properly seek care without his employer's approval. Indiana Code § 32-3-3-4(d) provides:

> If, because of an emergency, or because of the employer's failure to provide an attending physician or services and products, or treatment by spiritual means or prayer, as required by this section, or because of any other good reason, a physician other than that provided by the employer treats the injured employee during the period of the employee's temporary total disability, or necessary and proper services and products are procured within the period, the reasonable cost of those services and products shall, subject to the approval of the worker's compensation board, be paid by the employer.

As this statute indicates, only three exceptions to the general rule exist. No approval is necessary "(1) in an emergency; (2) if the employer fails to provide needed medical care; or (3) for other good reason."[23] This statute codifies the generally accepted premise of worker's compensation law: employers have the right to control and select providers, but the right is not absolute and can be lost if an employee is not receiving appropriate and reasonable care.[24]

Under the statute, "reimbursement for medical treatment not authorized by the employer, or the Board, should be the rare exception."[25] As the supreme court has explained, "the employee runs a high risk that he or she will not be reimbursed for such treatment. And the employee can avoid that risk simply by obtaining prior approval."[26] As the general rule should pre-

---

[23] Daugherty v. Industrial Contracting & Erecting, 802 N.E.2d 912, 917 (Ind. 2004).

[24] *See generally* 100 C.J.S. Workers' Compensation § 548 ("The right to choose the medical or surgical attendant and the hospital is, in the first instance, with the employer or insurer and the employee who contracts separately for hospital treatment cannot recover the cost unless the employer has neglected or refused to provide the necessary services and has consented to the selection by the employee, or other circumstances justify selection by the employee."); Perez v. U.S. Steel Corp., 172 Ind. App. 242, 244, 359 N.E.2d 925, 926 (1977) ("The thrust of this provision is that in the absence of an emergency or other good reason, an employee is not free to simply elect, at the employer's expense, additional treatment or other physicians than those tendered by his employer.").

[25] *Daugherty*, 802 N.E.2d at 917.

[26] *Id.*

vail in the majority of cases, the employee bears the burden of establishing an exception under the statute.[27]

III. When the Exceptions Do Not Apply

The statute allowing employees to seek unauthorized care applies in only three circumstances.[28] And these exceptions apply only if a physician "other than that provided by the employer" is the physician from whom the employee seeks care.[29]

The court of appeals explained this rule in *Young v. Marling*. In *Young*, the employer argued that care provided by the physician selected by the employer was unauthorized for purposes of the Act based on directions from the employer to the physician to provide only specified treatment.[30] The court of appeals disagreed that treatment beyond the employer's permission was unauthorized under the Act. The court explained that there is nothing in the Act "to suggest that it is the insurer, rather than the authorized treating physician, that determines treatment." The court thus concluded that the employee did not need to show one of the exceptions identified in Indiana Code § 22-3-3-4(d), and that the employer was liable for the care it directed its selected physician not to perform.[31]

The decision in *Young* makes clear that the statute does not affect the rule that the authorized physician—and not the employer or insurance carrier—controls the course of an employee's care. In other words, "unauthorized care" means care by an unauthorized physician.

IV. The Failure to Provide Exception

The failure-to-provide exception applies when an employer has notice of the need for treatment but fails to provide it. The premise of this exception is straightforward and not particularly controversial. The Worker's Compensation Act requires employers to provide medical treatment for employees injured while at work. An employer's failure to provide required treatment does not affect the employee's right to the care. Therefore, "[t]he general rule is that if the employer fails to provide the medical care to an injured employee which is required by the workers' compensation statute, the employee may procure such medical care at the employer's expense."[32]

---

27 *See* Richmond State Hosp. v. Waldren, 446 N.E.2d 1333, 1336 (Ind. Ct. App. 1983).

28 *See* IND. CODE § 22-3-3-4(d).

29 *See* Young v. Marling, 900 N.E.2d 30, 36-37 (Ind. Ct. App. 2009).

30 *Id.* at 37.

31 *Id.*

32 2 MODERN WORKERS COMPENSATION § 202:36 (collecting cases and statutes).

A. AN EMPLOYER MUST HAVE HAD NOTICE AND OPPORTUNITY

The exception applies only if the employer has notice of the employee's need for care. Without notice, there can be no "failure." Similarly, the employer must have an opportunity to provide the necessary medical care before an employee can seek unauthorized care and recover under the failure-to-provide exception.[33] That is, "[t]here can be no failure to provide within the meaning of the statute without knowledge of need."[34]

B. THERE MUST BE A TRUE FAILURE

The exception applies to situations in which an employer fails to provide care, not to situations in which a disagreement exists between the employee and physician regarding the proper course of care. The court of appeals has made clear that, under this exception, "the mere fact that claimant has more faith in his family doctor, or lacks confidence in the employer's doctor, is not enough to change the [general rule that employers' physicians direct an injured employee's care]."[35] Disputes regarding the propriety of a provided physician's care or its adequacy should be addressed, if at all, under the other-good-reason exception.

C. THE COURT OF APPEALS HAS DISCUSSED THIS EXCEPTION IN DETAIL

The decision in *K-Mart Corp. v. Morrison*[36] illustrates how the court of appeals will apply the exception. In *K-Mart*, the employee initially received treatment for a work-related injury from physicians authorized by her employer. At some point in the treatment, however, the employee "did not continue her habit of informing K-Mart of her need and gaining approval for medical treatment from her supervisor."[37] The court recited the rule that "[w]hen the employer has no knowledge of the need for medical services and no opportunity to tender the medical services, he cannot be held liable for them," and concluded that the employer was not responsible for the treatment provided after the employee stopped obtaining approval.[38]

In concluding that the employer was not responsible for part of the employee's medical treatment, the court rejected the argument that constructive knowledge that treatment may be occurring satisfies the statute or obligates an employer to pay for the treatment. The court explained:

---

[33] *Richmond State Hosp.*, 446 N.E.2d at 1336 ("[W]hen the employer has no knowledge of the need for medical services and no opportunity to tender the medical services and when no emergency or other good cause is shown, he cannot be held liable for them.").

[34] *Id.*

[35] *Id.* (quoting 2 LARSON, WORKMEN'S COMPENSATION LAW § 61.12(c) (1981)).

[36] 609 N.E.2d 17 (Ind. Ct. App. 1993).

[37] *Id.* at 33.

[38] *Id.* at 33-34.

> While K-Mart did have indirect knowledge of Dr. Edwards, through the letter releasing Morrison to work, such indirect knowledge is inadequate to put K-Mart on notice of its continuing duty to supply the needed services in this case. In addition, Morrison makes much of the referrals that each doctor sent on to the next, stating as she did in her brief before the full Board, "all roads lead to Rome." We do not agree that mere referrals will validate unknown and unauthorized doctors or treatments simply because they descend in a direct line from an authorized doctor or treatment. Each new doctor or treatment should, at the very minimum, be communicated to the employer in such a way that that employer is put on notice that medical care is needed and the employer is given an opportunity to provide. This was not done here and therefore K-Mart cannot be held liable for these treatments.[39]

The *K-Mart* decision makes clear that, when advancing an argument that an employer failed to provide care, the claimant must show two things:

1) actual, not merely constructive, knowledge by the employer of the need for treatment; and
2) opportunity for the employer to provide treatment.

Establishing these elements should prove difficult in most cases, as employers, in general, are well aware of their obligations to provide medical care. Satisfying the exception should require a demonstration of something approaching or amounting to inability, negligence, or dereliction by the employer.

V. THE EMERGENCY EXCEPTION

A. EMERGENCIES WILL OFTEN BE EASY TO IDENTIFY

In the aftermath of a traumatic event, there is often good reason to forego the requirement that employees or bystanders determine an employer's preferred surgeon or emergency physician.[40] There is often no dispute whether a medical emergency exists.[41] To the extent disagreements exist,

---

39 *Id.* at 34.

40 *See*, *e.g.*, Gage v. Board of Control of Pontiac State Hosp., 206 Mich. 25, 35, 172 N.W. 536, 540 (1919) (noting that an exception to the general rule requiring notice to an employer of an injury should be recognized when "the surrounding circumstances and critical condition of the injured party present emergencies, or exigencies demanding prompt action which reasonably warrant the injured party in securing the then needed service at the employer's expense without first giving notice and opportunity to furnish or offer the same").

41 *See*, *e.g.*, Union Hospital v. S.P. Brown & Co., 104 Ind. App. 430, 11 N.E.2d 520, 521 (1937) (recognizing that the employer agreed an emergency existed where employee broke his neck during fall at work).

testimony by the treating physicians should provide compelling evidence of whether the treatment addressed an emergency situation.[42]

It is relatively clear that elective procedures will usually be considered nonemergencies.[43] Further, when a patient is stable or in a quiescent state, it should prove difficult to demonstrate an emergency.[44] Elective or palliative care may certainly be necessary and reasonable; but need for care does not necessarily preclude notice to an employer and allowing the employer to exercise its right to choose the proper healthcare professional to provide the care.

B. EMERGENCIES ARE GENERALLY SHORT-LIVED

Although the statute allows treatment by an unauthorized provider in an emergency, once a physician provides emergency treatment, an employee is not automatically free to continue treating with that physician instead of an authorized physician. The Supreme Court of Louisiana addressed this situation and found that, although the employee's initial treatment with an unauthorized physician addressed an emergency, treatment provided by this physician after the employee's condition stabilized, over a period of eight months, was not emergency treatment.[45] As this case illustrates, a physician who provides emergency care does not thereby become an authorized provider.

C. EMERGENCY TREATMENT MUST BE OTHERWISE COMPENSABLE

It is worth noting that an employee can recover expenses for emergency treatment only if the treatment was otherwise compensable under the Worker's Compensation Act.[46] In other words, the statutory exception holding an employer liable for emergency treatment performed by an unautho-

---

[42] *See*, *e.g.*, Siegel v. AT&T Commc'ns, 611 So. 2d 1345, 1349 (Fla. Dist. Ct. App. 1993) (accepting treating physician's opinion that treatment for heart palpitations was addressing an emergency); Thomas v. Roy D. Lowery Logging, Inc., 760 So. 2d 624, 627 (La. Ct. App. 2000) (accepting treating surgeon's opinion that amputation addressed an emergency situation).

[43] State ex rel. Rutherford v. Industrial Comm'n, 2004-Ohio-5712, ¶ 24 (Ohio Ct. App. 2004) (finding employer had no obligation to pay for elective decompression procedure).

[44] *Cf.* Talas v. Correct Piping Co., 435 N.E.2d 22, 27 (Ind. 1982) (recognizing that the Act's provision for an employer's liability for treatment during an emergency or while the employee is temporarily totally disabled did not apply, noting that the employee's condition was "in a quiescent state").

[45] *See* Snearl v. Kelly's Indus. Servs., Inc., 924 So. 2d 138, 140 (La. 2006). The *Snearl* court was addressing a Louisiana statute that has no direct counterpart in Indiana. Nor was it deciding the question of whether an employer had to pay for the nonemergency care. Still, the court's discussion of what constitutes emergency treatment is rational and should apply generally to disputes over whether a medical condition constitutes an emergency.

[46] Cespedes v. Yellow Transp., Inc. (URC)/Gallagher Bassett Servs., Inc., 130 So. 3d 243, 251 (Fla. Dist. Ct. App. 2013) ("We note, however, that simply because emergency care was provided does not make such care 'compensable' . . . . Rather, the compensability of emergency care under chapter 440, and the providing physician's eligibility for payment for such care, is dependent on additional elements contained in the Workers' Compensation Law.").

rized provider does not expand the employer's overall responsibility for caring for an injured employee. An employee who seeks emergency care after an injury caused by the employee's intoxication or knowing rule violation, for example, should not be able to require the employer to pay for the emergency services.[47]

VI. THE OTHER-GOOD-REASON EXCEPTION

A. WHAT IS AN "OTHER GOOD REASON" DEPENDS ON THE FACTS

The emergency exception is straightforward and relatively noncontroversial. The failure-to-provide exception sets the bar high for employees and, by its very elements, allows employers the opportunity to control and provide care to injured employees. The other-good-reason exception, however, is less clearly defined and more difficult for employers to control on the front end. The lack of bright line rules for the good reason exception is a product of the statute, not the courts, as the phrase is inherently amorphous and not susceptible to precise rules or definitions.[48] Indeed, the General Assembly's use of the phrase implies that fact-sensitive inquiries will be necessary.[49] As one court has explained when discussing the similar concept of "good cause,"

> At its core, however, the standard of good cause, like many others in the law, is necessarily amorphous. Whether or not it has been satisfied is largely dependent upon the facts of each individual case. It is for this very reason that such a determination is entrusted to the sound and considerable discretion of the district court in the first instance.[50]

---

47 *See* IND. CODE § 22-3-2-8.

48 *See*, *e.g.*, State v. Toney, 315 Md. 122, 133, 553 A.2d 696, 702 (1989) ("Those authorities which have defined good cause, generally have adopted somewhat vague and amorphous definitions.").

49 Courts generally recognize that what will constitute good reason will depend on particular facts and circumstances. *See*, *e.g.*, State v. Briggs, 1998 WL 10264, at *1 (Alaska Ct. App. Jan. 14, 1998) ("The question of whether there is good reason for a continuance depends to a great extent on the circumstances of the individual case."); First Nat'l Bank v. Casey, 158 Iowa 349, 138 N.W. 897, 899 (1912) ("[W]hether there was 'good reason to believe' the minor dealt with [was] capable of contracting necessarily must depend on the circumstances of each particular case."); Commonwealth v. Austin, 421 Mass. 357, 362, 657 N.E.2d 458, 461 (1995) ("The [good reason] analysis cannot be generalized. Each case must be resolved on its own peculiar facts . . . ."); Lawson v. Shotwell, 27 Miss. 630, 635 (Miss. Err. & App. 1854) ("A good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason, must depend upon the facts of the case when presented."); Dennis v. Dennis, 179 Neb. 200, 209-10, 137 N.W.2d 694, 699 (1965) ("What constitutes good reason for setting aside such a decree or what constitutes an unconscionable result prohibiting it depends upon the facts and circumstances of each particular case.").

50 Colasante v. Wells Fargo Corp., 81 F. App'x 611, 613 (8th Cir. 2003).

That being said, in explaining what constitutes "other good reason" for purposes of unauthorized treatment, the Indiana Supreme Court has established basic rules that provide some guidance.

B. *DAUGHERTY V. INDUSTRIAL CONTRACTING & ERECTING*

Although Indiana courts had long noted the other-good-reason exception to the general rule, no court had discussed the meaning of the phrase in depth until 2004, when the Indiana Supreme Court decided *Daugherty v. Industrial Contracting & Erecting*. The ultimate question in *Daugherty* was whether an employee was required to obtain approval from his employer or the Worker's Compensation Board before undergoing knee-replacement surgery.[51] It was agreed that the surgery was a nonemergency, and there was no argument that the employer had failed to provide care. As the court noted, the employer had paid for treatment by six different physicians, who all believed surgery was unnecessary. Thus, the court described the situation as "one of . . . a disagreement over the appropriate care."[52]

The court noted that "[t]he mere fact that the unauthorized medical treatment is an acceptable method of treating the condition does not mean that the employer should pay for the treatment,"[53] but it noted that "difficult questions can arise when there is a difference of opinion on diagnosis or appropriate treatment, as when the employer's doctor recommends conservative measures while the claimant thinks he or she should have surgery."[54] The court recognized that several states have developed tests under which responsibility for the care turns on whose opinion regarding the care at issue turned out to be correct.[55] The court rejected this approach, but adopted the following test developed by the Court of Appeals of Virginia:

> [I]f the employee, without authorization but in good faith, obtains medical treatment different from that provided by the employer, and it is determined that the treatment provided by the employer was inadequate treatment for the employee's condition and the unauthorized treatment received by the claimant was medically reasonable and necessary treatment, the employer should be responsible, notwithstanding the lack of prior approval by the employer. These legal principles which provide a basis for the payment of unauthorized medical treatment are part of the "other good reasons test."[56]

---

[51] Daugherty v. Industrial Contracting & Erecting, 802 N.E.2d 912, 917 (Ind. 2004).

[52] *Id.*

[53] *Id.*

[54] *Id.* (quoting 5 LARSON'S WORKERS' COMPENSATION LAW § 94-02[5], at 94-19 (2002)).

[55] *Id.* (citing cases from Arkansas, California, Oklahoma, and Nebraska).

[56] *Id.* (quoting Shenandoah Prods, Inc. v. Whitlock, 421 S.E.2d 483, 486 (Va. Ct. App. 1992)).

The court emphasized that this new test should not open the flood gates for claims of unauthorized care.

> We hasten to add that reimbursement for medical treatment not authorized by the employer, or the Board, should be the rare exception. Indeed the employee runs a high risk that he or she will not be reimbursed for such treatment. And the employee can avoid that risk simply by obtaining prior approval.[57]

Despite the strong showing required to satisfy the newly adopted test, the *Daugherty* court found the employee established other good reason based on several facts. First, the employee had sought prior approval from his employer before undergoing the unauthorized treatment. Second, the treatment provided by the employer was, in the court's opinion, inadequate, as the employee was still in pain and unable to perform his regular work duties. Third, the Board found that the unauthorized provider's treatment was "reasonable and appropriate," a factual finding supported by the record.[58] These facts—or the absence thereof—should provide the starting point for an analysis of whether a good reason exists.

C. INDIANA DECISIONS FOLLOWING *DAUGHERTY*

A surprisingly small body of Indiana case law exists on the *Daugherty* rule. In fact, only three court of appeals' decisions have discussed and applied the good cause analysis developed by *Daugherty*.[59] All three are unpublished and, therefore, of no precedential value and cannot be cited to a court.[60] However, although the appellate rule regarding unpublished decisions prohibits citation in "any court," the rule, on its face, does not prohibit citation to an administrative body such as the Worker's Compensation Board.[61] Therefore, although the opinions "shall not be regarded as prece-

---

57 *Id.*

58 *Id.* at 919.

59 The court of appeals has cited *Daugherty* for the general rule that an employer's doctors control the course of an employee's medical care in a fourth case, but that case involved an analysis of whether an injured employee timely filed his claim. *See Bowles*, 824 N.E.2d at 775 ("Bowles's true complaint, we believe, lies not with the application of *Duvall,* but with Indiana's worker's compensation scheme, which requires employees seeking compensation under the Act to put themselves under the direction and control of their employer's doctors.") (citing *Daugherty,* 802 N.E.2d at 915). The supreme court has cited *Daugherty* in two cases, but only for general statements regarding the purpose of the Worker's Compensation Act. *See* DePuy, Inc. v. Farmer, 847 N.E.2d 160, 170-71 (Ind. 2006) ("The purpose of the WCA is 'to shift the economic burden of a work-related injury from the injured employee to the industry and, ultimately, to the consuming public.'") (quoting *Daugherty*, 802 N.E.2d at 919); Knoy v. Cary, 813 N.E.2d 1170, 1173 (Ind. 2004) ("The worker's compensation law is to be construed broadly.") (citing *Daugherty,* 802 N.E.2d at 919).

60 *See* IND. R. APP. P. 65.

61 *Id.*

dent," they could be of some value to the Board.[62] Further, the decisions indicate the way the court of appeals might treat certain situations and are of value when analyzing and discussing the potential for relief on appeal with clients.

1. *Marion County Health Department v. Hill*[63]

The *Hill* decision, the most recent word from the court of appeals on the other-good-cause provision, provides a good example of the type of evidence the court will examine when reviewing a decision by the Board. In *Hill*, the employee sought treatment at his employer's clinic and with healthcare providers to which clinic physicians referred him for approximately four and one-half months. After being released from the clinic's care, the employee was still having difficulties and sought treatment on his own from an orthopedic spine surgeon, who informed the employee that he had a herniated disc and needed surgery. The employee then returned to his employer's clinic and informed a nurse of the recommendation. The nurse said that she would have to check with the clinic's doctor and the company's worker's compensation department to determine whether the surgery would be covered. Before hearing back, the employee underwent a root nerve block. The unauthorized care and bills were processed through the employee's personal health insurance.[64]

The employee then spoke with his employer's clinic's physician, who told the employee that if he continued to treat with the surgeon, the employee would be responsible for the care, but that if the employee treated at the clinic, and if the clinic physician believed the employee had suffered a work-related injury, the clinic would treat and, if necessary, refer the employee to another provider. The employee then underwent back surgery and follow-up treatment with the unauthorized surgeon.[65]

The employee filed a claim with the Worker's Compensation Board seeking reimbursement for the unauthorized care. The single hearing member entered an order finding that the employer was responsible for the unauthorized care. The employer appealed to the Board, which affirmed the single hearing member.[66]

The court of appeals affirmed the Board's decision and found the employee had shown other good cause based on the following:

- the employee was still in pain when he was released from his employer's clinic's care;

62 *Id.*

63 Marion Cty. Health Dep't v. Hill, 2014 WL 3362227, 15 N.E.3d 688 (Ind. Ct. App. 2014).

64 *Id.* at *2-3.

65 *Id.* at *3.

66 *Id.* at *3-4.

- MRI results that existed at the time the employee was released from the clinic's care provided objective support for the employee's claims of ongoing pain;
- treatment provided by the employer, including physical therapy and a steroid injection, had provided no or minimal relief;
- the employee informed his employer of the planned surgery before undergoing the surgery;
- the care being provided at the employer's clinic was inadequate, as evidenced by the employee's ongoing and increasing pain and lack of progress under the clinic's physician's direction; and
- the surgery improved the employee's condition.[67]

It is important to note that the *Hill* court affirmed a decision by the Worker's Compensation Board. The court of appeals provides a "deferential standard of review" when addressing decisions by the Board and will reverse only if "the evidence is undisputed and leads inescapably to a result contrary to the one reached by the Board."[68] Therefore, although the *Hill* decision illustrates the type of analysis the court of appeals may employ when implementing *Daugherty*, it also must be viewed in the context of the deference paid by the court of appeals to Board decisions.

2. *Pettineo v. Crown Point Community School Corp.*[69]

The *Pettineo* decision highlights the important role that medical testimony can play in a decision related to the other-good-cause exception and demonstrates that employers may face an uphill battle when allegedly unauthorized treatment stemmed from treatment by an initially authorized physician.

In *Pettineo*, the employee suffered a work-related injury to her right big toe and received authorized medical care from various physicians for her toe injury and complex regional pain syndrome. The authorized care culminated in a surgery and—based on the employee's condition after the surgery—a permanent partial impairment rating.[70]

---

67 *Id.* at *7-8.

68 Graycor Indus. v. Metz, 806 N.E.2d 791, 797 (Ind. Ct. App. 2004) (quoting Ind. Mich. Power Co. v. Roush, 706 N.E.2d 1110, 1113 (Ind. Ct. App. 1999), *trans. denied*; *see also* Rocky River Farms, Inc. v. Porter, 925 N.E.2d 496, 499 (Ind. Ct. App. 2010) ("We defer to the Board's determination of a statute and liberally construe the Act in favor of the employee."), *trans. denied*.

69 Pettineo v. Crown Point Cmty. Sch. Corp., 893 N.E.2d 348, 2008 WL 3853617 (Ind. Ct. App. 2008) (unpublished).

70 *Id.* at *1.

A few months after the surgery, the employee returned to her surgeon with complaints of pain in her right big toe and knee. The physician believed the pain was related to the initial injury and performed a second surgery. He then referred the employee to another physician for pain management. This physician treated the employee with lumbar sympathetic blocks and recommended continued injections.[71]

The employee filed an application for adjustment of claim against her employer, who denied that the second surgery and pain management treatment were related to the compensable injury. The single hearing member found the employer was not required to pay for any of the unauthorized care. The Board affirmed the single hearing member.[72]

The court of appeals reversed, first finding that the care at issue was caused by the work-related injury and then finding that the employer was responsible for the care. The court found it particularly important that the employee returned to the same physician whom the employer had previously authorized to provide treatment.[73] The court also noted that many of the circumstances present in *Daugherty* were present here. Specifically, the court found that the unauthorized treatment was appropriate and necessary, citing medical testimony that the treatment improved the employee's ability to function. The court also found relevant that the prior treatment had failed, citing the evidence that the prior treatment had left the employee with impairment and limited ability to perform work duties.[74]

Based on these findings, the court of appeals reversed the Board's order, and remanded with instructions that the Board require the employer to pay for the unauthorized care. This result is somewhat surprising or unusual given the deference paid to the Board's decisions, but the decision also illustrates the attention the court of appeals pays to supreme court decisions with similar facts.

3. *Harrold v. L&D Mailmasters*[75]

The *Daugherty* court indicates that a finding of other good cause will occur rarely and should be the exception rather than the rule. The *Harrold* decision reinforces the concept and shows that employees cannot simply choose to seek care from the physician of their choice and then ask employers to pay for the care without, at the very least, giving their employers notice of and the opportunity to provide purportedly needed care.

In *Harrold*, the employee suffered a work-related injury causing pain in her back and hip. The employer provided treatment from several physi-

---

[71] *Id.*

[72] *Id.* at *1-2.

[73] *Id.* at *3-4.

[74] *Id.*

[75] Harrold v. L&D Mailmasters, 2014 WL 605478, 5 N.E.3d 810 (Ind. Ct. App. 2014), *trans. denied*.

cians, one of whom referred the employee to another physician for epidural injections. The employee declined to follow through with the treatment because she feared the injections.[76]

After physical therapy, an authorized physician and a Board-ordered independent medical examination showed that the employee had reached maximum medical improvement. The employee disagreed with these conclusions and sought her own care with an unauthorized provider. This physician found the employee's prior course of treatment appropriate and recommended no surgery. The employee, however, returned to the physician whom her employer had initially authorized and told him that the unauthorized physician had recommended surgery. The physician performed the surgery, which an examiner selected by the employer found to be unnecessary and unrelated to the accident at work.[77]

The single hearing member found that the employer had no obligation to pay for any of the treatment after the maximum medical improvement finding. The Board affirmed, as did the court of appeals.[78]

In affirming the Board, the court of appeals found several factors important. First, the court noted that the employee had never sought approval for the unauthorized care. Second, every physician who treated the employee recommended injections, which the employee refused to undergo. The court explained that the employee "cannot claim inadequate treatment from physicians provided by [her employer] when she, on her own accord, did not avail herself of all treatment offered."[79] Third, the court noted that the employee misrepresented her unauthorized physician's recommendation regarding surgery.[80]

The *Harrold* decision is the only post-*Daugherty* decision analyzing whether an employee had other good reason to seek unauthorized care and concluding that an employer did not have to pay for unauthorized care. The decision enforces the concept that "other good cause" must mean more than good cause to seek the treatment, and must involve a showing of why the employee could not obtain needed treatment through the established procedure under which the employer chooses the authorized providers.

D. VIRGINIA CASE LAW SHOULD PROVIDE PERSUASIVE AUTHORITY

The Indiana Supreme Court specifically adopted the Virginia rule when deciding what "other good cause" means. Therefore, although Virginia case

76 *Id.* at *1.

77 Id. at *2.

78 *Id.*

79 *Id.* at *3.

80 *Id.* at *4.

law would not bind the Board or an Indiana court, it should be more persuasive than other out-of-state law.[81]

1. Adequacy of the Authorized Physicians' Care Matters

Evidence that an employee attempted to obtain complete relief from an authorized physician and went elsewhere only after being told that nothing else could be done weighs in favor of a finding of good cause.[82] Similarly, if an employee seeks unauthorized care in an emergency and learns that diagnoses reached by prior authorized providers were inaccurate, an employee may act in good faith and for good reason by following treatment plans identified and recommended by the unauthorized provider.[83]

Similarly, when an employee gives his employer an opportunity to provide needed care but has reason to believe that the employer is unwilling or unable to provide care or needed relief, a court will be more likely to find that an employee had good reason to look elsewhere.[84] But if the employer is providing adequate care, it will be difficult for an employee to show other good cause.[85]

2. Reasonableness Is Not Determinative

That unauthorized care was reasonable and appropriate is insufficient to establish other good cause.[86] Similarly, the success of unauthorized care does not mean an employer should have to pay for it.[87] These concepts are logical extensions or applications of the general rule that an employee must show good reason for seeking care from his own physician without authorization.

---

[81] Virginia cases that are not published in the South Eastern Reporter are citable as persuasive authority. *See* VA. SUP. CT. R. 5:1.

[82] H.J. Holz & Son, Inc. v. Dumas-Thayer, 37 Va. App. 645, 654-56, 561 S.E.2d 6, 10-12 (2002); Lynchburg City Sch. v. Snowie A.E. Dalton, 1996 WL 191080, at *1-2 (Va. Ct. App. Apr. 23, 1996) (finding employee had good cause to seek treatment from unauthorized physician where authorized providers were unable to diagnose disc defect, and instead told employee his pain was based on psychological factors).

[83] Loudoun Cty. Sch. Bd. v. Kostecka, 2003 WL 21384853, at *2-3 (Va. Ct. App. June 17, 2003).

[84] Hayes v. Perrel Mgmt. Co., 2011 WL 807401, at *4-5 (Va. Ct. App. Mar. 8, 2011).

[85] Town of Tappahannock Maint. Dep't v. Reynolds, 1997 WL 92088, at *3 (Va. Ct. App. Mar. 4, 1997).

[86] Haramis v. G.T. Painting & Constr. Co., 1995 WL 293060, at *1 (Va. Ct. App. May 16, 1995) ("The mere fact that the unauthorized treatment is an acceptable method of treating the condition does not mean that the treatment should be paid for by the employer.") (quoting *Shenandoah Products,* 15 Va. App. at 213, 421 S.E.2d at 486).

[87] Johnson v. City of Hampton Gen. Servs., 1995 WL 80205, at *2-3 (Va. Ct. App. Feb. 28, 1995) (holding that the employee's return to work after unauthorized chiropractic care did not require reversal of commission's finding that employer was not required to pay for unauthorized care).

3. Notice or Information the Employee Provided to the Employer Is Important

If an employee has communicated with his employer regarding the need for care and the employer has provided less-than-satisfactory responses, good faith by the employee and good cause for an employee to seek unauthorized care is more likely to exist.[88] On the other hand, when an employee does not keep in touch with his employer regarding the status of his condition and leaves the employer with the impression that the employee is not in need of care, courts are unlikely to find good reason for the employee going to an unauthorized provider.[89]

4. Expert Testimony Is Persuasive

Testimony by authorized physicians can be persuasive evidence of whether an employee was justified in seeking unauthorized treatment.[90] Testimony of an independent physician can be of similar value.[91] Of course, this can cut both ways, as an authorized physician's opinion that unauthorized care was necessary and appropriate would be compelling evidence for an employee.[92]

E. AN EMPLOYEE'S REQUIRED SHOWING UNDER *DAUGHERTY*

Although *Daugherty* should be the focus of an analysis of whether an employee sought unauthorized care for good reason, the supreme court in *Daugherty* did not overrule prior case law. Indeed, the *Daugherty* court cited prior Indiana decisions when recognizing the "long held" rule that "an employee generally is not free to elect at the employer's expense additional

88 Virginia Elec. & Power Co. v. Earley, 2010 WL 1027530, at *3-4 (Va. Ct. App. Mar. 23, 2010) (noting that the employee had informed her employer that she needed care but was not contacted by her employer's insurance carrier until after she had sought the unauthorized care).

89 Locksmith v. Chippenham Hosp., 2004 WL 1049171, at *3-4 (Va. Ct. App. May 11, 2004) (noting that employee did not timely inform employer of his move to Wisconsin); Frye v. Reynolds Metals Co., 1998 WL 527068, at *1-2 (Va. Ct. App. Aug. 25, 1998) (noting that the employee did not timely seek authorization from his employer for psychiatric treatment, which had not been recommended by any authorized provider).

90 Frye v. Reynolds Metals Co., 1998 WL 527068, at *1-2 (Va. Ct. App. Aug. 25, 1998) ("As fact finder, the commission was entitled to accept the opinion of Dr. Jim Brasfield, an authorized treating physician, who discerned no evidence of psychiatric problems during his treatment of Frye. In addition, the commission was entitled to reject the contrary opinion of Dr. Nelson, who did not begin treating Frye until approximately two years after his industrial accident.").

91 Johnson v. City of Hampton Gen. Servs., 1995 WL 80205, at *2-3 (Va. Ct. App. Feb. 28, 1995).

92 Wellmore Coal Corp. v. Williamson, 1998 WL 7735, at *1-2 (Va. Ct. App. Jan. 13, 1998) (noting that a treating physician recommended that the employee seek treatment from a physician closer to the employee's home); Weston Truck Lines, Inc. v. Pepper, 1993 WL 525914, at *2-3 (Va. Ct. App. Dec. 21, 1993) (finding authorized physician's opinion that he had not diagnosed a condition, but that the condition was caused by a work-related injury, supported commission's finding that the employee had good cause to seek unauthorized care for condition); AMF Bowling, Inc. v. Giang, 1993 WL 388244, at *1 (Va. Ct. App. Oct. 5, 1993) (finding evidence that authorized physician approved care by unauthorized physician supported finding of good cause).

treatment or other physicians than those tendered by the employer."[93] Therefore, pre- and post-*Daugherty* law, as well as law from Virginia (or other states that follow a statutory scheme similar to that of Indiana) can all form the legal framework for a discussion of whether an employee sought unauthorized care for other good reason. These decisions, when taken together, establish some general principles.

1. Success of the Unauthorized Care Should Be a Prerequisite for, but Not a Prima Facie Showing of, Other Good Cause

As made explicitly clear by the *Daugherty* court, the success of unauthorized care will not, in and of itself, establish other good reason. On the other hand, evidence that unauthorized treatment failed should be evidence that would weigh against a finding that other good cause existed for the treatment.[94]

2. Dislike of an Authorized Provider Is Not Enough

Mere dissatisfaction with authorized care should not provide good reason to seek care from a new physician.[95] Indeed, allowing an employee's subjective dislike for a provider or recommended course of care to constitute good reason to seek care elsewhere would eviscerate the rule that employers' authorized physicians, not employees, direct the course of care.

It is important to remember that this rule does not eliminate any liberty or freedom held by an employee. Employees are always free to take themselves out of their employers' care. Employees (or their personal health insurers) simply have to be willing to pay for what they want.

3. Good Reason for Seeking Care Does Not Equate to Good Reason for Seeking *Unauthorized* Care

An employee cannot show a good reason for seeking unauthorized care by showing merely that he had good reason to believe the care was warranted.[96] The court of appeals decision in *Richmond State Hospital v. Waldren* illustrates this point. In that case, a claimant sought unauthorized care based on her desire for a "more professional opinion" from a doctor

---

93 Daugherty v. Industrial Contracting & Erecting, 802 N.E.2d 912, 915 (Ind. 2004) (citing K-Mart Corp. v. Morrison, 609 N.E.2d 17, 33 (Ind. Ct. App. 1993); Richmond State Hosp. v. Waldren, 446 N.E.2d 1333, 1336 (Ind. Ct. App. 1983); Perez v. U.S. Steel Corp., 172 Ind. App. 242, 359 N.E.2d 925, 927 (1977).

94 *Cf.* Roush v. W.R. Duncan & Son, 96 Ind. App. 122, 183 N.E. 410, 413 (1932) (finding employer was not *responsible* for costs of unauthorized and unsuccessful second surgery).

95 *Perez*, 172 Ind. App. at 244, 359 N.E.2d at 926–27 (1977) (finding employer was not required to pay for treatment after employee "merely elected to secure further medical service after the employer's authorized physician indicated that no further treatment was called for"); Indiana Liberty Mut. Ins. Co. v. Strate, 83 Ind. App. 493, 148 N.E. 425, 427 (1925).

96 *Cf.* Jones & Laughlin Steel Corp. v. Kilburne, 477 N.E.2d 345, 352 (Ind. Ct. App. 1985) ("Although the Board determined that it was necessary for Kilburne to be seen by his family physician it failed to make findings or to state the reason for that conclusion.").

other than the one provided by her employer.[97] The Board found that the employer was required to pay for the unauthorized care, stating that the employee "had good cause to seek medication treatment from [the unauthorized provider]."[98] However, the court of appeals noted that the award had no findings regarding this good cause other than the employer's failure to provide treatment. Although the court affirmed the Board's conclusion that the care provided by the unauthorized provider was necessitated by the work-related injury, the court reversed the Board's determination that the employer was required to pay for the care.[99] The *Richmond Hospital* decision, therefore, indicates clearly that a good reason to seek unauthorized care requires more than a showing that there was good reason to seek the treatment; the employee must also show good reason for seeking the treatment *without authorization from the employer*.

VII. CONCLUSION

Indiana, for good reason, has allowed and continues to allow employers to choose the physicians who will treat their injured employees. This right is important, but must be exercised in conjunction with employers' general obligations to provide appropriate and necessary care,[100] and must be examined in light of the overall humanitarian purposes of the Worker's Compensation Act.[101] Given the common goal of workers, employers, and physicians, courts consistently recognize that exceptions to the general rule should be rare. These statements should hold true, and employers should retain their ability to select the most effective and appropriate physicians to care for their injured employees. Employers have clear incentive to do so, as having healthy workers is the universal goal of employees, physicians, employers, and the Worker's Compensation Act.

---

97 446 N.E.2d at 1334.

98 *Id.* at 1336.

99 *Id.*

100 *See* 2 EMPLOYMENT LAW § 7:27 (5th ed.) ("Employers are also obliged to provide proper care. When they send injured workers to physicians or facilities that lack the capacity to treat their medical problems, the employees may resort to other providers and charge their employer for the necessary services.") (collecting cases, including *Daugherty*).

101 *See generally*, Walker v. State, Muscatatuck State Dev. Ctr., 694 N.E.2d 258, 266 (Ind. 1998) ("[I]n performing a legal analysis and in interpreting the provisions of the Worker's Compensation Act, we construe the Act and resolve doubts in the application of terms in favor of the employee so as to effectuate the Act's humanitarian purpose to provide injured workers with an expeditious and adequate remedy.").