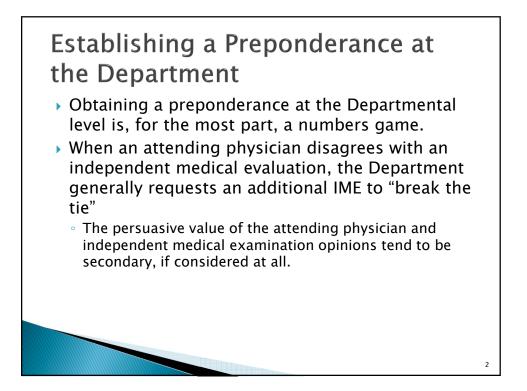
Preponderance of Medical Evidence: Quantity vs. Quality





"Preponderance of Evidence" Myth #1

"I have more doctors on my side, so I should win my case."

What *legally* constitutes a preponderance of evidence?

"The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." PREPONDERANCE OF THE EVIDENCE, Black's Law Dictionary (9th ed. 2009).

Establishing a Preponderance at the Board and in Court

- The *persuasive value* of medical opinions is paramount.
- Obtaining a preponderance is *no longer just a numbers game*.

What do the Board and Superior Court consider?

 "In determining the credibility and weight to be given such opinion evidence, you may consider, among other things

- the education, training, experience, knowledge and ability of that doctor,
- $^{\circ}\,$ the reasons given for the opinion,
- the sources of the doctor's information,
- together with the factors already given you for evaluating the testimony of any other witness."

Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 573, 761 P.2d 618 (1988).

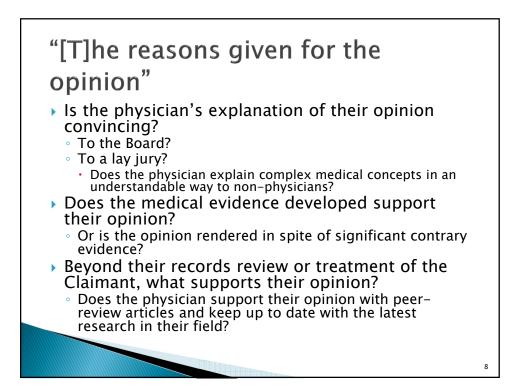
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"[T]he education, training, experience, knowledge and ability of that doctor"

What is the physician's educational background?
M.D. vs. D.O. vs. D.C. vs. Ph.D.

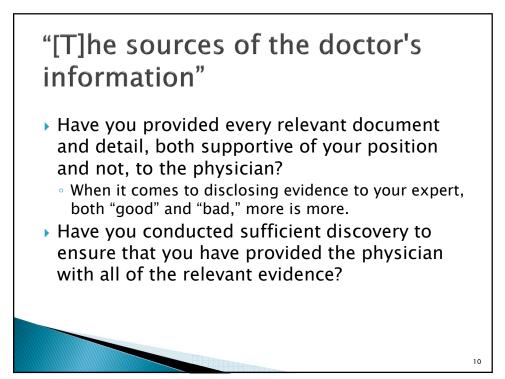
> What is the physician's specialty, if any?

- What type of conditions are at issue?
 - · Do you need a surgeon?
- Who is opposing counsel calling?
- Is the physician engaged in an active practice?
- Is the physician known in the workers' compensation community to be fair and impartial?



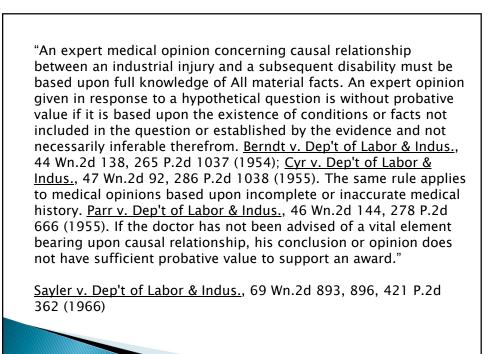


- Is the physician's opinion based solely or primarily on self-reporting by the Claimant?
- Has the physician's opinion been tainted by opinions or comments on the evidence provided by the referring party?
 - Information in IME or attorney referral cover letters: less is more.



"[T]he sources of the doctor's information"

 Very few things are more damaging to the credibility of expert medical testimony than opposing counsel pointing out that the expert has rendered an opinion without full knowledge of the relevant facts or based upon incorrect information



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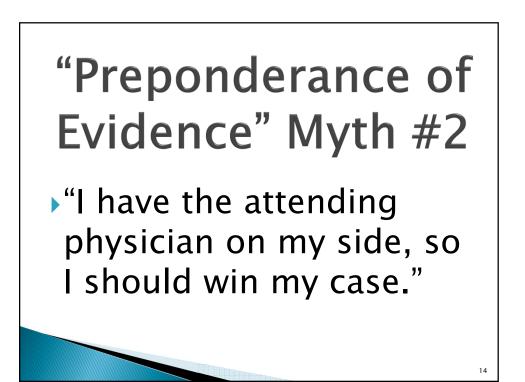
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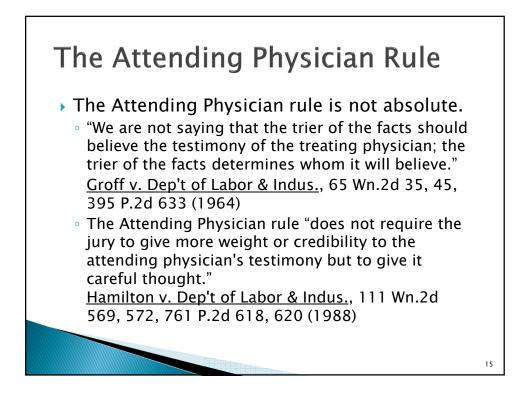
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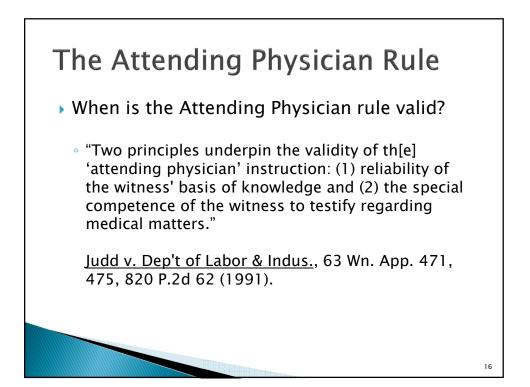
The Attending Physician Rule

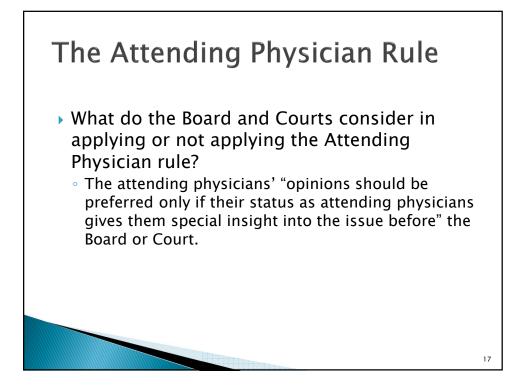
 "[A]n attending physician, assuming of course that he shows himself to be qualified, who has attended a patient for a considerable period of time for the purpose of treatment, and who has treated the patient, is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once."

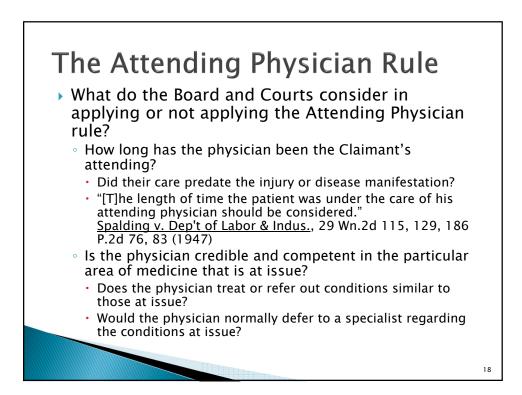
<u>Spalding v. Dep't of Labor & Indus.</u>, 29 Wn.2d 115, 128-29, 186 P.2d 76 (1947).



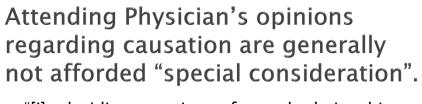






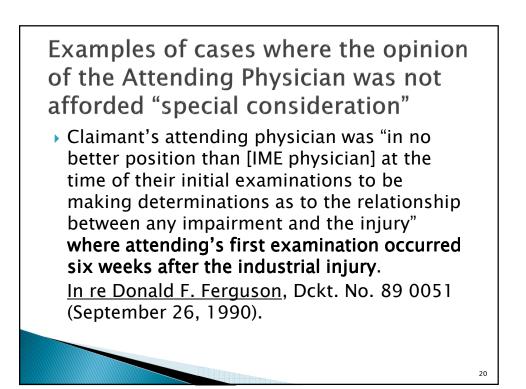


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- "[I]n deciding questions of causal relationship, an attending physician is oftentimes in no better position than a well informed examining physician."
- Attending physician's "ability to testify regarding the relationship between the industrial injury and the claimant's [] symptoms was not enhanced by the fact that he saw the claimant more than once, since [the IME provider] had the benefit of the claimant's medical history."

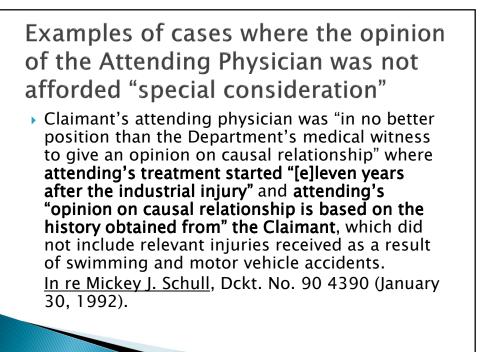
<u>In re Ray Behling</u>, Dckt. No. 69965 (May 20, 1986).



Examples of cases where the opinion of the Attending Physician was not afforded "special consideration"

Claimant's attending physician was "in no better position than [IME physician] with respect to determining the causal relationship issue" where attending's first examination occurred "some months after the industrial injury" and attending "relied on claimant's history and description of the industrial injury in forming their opinions."

In re Richard L. Miller, Dckt. No. 85 3068 (October 21, 1987).



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