Preponderance of Medical Evidence: Quantity vs. Quality

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Establishing a Preponderance at the Department

- Obtaining a preponderance at the Departmental level is, for the most part, a numbers game.
- When an attending physician disagrees with an independent medical evaluation, the Department generally requests an additional IME to "break the tie"
  - The persuasive value of the attending physician and independent medical examination opinions tend to be secondary, if considered at all.

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"Preponderance of Evidence" Myth #1

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

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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).

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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*.

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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,
  - 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?

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"[T]he reasons given for the opinion"

- Is the physician's explanation of their opinion convincing?
  - To the Board?
  - To a lay jury?
    - Does the physician explain complex medical concepts in an understandable way to non-physicians?
- Does the medical evidence developed support their opinion?
  - Or is the opinion rendered in spite of significant contrary evidence?
- Beyond their records review or treatment of the Claimant, what supports their opinion?
  - Does the physician support their opinion with peer-review articles and keep up to date with the latest research in their field?

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

- 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.

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

- Have you provided every relevant document and detail, both supportive of your position and not, to the physician?
  - When it comes to disclosing evidence to your expert, both "good" and "bad," more is more.
- Have you conducted sufficient discovery to ensure that you have provided the physician with all of the relevant evidence?

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"[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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"An expert medical opinion concerning causal relationship between an industrial injury and a subsequent disability must be based upon full knowledge of All material facts. An expert opinion given in response to a hypothetical question is without probative value if it is based upon the existence of conditions or facts not included in the question or established by the evidence and not necessarily inferable therefrom. Berndt v. Dep't of Labor & Indus., 44 Wn.2d 138, 265 P.2d 1037 (1954); Cyr v. Dep't of Labor & Indus., 47 Wn.2d 92, 286 P.2d 1038 (1955). The same rule applies to medical opinions based upon incomplete or inaccurate medical history. Parr v. Dep't of Labor & Indus., 46 Wn.2d 144, 278 P.2d 666 (1955). If the doctor has not been advised of a vital element bearing upon causal relationship, his conclusion or opinion does not have sufficient probative value to support an award."

Sayler v. Dep't of Labor & Indus., 69 Wn.2d 893, 896, 421 P.2d 362 (1966)

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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."

  Spalding v. Dep't of Labor & Indus., 29 Wn.2d 115, 128–29, 186 P.2d 76 (1947).

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"Preponderance of Evidence" Myth #2

- "I have the attending physician on my side, so I should win my case."

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The Attending Physician Rule

- The Attending Physician rule is not absolute.
  - "We are not saying that the trier of the facts should believe the testimony of the treating physician; the trier of the facts determines whom it will believe." Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 45, 395 P.2d 633 (1964)
  - The Attending Physician rule "does not require the jury to give more weight or credibility to the attending physician's testimony but to give it careful thought." Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 572, 761 P.2d 618, 620 (1988)

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The Attending Physician Rule

- When is the Attending Physician rule valid?
  - "Two principles underpin the validity of th[e] 'attending physician' instruction: (1) reliability of the witness' basis of knowledge and (2) the special competence of the witness to testify regarding medical matters."

    Judd v. Dep't of Labor & Indus., 63 Wn. App. 471, 475, 820 P.2d 62 (1991).

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The Attending Physician Rule

- What do the Board and Courts consider in applying or not applying the Attending Physician rule?
  - The attending physicians' "opinions should be preferred only if their status as attending physicians gives them special insight into the issue before" the Board or Court.

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The Attending Physician Rule

- What do the Board and Courts consider in applying or not applying the Attending Physician rule?
  - How long has the physician been the Claimant's attending?
    - Did their care predate the injury or disease manifestation?
    - "[T]he length of time the patient was under the care of his attending physician should be considered." Spalding v. Dep't of Labor & Indus., 29 Wn.2d 115, 129, 186 P.2d 76, 83 (1947)
  - Is the physician credible and competent in the particular area of medicine that is at issue?
    - Does the physician treat or refer out conditions similar to those at issue?
    - Would the physician normally defer to a specialist regarding the conditions at issue?

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Attending Physician's opinions regarding causation are generally not afforded "special consideration".

- "[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."

  In re Ray Behling, Dckt. No. 69965 (May 20, 1986).

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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] at the time of their initial examinations to be making determinations as to the relationship between any impairment and the injury" **where attending's first examination occurred six weeks after the industrial injury.**

  In re Donald F. Ferguson, Dckt. No. 89 0051 (September 26, 1990).

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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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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 the Department's medical witness to give an opinion on causal relationship" where **attending's treatment started "[e]leven years after the industrial injury"** and **attending's "opinion on causal relationship is based on the history obtained from" the Claimant**, which did not include relevant injuries received as a result of swimming and motor vehicle accidents.
  In re Mickey J. Schull, Dckt. No. 90 4390 (January 30, 1992).

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