

EMPLOYER AND/OR INSURER LIABILITY DISPUTES

Employer and insurer liability disputes are governed by [21 VSA §662\(c\) and \(d\)](#). The law places the burden on the most recent employer/insurer to prove that another employer/insurer is responsible for the claimed injury and benefits due.

The Department considers the following legal definitions and factors when reviewing evidence presented in an employer/insurer liability dispute when making a determination as to which employer/insurer is responsible:

"Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2.1110.

"Recurrence" means the return of symptoms following a temporary remission. Rule 2.1312.

In some instances an injury is neither an aggravation nor a recurrence, "but rather an injury distinct from the injured worker's prior injuries." [*Pacher v. Fairdale Farms*, 166 Vt. 626, 628 (1997)] It may be characterized as a "flare-up," which this Department defines as a temporary increase in pain and/or partial immobility, but with no addition to the injured worker's permanent condition in any medically or legally significant way. *Smiel v. Okemo*, Opinion No. 10-93WC (Aug. 24,1993).

Case law provides further guidance on the analysis in determining whether an injury is a new injury, an aggravation or recurrence of a prior injury or a flare-up and also provides clarity as to responsibility as set forth below:

A recurrence is the continuation of a problem which had not previously resolved or become stable, whereas an aggravation is the destabilization of a condition which had become stable, although not necessarily symptom-free. *Jaquish v. Bechtel Const. Co.*, Opinion No. 30-92WC (December 29, 1992).

Among the factors to be considered in characterizing an injury as an aggravation rather than a recurrence are:

1. whether there is a subsequent incident or work condition which destabilized a previously stable condition;
2. whether the injured worker had stopped treating medically;
3. whether the injured worker had successfully returned to work;
4. whether the injured worker had reached an end medical result; and
5. whether the subsequent work contributed independently to the final disability.

Trask v. Richburg Builders, Opinion No. 51-98WC (August 25, 1998).

If a second accident at least partly precipitates and independently contributes to an injured worker's disability, the injury will be found to be a new injury and the insurer on the risk at that time is the responsible party. *Doyle v. G.P.I. Const. Co.*, Opinion No. 19-89WC (May 22, 1991).

If a claim is denied or if a request for discontinuing benefits is issued on the **SOLE** basis that another employer and/or insurer is responsible, the adjuster must include evidence supporting the other employer/insurer's liability. When possible, the adjuster should provide the Department with the name of the employer and/or insurer against whom it is asserting liability. The Department will ensure that all employers/insurers have been provided with notice of possible liability and within 30 days of the notice, it will review the evidence and issue an order requiring one employer/insurer to pay benefits. In addition, the Department will order the employers/insurers to participate in ARBITRATION.

ARBITRATION is governed by [21 V.S.A. §662\(e\)](#) and Rule 8.0000.

When arbitration is ordered, the employer/insurers will be afforded the opportunity to mutually select an arbitrator within 30 days. If the parties cannot agree on an arbitrator, the Department will select one.

Once an arbitrator is selected or appointed, the parties must jointly provide the arbitrator with the claim file. The initial arbitration conference must be held within 30 days of receipt of the file. The arbitration hearing must be held within 90 days of the initial arbitration conference. The arbitrator shall render a decision within 45 days after the close of the arbitration proceeding.

The arbitrator has the authority to apportion liability, including costs and attorney fees, which may be limited to one or more parties.

IT IS IMPORTANT TO NOTE THAT YOU CAN PAY OR CONTINUE TO PAY BENEFITS TO A INJURED WORKER AND STILL PURSUE THE LIABILITY OF ANOTHER EMPLOYER/INSURER. If you are willing to pay benefits voluntarily to the injured worker pending notice to the involved employers/insurers and a decision by the Department, you should send a letter to the Department advising that you are doing so, and request that the Department put another employer/insurer on notice pursuant to [21 VSA §662\(c\)](#). You must include the evidence you are relying upon to support the request and you should identify the employer/insurer you seek to have put on notice. If it is ultimately determined that another employer/insurer is responsible for benefits, you can request that the Department require the other employer/insurer reimburse you for payments made. Copies of your written communication to the Department must be copied to all involved parties, including the injured worker and if represented, his or her attorney.

ARBITRATION IS ONLY APPROPRIATE WHEN THE SOLE DISPUTE INVOLVES EMPLOYER/INSURER LIABILITY. If the claim involves **OTHER ISSUES IN ADDITION** to the **EMPLOYER/INSURER LIABILITY** dispute, the Department will refer the claim to the formal hearing docket instead of ordering the parties to participate in arbitration.

The Department may or may not schedule and conduct a telephone conference before ordering payment of benefits or arbitration, or before referring a claim to the formal hearing docket