

The Appeals Board affirms the Judge's finding that Mr. Douglas E. Fickel injured his left shoulder while working for Comfort Contractors, Inc., on June 8, 1999. Likewise, the Board affirms the finding that, under these facts, Mr. Fickel had just cause that excused his failure to report the accidental injury within the first 10 days following the accident.

In January 1999, approximately 5 months before the June 1999 accident, Mr. Fickel had left shoulder surgery. After that surgery, Mr. Fickel returned to work for Comfort Contractors, Inc. On June 8, 1999, Mr. Fickel, who oversees the plumbing work performed by the company, was helping a co-worker load a drain cleaning machine onto a truck.

After lifting the drain cleaning machine, Mr. Fickel noticed a pulling sensation in his left shoulder. He assumed he had merely stretched a muscle or was experiencing discomfort associated with the earlier surgery. But in late July 1999, when he next saw Dr. John Yost Jr. for a follow-up appointment related to the left shoulder surgery, the doctor advised Mr. Fickel that he had reinjured his shoulder. Mr. Fickel then reported the June 8, 1999 incident to the company. Notice was given to the company within 75 days of the June incident.

The Judge had the opportunity to observe Mr. Fickel testify and the Judge found that testimony credible. The Appeals Board agrees. These facts demonstrate the difficulty workers sometimes experience in determining whether their aches and pains emanate from a work-related injury, from the natural and probable sequelae of a preexisting condition, or from the day-to-day muscle soreness associated with their work. Because he did not realize that he had sustained a new injury to his shoulder on June 8, 1999, Mr. Fickel had just cause that excused the failure of providing the company with notice of the accidental injury within the first 10 days following the incident.

WHEREFORE, the Appeals Board affirms the January 20, 2000 preliminary hearing Order entered by Judge Frobish.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

c: David J. Bideau, Chanute, KS
Ronald J. Laskowski, Topeka, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director