SCOTT V. GENERAL EQUIP. CO., 1964-NMSC-056, 74 N.M. 73, 390 P.2d 660 (S. Ct. 1964)

Charles Phillip SCOTT, Claimant, Plaintiff-Appellant,
vs.
GENERAL EQUIPMENT COMPANY, Employer, and Hardware Mutual Company, Insurer, Defendants-Appellees

No. 7374

SUPREME COURT OF NEW MEXICO

1964-NMSC-056, 74 N.M. 73, 390 P.2d 660

March 23, 1964

Workmen's compensation case. The District Court, Grant County, H. Vearle Payne, D.J., entered judgment for employer and its insurer and plaintiff appealed. The Supreme Court, Moise, J., held that action for compensation could not be maintained where plaintiff failed to give written notice, and where neither plaintiff's employer, its office manager nor anybody else with authority was advised by plaintiff of the claimed accident and injury until some 13 days or more after its alleged occurrence, at which time plaintiff mentioned his injury in conversation.

COUNSEL

H. 0. Robertson, John W. Reynolds, Silver City, for appellant.

LaFel E. Oman, Garnett R. Burks, Jr., Las Cruces, for appellees.

JUDGES

Moise, Justice. Chavez and Noble, JJ., concur.

AUTHOR: MOISE

OPINION

*{*74}* **{1}** Plaintiff appeals from an order sustaining a motion for summary judgment and dismissing his workmen's compensation action.

{2} It is plaintiffs position that the court erred in granting summary judgment because there were present material issues of fact as to the injury claimed to have been suffered, and as to compliance with 59-10-13A, N.M.S.A.1953, providing for written notice of the accident and injury, or waiving it where the employer, his superintendent,

foreman or other agent in charge of the work had actual knowledge of the occurrence of the accident. Because the notice question is decisive of this appeal, we discuss it only.

{3} There is no disagreement concerning the rule, many times repeated by us, that disputed issues of material fact may not be decided on motion for summary judgment. Buffington v. Continental Casualty Company, 69 N.M. 365, 367 P.2d 539. However, here there is no contention by plaintiff that any written notice was given. On the contrary, he would come within 59-10-13.4(B), N.M.S.A.1953, which excuses written notice if the "employer * * * or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence."

{4} Plaintiff admits that neither the employer, his office manager, nor anybody else in authority was advised by him of the claimed accident and injury until some 13 days or more after its alleged occurrence, and then only in conversation. This is not a compliance with 59-10-13.4, N.M.S.A.1953, in any sense.

{5} We observed in Buffington v. Continental Casualty Company, supra, that we had never held that in order to have "actual knowledge," personal witnessing of an accident by a superintendent, foreman or other agent in charge of work was required. In that case we held that verbally advising the employer on the day following the claimed injury, when considered with the other *{*75}* facts there present, met the requirements of the statutes. The oral reporting of an accidental injury on the day following its occurrence, together with the additional facts of Winter v. Roberson Construction Company, 70 N.M. 187, 372 P.2d 381, was held sufficient to support a finding of "actual knowledge."

{6} In Lozano v. Archer, 71 N.M. 175, 376 P.2d 963, we found "actual knowledge" under the particular facts there present where no one in authority actually saw the accident and no written notice had been given, but it was reported immediately.

{7} Adhering to the rule developed in these cases, we are not prepared to find "actual knowledge" which would serve to excuse written notice in a verbal statement to the employer long after the claimed accident giving rise to the injury. In the instant case it was at least 13 days later, and possibly more, according to plaintiff's testimony viewed in its most favorable light. To hold otherwise would effectively nullify the requirement of written notice, and would stretch "actual knowledge" excusing the same beyond recognition.

{8} The court having ruled correctly, the judgment appealed from is affirmed.

{9} It is so ordered.