IN THE UTAH COURT OF APPEALS

----ooOoo----

Steve Mojica, Plaintiff and Appellant, v. O'currance, Inc.; Chongqing Bashan Instrument Factory, Inc.; Global Health Solutions, Inc.; Natural Wellness Network, Inc.; and John Does I-V, Defendants and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20041026-CA F I L E D (September 9, 2005) 2005 UT App 385

Third District, Salt Lake Department, 040905109
The Honorable Anthony B. Quinn

Attorneys: Daniel F. Bertch and Kevin K. Robson, Salt Lake City, for Appellant
Robert L. Stevens, Salt Lake City, for Appellee

Before Judges Billings, Bench, and McHugh.

PER CURIAM:

Steve Mojica appeals the trial court's dismissal of his complaint against O'currance, Inc. (O'currance) as barred by the Utah Workers' Compensation Act (the Act). See Utah Code Ann. §§ 34A-2-101 to -803 (2001).[1]

When reviewing whether a trial court properly granted a motion to dismiss for failure to state a claim, this court "accept[s] the factual allegations in the complaint as true and consider[s] them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving party." Coroles v. Sabey, 2003 UT App 339,¶2 n.1, 79 P.3d 974. Dismissal under rule 12(b)(6) is warranted "only in cases in which, even if

---

[1]The order dismissing O'currance as a party was properly certified as final and appealable pursuant to rule 54(b) of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 54(b).

the factual assertions in the complaint were correct, they provide no legal basis for recovery." Mackey v. Cannon, 2000 UT App 36,¶13, 996 P.2d 1081. The trial court's grant of a motion to dismiss is a question of law reviewed for correctness. See id. at ¶9.

Under the Act, workers' compensation "shall be the exclusive remedy against the employer . . . on account of any injury or death, in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of the employee's employment, and no action at law may be maintained against an employer." Utah Code Ann. § 34A-2-105(1). Thus, if Mojica's injury from the use of the heat lamp was sustained in the course of or because of his employment, or arose out of his employment with O'currance, his claims against O'currance are barred. Mojica argues that because he was at home when the injury occurred, he was not in the course of his employment. However, the facts alleged against O'currance in Mojica's complaint establish that his injury arose out of his employment. As a result, his claims against O'currance are barred under Utah Code section 34A-2-105(1).

In his complaint, Mojica alleged the following facts relevant to O'currance and determining whether Mojica's injury arose from his employment: O'currance employed Mojica to telemarket the heat lamp that injured him; the manufacturer or distributor sent a sample heat lamp to O'currance for employees to "use and familiarize themselves with for sales purposes"; in November 2002, O'currance "made the heat lamp available to [Mojica] so he could become familiar with what he would be selling"; Mojica took the heat lamp home and used it according to the instructions, resulting in injury. O'currance moved to dismiss based on these facts, admitted as true for the purposes of the motion.

Because Mojica was not at his work place when he was injured, other factors must be considered to determine whether the injury "arose out of" his employment.

> "An accident arises out of employment when there is a causal relationship between the injury and the employment. Arising out of, however, does not mean that the accident must be caused by the employment; rather, the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion."

Ae Clevite, Inc. v. Labor Comm'n, 2000 UT App 35,¶12, 996 P.2d 1072 (quoting Buczynski v. Industrial Comm'n, 934 P.2d 1169, 1172 (Utah Ct. App. 1997)). Furthermore, "the controlling test should be if the circumstances of the employment can be fairly said to have elicited conduct by the employee which results in his injury." Commercial Carriers and Old Republic Ins. v. Indust. Comm'n, 888 P.2d 707, 712 (Utah Ct. App. 1994).

Under this test, the facts alleged in the complaint establish that Mojica's injury "arose out of" his employment. He took the lamp to try it for the purpose of familiarizing himself with it and to prepare to market it. He had the lamp only because of his employment and used it to further his employer's interests. Both his access to and use of the lamp were directly connected to his employment. Because he was employed to market the lamp, his employment "can be fairly said to have elicited" the conduct resulting in injury, his use of the lamp. Id. As a result, his claims against O'currance are barred.

Accordingly, the dismissal of Mojica's complaint is affirmed.

_____
Judith M. Billings,
Presiding Judge

_____
Russell W. Bench,
Associate Presiding Judge

_____
Carolyn B. McHugh, Judge