IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended,
and Ontario Regulation 293/85

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

MARKEL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

George O. Frank for the Applicant

Kevin Adams for the Respondent

Introduction

The parties in this case are two insurers carrying on the business of automobile insurance in the Province of Ontario. They have submitted a dispute to me to be resolved as an arbitrator in accordance with the *Arbitrations Act* 1991.

This is a priority dispute between two insurers as to which insurer is responsible to pay statutory accident benefits with respect to an accident which occurred April 4, 2006. In that accident, Duncan McK[1] sustained serious injuries. A claim was made to Security National who has been administering a statutory accident benefits claims file. They seek to recover indemnity from Markel and seek to have a determination that Markel is the highest priority insurer obliged to pay the statutory accidents benefits in this case.

The parties entered into an Arbitration Agreement and submitted this arbitration to me. We had a hearing on this case on September 22, 2009, and we had previous hearings with respect to

[1] In consideration of the privacy interests of witnesses who were required to testify about their personal affairs, I have deleted reference to surnames.

some interlocutory matters and other issues. This case has a long history ultimately bringing into the point where we can have a determination as to the substantive priority issue.

As with all of these priority issues, this involves consideration of the operation of section 268 of the *Insurance Act*. That section of the *Insurance Act* sets out priority rankings between different insurers who might potentially be obliged to pay statutory accident benefits to somebody injured in an accident.

Since 1990, the legislation has broadened the scope of people who might be entitled to statutory accident benefits. The result of that broadening of access to entitlement is that an injured individual might have access to a number of insurers in order to seek payment of accident benefits.

The ranking provisions in section 268 of the *Insurance Act* goes some distance towards sorting out those obligations in conjunction with the regulation provisions found in the Statutory Accident Benefits Schedule. The procedure for determining the priority between insurers is governed by a regulation under Regulation 283/95. That regulation requires the priority dispute to be determined by an arbitration as is being pursued by the parties in this case.

Background of This Dispute

In 1990, Ontario changed its approach to compensation for personal injury arising out of motor vehicle accidents. By introduction of a legislative package characterized as the Ontario Motorist Protection Plan, the legislature diminished the role of tort law, and imposed a comprehensive first party benefits program providing compensation on a “no fault” basis to injured motorists. This shift in approach was anticipated to reduce the amount of costs and compensation associated with tort claims. At the same time the new program greatly enhanced the potential benefits available to an injured person on a “no fault” basis. While we have seen a number of revisions to the legislation and regulations since 1990, Ontario continues to operate in a compensation environment of restricted tort access, operating in parallel with elaborate no fault benefits.

Concurrent with this shift in approach the government faced problems of dislocation. It was evident that a shift from a tort basis to a first party emphasis would have the effect of making the relationship between an injured person and their provider of no fault benefits very important. Prior to 1990, the first party benefits were much more modest with limits of $25,000.00 for medical and rehabilitation benefits and weekly disability payment limits of $140.00. Given the new and significant first party benefit structure after 1990, the legislature also revisited the entitlement structure, redefining where an injured person should look for first party benefits. Prior to 1990, the basic rule required an individual who was an occupant of an automobile to claim the no fault benefits from the insurer of the automobile. If the person was not an occupant but was struck by an automobile they would claim the benefits from the insurer of the vehicle that struck them.

With the changes that were brought in in 1990, the government changed this arrangement to create a different set of priorities which are now found in section 268 of the *Insurance Act*. The key difference was that the legislation requires injured persons to claim their benefits first from the insurer of any policy where the injured person is a named insured, spouse of a named insured, or a dependent of a named insured. In effect this means that the insurance coverage

for no fault benefits, now referred to as Statutory Accident Benefits, follows the contractual insurance arrangements of the individual, or his or her family, and not necessarily the automobile.

One can understand some attractiveness to this approach. It puts the injured person in the position of dealing with the insurer from whom they purchased benefits. It puts insurers in the position of providing benefits to their own customers. It facilitates the purchase of optional benefits. The former system, where injured individuals were more likely to be claiming from an insurer where there was no contractual relationship, was less attractive.

With the implementation of the Ontario Motorist Protection Plan, and the increased importance of the first party benefits program, the government also designed the system to ensure that benefits were available broadly and therefore defined coverage to offer benefits to a wide range of individuals in relation to any policy of insurance. The policy extends coverage to named insureds, spouses, dependents, listed drivers, occupants of the insured vehicle, persons involved in an accident with the insured vehicle, and certain regular users of vehicles. The policy goal of such a board range of coverage is clear -- to ensure that persons injured in a motor vehicle accident are likely to have coverage from some source. Under the legislation any person injured in a motor vehicle accident that did not have recourse to some coverage in this scheme would have recourse to benefits from the Motor Vehicle Accident Claims Fund.

Having taking the step of broadly defining coverage under that standard program, the government had to deal with the likely reality that any person injured in a motor vehicle accident would have the status of being a “insured person” under more than one policy of insurance. This is helpful for the purpose of ensuring coverage to be broadly available but unhelpful in delineating which insurer has the obligation to handle a claim when there is more than one insurer potentially involved. As a result, the legislature enacted certain priority rules in section 268 of the *Insurance Act* setting out a ranking of where individuals should receive their statutory accident benefits in the event of multiple coverage. Over the years there have been a number of amendments to the legislation and supporting regulations with respect to these priority rules.

When the government changed the priority rules to bring potential claimants to a closer relationship with their own insurance company, by requiring payment of the statutory accident benefits by that company regardless of involvement of the insured vehicle, they had to recognize the existence of fairly common relationships that give rise to use of vehicles on a personal basis, but where the purchaser of the insurance is not the regular user of the vehicle. The traditional “company car” scenario involves situations where a business purchases a vehicle, and insurance for the vehicle, and then makes that vehicle available for the regular, personal, and frequent use of its employees or officers. Similarly, the practice of renting and leasing vehicles might result in the creation of contract of automobile insurance in the name of a vehicle owner but which is truly the personal automobile of someone other than the registered owner. Given the known frequency of these types of transactions, the legislature attempted to address how the new priority rules would apply to these situations. The result was regulation provisions, now embodied in section 66 of the SABS, previously found in other provisions with other language that address these arrangements. The apparent purpose of the regulation provision is to deem the person, for whom a vehicle is made available for regular use, to be a “named insured”. This is clearly a recognition that in these types of transactions the regular user is in such a relationship with the vehicle and the vehicle insurer that that person should

claim their benefits first from the insurer of the vehicle, rather than claim the benefits from some other insurance company.

The “regular use” case law has developed somewhat broadly. Regulation changes have tried to narrow these provisions somewhat. But we continue to see examples of circumstances where the “regular user” provisions are applied to a variety of vehicle usage arrangements.

These priority rules addressing regular use are easily applied to the traditional “company car” and rental cases. The rules are more challenging to apply in other circumstances.

This case is one of a series of cases where priority rules are in question as a result of non-traditional ownership and insurance arrangements.

Automobile insurance in Ontario is constructed in such a way as to provide coverage to an insured person who is the owner of an automobile. That standard policy, generally referred to as the “owners’ policy”, provides liability coverage for the owner and for anyone else who operates the vehicle with the consent of the owner. As an adjunct to that liability coverage there is Statutory Accident Benefits coverage.

The most common insurance transaction is one where a standard policy of insurance is issued by an insurer to an insured who is the owner of the vehicle. But we also see a variety of cases where the transactions are different. These are cases where the true owner of the vehicle is not the named insured under the policy of insurance but is an additional named insured, or listed driver, at best. In these arrangements, it is common that the true owner of the vehicle has committed the vehicle to some commercial endeavour that includes obtaining insurance and other obligations in the business relationship. In these transactions, the policy of insurance is primarily a contractual relationship between the insurer and a non-owner. Given the commercial relationships in operation, the non-owner has some element of control, and some factual expectation of loss in the event of a liability claim. Accordingly, there is legitimate interest in procuring and maintaining adequate insurance with respect to the vehicle. The net result, however, is that a policy of insurance is effectively procured by someone who is not the owner of the vehicle.

These factual situations create difficulty in dealing with the priority rules and the deemed “named insured” regulation provisions. In a number of cases arbitrators and courts have been asked to determine whether or not the vehicle is being made available for regular use of an individual, when that individual is characterized as the owner of the vehicle.

In this case, the following entities are involved:

Duncan McK, who is the individual who was injured in the accident. He was an employee, then operator, of Pinnacle Transport Limited. First he had worked as an employed truck driver operating a vehicle owned by Pinnacle Transport. Then he took an office position working internally for Pinnacle. He then approached the principals of Pinnacle looking for opportunities to increase his income and as a result entered into an arrangement whereby he became an “owner operator”. He agreed to purchase a vehicle from Pinnacle, and he entered into a contractual relationship with Pinnacle about the operation of the vehicle on Pinnacle’s behalf.

Pinnacle Transport Limited is the business entity that McK was associated with. They operate a trucking company and they have vehicles which they ownoperated by employees, and, in addition relationships with owner operators. Pinnacle Transport is also the named insured under the policy of insurance obtained from Markel, policy number 2005590, which insured all vehicles owned, registered, leased and/or operated on behalf the named insured.

The Tidy Scott is the registered sole proprietorship of Duncan McK. He originally established this in conjunction with a cleaning business that he was operating with his wife but he later used this as his alter ego in his involvement with Pinnacle. The contract documents and some of the registration documents indicate that Tidy Scott as one of the participants in the arrangements with Pinnacle and the truck. According to McK's testimony, he was the sole individual involved with the Tidy Scott and this was essentially his name used for creating a structure that was perceived to offer certain tax advantages.

Markel Insurance Company of Canada is the insurer of the fleet of vehicles operated on behalf of Pinnacle, which includes the vehicle involved in the accident giving rise to Mr. McK's injuries.

Security National Insurance Company, also known as TD Meloche Monnex, is the insurer of Mr. McK's personal automobile. A SABS claim was presented to Security National and they have responded to it and they have instituted this priority dispute ascertaining that the obligation to pay statutory accident benefits properly rest with Markel.

The Evidence in this Proceeding

In this proceeding I received an Agreed Statement of Facts and annexed documents which were agreed to be submitted to form part of the record. It was agreed that these documents could be accepted by me, or rejected, or used in whole or in part as evidence in the proceeding. The Agreed Statement of Facts and annexed documents were marked as Exhibit #1 to the proceeding. During the course of the proceeding the parties agreed to add the following statement to the agreed statement of facts:

> "Neither Chris Gullison nor Beth Buss had any direct communications with the McKs."

Exhibit #2 to the proceeding was the Arbitration Agreement executed by the parties at an earlier date.

Exhibit #3 to the proceeding is a Bill of Sale indicating received from "The Tidy Scott" (Duncan McK) the sum of $19,550.00 for the purchase of a 1998 GMC truck.

Exhibit #4 is a document dated September 14, 2005 from The Tidy Scott/Duncan McK addressed "to whom it may concern", authorizing plates belonging to Pinnacle Transport Limited to be attached to the vehicle in the name of The Tidy Scott.

Exhibit #5 to the proceeding was the business registration, as a sole proprietorship, of The Tidy Scott showing the "legal name" as Duncan Robert Bruce McK. This is the master business license and it appears to be effective after the date of this accident.

Exhibit #6 to the proceeding is a professional driver's manual given to Duncan McK by Pinnacle containing many detailed rules and regulations. McK testified that he was required to adhere to these rules and regulations.

Exhibit #7 to the proceeding is the Document Brief of the Applicant. This is a cerlox bound production of 21 documents. The parties agreed that documents 4, 5 and 6 of this document brief could form part of the record of this arbitration and that I might choose to accept or reject those documents and the statements and facts contained therein. There was a contest between the parties with respect to other documents. The Applicant submitted that documents number 8, 12, 15, 17, 19 and 20 should also be received. The Respondent objected. I heard submissions from the parties and ruled that documents number 15 and 20 should also form part of the record. As the other documents are physically annexed to Exhibit #7, I have them in my possession but I will make no reference to them except to the extent that they are otherwise agreed to in the Agreed Statement of Facts. At the hearing, I gave brief reasons for my ruling with respect to the disputed documents.

Exhibit #8 to the proceeding, consisting of three parts, are three pay stubs for Duncan McK reflecting the financial transactions associated with pay periods February 19th to March 4th, 2006 (Exhibit #8A), March 5th to March 18th, 2006 (Exhibit #8B) and March 19th to April 1st, 2006 (Exhibit #8C).

In addition, I agreed to receive as part of the record of these proceedings the evidence of Elizabeth Buss taken February 19, 2008 and found accorded at questions 236, 237, 238 and 239 of that transcript.

The Issues

The parties put forward three issues for determination in this priority dispute:

1. Whether or not Duncas McK was an "occupant" of the 1998 GMC truck at the time of the accident;

2. Whether or not an election was made on behalf of Duncan McK in accordance with section 268 (5.2) of the *Insurance Act* to claim benefits from Security National;

3. Was the 1998 GMC truck made available to Duncan McK such as to result in him being a deemed named insured in accordance with section 66 of the regulations.

Evidence of Duncan McK

Duncan McK testified in person at the hearing in Toronto on September 22, 2009. He is the injured claimant in this matter. He was injured in an accident which occurred at the premises of Pinnacle Transport on April 4, 2006. He has been associated with that company for a number of years, since 1996. Originally he worked as an employed driver operating a vehicle owned by Pinnacle. Then he moved to work in the office environment for a number of years. After working in the office for Pinnacle he was seeking ways to enhance his income. In dealing with the principals of Pinnacle, they suggested to him the opportunity to become an owner operator. Through this arrangement he came to the status that he had in 2006.

The arrangement with respect to the owner operator status is documented in a number of exhibits. In particular, there is the independent contractor agreement which is found at tab 5 of Exhibit #1. This is an agreement dated September 14, 2005, which is entered into between Pinnacle Transport Limited and "The Tidy Scott". The agreement is 10 pages in length and is signed by Duncan McK as contractor. The essence of the agreement is to call upon Duncan McK/The Tidy Scott to engage in business as an independent contractor to work with Pinnacle. The obligation on Pinnacle is to tender freight contracts to the "contractor". The contractor agrees to provide services to Pinnacle. The contractor is not to use the "equipment" as a personal vehicle and is not to operate the equipment for any other carrier or operator under Pinnacle's license and insurance.

Section III of the agreement requires Pinnacle to utilize the motor vehicle described as the "equipment" of the contractor which is the 1998 GMC truck stated to be owned by The Tidy Scott/McK.

The financial arrangements require the contractor to pay for all of the vehicle related expenses. Licensing and insurance are arranged by Pinnacle but are paid for by Pinnacle deducting the cost from payments due to the contractor. Therefore, while Pinnacle acts for the intermediary, the actual insurance and licensing costs are paid for by the contractor. The maintenance, fuel cost and so forth are paid directly by the contractor. It is possible, but not required, that vehicle servicing could be done by Pinnacle's mechanics in which case the cost would be deducted from the bi-weekly remuneration to the contractor. The remuneration is based on a 75/25 split between the contract and Pinnacle. Accordingly, if the cost to the customer for the shipping is $100.00, $75.00 would be paid to the contractor and $25.00 would be paid to Pinnacle.

Pinnacle's role in the transaction is to provide the customers, the dispatching, and the shipping facility. The contractor's role is to provide the vehicle, to maintain the vehicle, to pay for the insurance and licensing costs through Pinnacle, and to provide the driver.

McK's evidence about the involvement of "The Tidy Scott" is unequivocal. He portrays this simply as his own sole proprietorship. He denied any other owners or employees. He described The Tidy Scott as "my company". He described himself as the owner and CEO. He was the only person working in the company.

From his point of view there were tax advantages to arranging his affairs in this manner.

McK does not recognize any de facto difference between himself and "The Tidy Scott".

The contracting arrangement with Pinnacle required McK to supply a vehicle. He had the option of buying a vehicle externally. He had the option of financing a vehicle externally. In fact, however, he acquired the vehicle from Pinnacle and they financed it by allowing him to pay for the vehicle by deductions from his remuneration. As can be seen in Exhibits #8A, B, and C, each of those statements shows a deduction for a truck payment of $400.00. Exhibit #3 is a Bill of Sale for the vehicle showing the sale of the vehicle to The Tidy Scott (Duncan McK) in September of 2005. The vehicle and plate permits were filed as an agreed document at tab 3 of Exhibit #1. The vehicle portion shows Duncan McK and The Tidy Scott as the names on the vehicle permit. Under the plate portion permit, it is shown Pinnacle Transport Limited. There

was evidence that this arrangement is necessary as Pinnacle Transport has the necessary licenses for carrying on the freight transportation business.

Ancillary to the arrangements between Pinnacle and McK, McK made application to the Workplace Safety and Insurance Board for a determination of his independent operator status. The documentation in relation to this is found at tabs 6 and 7 of Exhibit #1. It appears that McK made an application for that status in June of 2005 and in January of 2006 the WSIB confirmed that they considered this person to be an independent operator under the applicable legislation.

Mr. McK was examined about the circumstances of the accident. The accident was a serious one and he suffered significant injuries. His recollection of the accident may be impacted by the severity of the injuries that he sustained. His evidence to the arbitration was to the effect that he was in the dispatcher's area at the premises of Pinnacle immediately prior to the accident. His vehicle was being emptied and he had been advised that there was no new load for him to take. Therefore another Pinnacle employee, Jim Butcher, was moving his truck away from the loading dock. While this was going on there was a change and it was determined that there was a load for McK to take. McK went outside in order to communicate this to Butcher who was in the process of moving McK's truck to another position in the yard. It was McK's intention to communicate to Butcher that there was a load to be put on the truck and that the truck should be returned to the loading dock. To accomplish this, McK ran quickly across the yard towards the moving truck. He approached the truck from the right side.

The truck is configured with two steps in front of the right front wheel of the cab portion of the truck. These are illustrated by pictures which were contained in documents at tab 5 of Exhibit #7. These pictures illustrate the steps for mounting the cab of the truck and these steps are immediately in front of the turning wheels at the front of the vehicle.

Mr. McK describes running towards the vehicle and stepping onto the step and grabbing onto the exterior rear view mirror with his right hand. His evidence was to the effect that he did not have a good grip and he was falling backwards with his left foot coming down in front of the vehicle wheel. Also, because the vehicle was turning towards the right, the vehicle wheel was outside of the fender of the truck. Mr. McK describes being caught and pulled down from the step into the path of the wheel. The wheel pushed him along the ground and then the vehicle went on top of him.

McK was also questioned about the issues of application for benefits and the question of whether or not he had made a choice or election to claim benefits from Security National (who he referred to as TD Meloche Monnex in his testimony). Essentially his information was to the effect that everything was handled by someone else. He was not in any condition to deal with the insurance and other issues following the accident. It was his evidence that his wife had contacted the leasing company of their personal automobile in order to advise of the accident and disability and to deal with the financial repercussions. Someone from the leasing company suggested that she should be contacting the personal auto insurer for possible access to Statutory Accident Benefits. As a result, contact was made with Security National and the SABS claim process was commenced.

There was no evidence of any choice, election or selection of coverage to be claimed from Security National as opposed to any other option. The record before me suggests only that the

claim was made to the sole source recognized at the time. There is no evidence of contact from Markel.

I found the evidence given by Duncan McK on the various issues to be given in a straight forward manner. I felt that his position was quite strong to the effect that he and The Tidy Scott were one and the same entity. There was no appreciable distinction between the two entities as far as he was concerned.

I accepted the testimony offered by Mr. McK as I found him to be a credible witness with no suggestion that any of his evidence was slanted in anyway.

Evidence of John Fraser

John Fraser attended and testified at the hearing in Toronto on September 22, 2009. He is one of the key personnel at Pinnacle Transport. He came and testified about some of the corporate arrangements. He was not at the location at the time of the accident and he had not been there immediately prior to the accident. He came to the scene after the accident had happened. He denied any personal direct knowledge of the motor vehicle accident.

He testified about the relationship between Pinnacle and The Tidy Scott who he knew to be McK. He saw this arrangement as an opportunity given to McK to advance himself in the company.

He confirmed the financial arrangements with respect to the vehicle and described this as equivalent of giving a "mortgage back" to McK as McK did not have sufficient cash.

Mr. Fraser was asked a number of questions about the reporting of the accident to Markel and the involvement of Markel. He indicated that the accident was reported to Markel the day following the event. He indicated that he did speak to Beth Buss at some point but was not aware of other communications. He denied receiving any paperwork with respect to statutory accident benefits from Markel. He wasn't aware of other communications. He doesn't remember anything to do with the Statutory Accident Benefits claim.

Other than being confirmatory of matters which were already in documentation, I did not find the evidence of Mr. Fraser to be particularly significant to the issues that needed to be addressed in this case.

Analysis and Decision

The Occupancy Issue

An important issue in this case is whether or not McK, at the time of the accident is considered an occupant of the automobile. The term occupant is defined by section 224 of the *Insurance Act* as follows:

> **"'occupant', in respect of an automobile, means,**
>
> **(a) The driver,**
> **(b) A passenger, whether being carried in or on the automobile,**
> **(c) A person getting into or on or getting out of or off the automobile;"**

The totality of the information before me suggests that McK was in the process of getting up and onto the vehicle for the purpose of communicating with the driver. In his evidence he denied any intention to get into the vehicle. He denied any purpose of transportation from point to point by being on the vehicle. The sole purpose of his interaction with the vehicle was to communicate with the driver to have the vehicle return to the loading dock to pick up from freight. I was referred to various witness statements that are at tab 4 of Exhibit #7. Some of the evidence indicates that McK appeared to try to jump onto the step of the truck on the passenger side as it was moving and his foot slipped and he slipped under the front wheel of the truck.

Counsel advised me that there are no cases interpreting this subpart of the definition of occupant. I am not surprised that there are no cases on similar facts.

From a simple review of the definition of the word occupant, it is conceivable to me that McK might be considered a driver, a passenger, or a person getting on the automobile that the time.

With respect to being the driver, the case law has expanded the concept of driver to indicate a person who is not in the vehicle. In the Ontario Court of Appeal decision of *Axa* v. *Markel*[2], the court was considering the same definition of "occupant" with respect to a driver. The court was looking at the status of a person who had driven a vehicle to a yard. He had then exited the vehicle and was waiting outside the vehicle when he was injured. The question was whether or he could be considered a driver at the time of the accident. The Court of Appeal ultimately concluded that he would be considered a driver at that point. In paragraphs 18 through 21 of the decision, the court engages in an analysis with respect to the status of being a driver. The court ultimately applied the test of an objective observer. They asked whether or not an objective observer of the incident would feel that the individual was a driver keeping in mind the criteria set out by the statute.

Following the same analysis with respect to the statutory provision, but focusing on clause (c) of the definition I ask whether or not an objective observer would consider that McK was a person getting on the truck at the time of the accident. I conclude that he was. He describes in some detail the process of putting his foot on the step and attempting to hold onto the exterior mirror. He was not merely going beside the vehicle trying to get the driver's attention. He was actually elevating himself up towards the level of the driver and doing so by putting his weight on a step and holding onto the exterior mirror. While he had no intention of entering the cab of the vehicle, nor did he have any intention of being transported anywhere, he did have the intention of using this physical proximity in order to get the attention of the driver. In my view, the objective observer would conclude that McK was, at the time of the accident, getting on the vehicle. Therefore, I conclude that McK was an occupant of the vehicle at the time of the accident.

The "Choice" Issue

During the course of the proceeding the parties referred to the question of the "choice" issue. This is in reference to subsection 5.1 of section 268 of the *Insurance Act*. Section 268 of the Act contemplates a ranking system for determining which insurer of multiple insurers has the obligation to pay statutory accident benefits. Section 268(5), says that if a person is a named

[2] [2001] O.J. 294

insured under a contract then the person should claim benefits from that contract. Subsection (5.1) indicates that if there is more than one insurer where the person is a named insured (or a spouse or dependent of a named insured) then the person "in his or her discretion, may decide the insurer from which he or she will claim the benefit". According to the statute, this applies only "if there is more than one insurer against which a person may claim benefits…".

Hence, the legislation allows the claimant to exercise the discretion that has the effect of deciding the obligation of the insurers when there are multiple insurers at a certain level of priority.

This only has relevance to the McK case if McK is deemed to be a named insured under the Markel policy. Even then, subsection (5.2) of section 268 would determine priority without a "choice" if McK was an occupant of the vehicle insured by Markel at the time of the accident.

Counsel have correctly indicated that the "choice" issue only is of importance if it is determined that the vehicle is made available for McK's regular use by some entity (thereby deeming McK to be a named insured under the policy of the vehicle) and if he is not an occupant of the vehicle at the time of the accident.

In my view it would be incorrect to say, on these facts, that Mr. McK exercised the power of decision in section 268(5.1). Neither he or anyone else on his behalf knew that there was more than one insurer against whom he might claim benefits. No one made a "decision" about which insurer from which they would claim benefits. The evidence before me that at material times neither McK nor his family was aware of the possible selection between multiple insurers. In those circumstances, I do not find that the mere application for benefits amount to a choice that could be considered a decision pursuant to section 268(5.1).

I do not go so far as to conclude that it would be necessary for a person to have details about particulars of every possible insurer in order to make that decision. It might be that an insured person would have a general understanding that there was more than one insurer that might be called upon to respond and that the person would then make an application to a single identified insurer. However, in this case McK had no idea about there being another insurer that might be called upon to respond. Therefore I do not think that mere filing of an application with the sole known insurer can constitute a "decision" preconditioned by there being "more than one insurer against which a person may claim benefits".

Is McK deemed to be a named insured under the Markel policy?

The Markel policy includes section 66 of the regulation. McK would be deemed to be a named insured under that policy if the vehicle insured by Markel, the 1998 GMC truck was being made available for McK at the time of the accident by a sole proprietorship or other entity.

Security National makes two arguments in this regard. They argue that the vehicle was being made available by a joint venture comprised of Pinnacle, McK and The Tidy Scott. Alternatively, they argue that the vehicle was being made available by a sole proprietorship, namely The Tidy Scott. And of course, they also succeed if it is established that the vehicle is being made available for McK's use at the time of the accident by Pinnacle Transport.

The relationship between Pinnacle, The Tidy Scott, and McK, is multi-factorial. As to ownership of the vehicle, I am satisfied that Duncan McK and/or The Tidy Scott was the owner of the vehicle although there was financing in place requiring payments to Pinnacle and there were limitations on the use of the vehicle as a result of the contractual relationship with Pinnacle. The evidence of McK was to the effect that it was his vehicle and that he could do with it as he pleased. The permit portion of the registration is confirmatory of this. The Bill of Sale is confirmatory of this. Therefore, I find as a fact that the vehicle involved was owned by Duncan McK and/or The Tidy Scott.

The arrangements with Pinnacle are not dissimilar to the arrangements found in other reported cases. I am mindful of the appeal decision of Justice Day in the case of *Axa* v. *Markel*[3].

That case involved an arrangement with a motor vehicle which was not dissimilar to the arrangement for the case before me. One Iakovenko was injured while operating a General Motors' tractor truck registered to Sadetski. The true owner was Iakovenko. Sadetski provided financing. The registration of the plate portion of the permit was in the name of Canadian Transport Systems Corp. and this resulted in the vehicle becoming insured under the Canadian Transport Systems Corp. policy with Markel Insurance.

There was a familiar sounding owner operator contract. The parties argued about whether or not the vehicle was made available for Iakovenko's use by Canadian Transport Systems Corp. or not. Justice Day concluded that the reverse was the case. He found that the subject tractor was not made available by Canadian Transport Systems Corp. but rather was made available by Mr. Iakovenko.

In the arbitration award of the Honourable Drew Hudson, March 31, 2000, in Markel v. State Farm, there was a vehicle subject to a contractor operating agreement with Thompson Emergency Freight System, similar issues arose about whether or not the vehicle was provided by the driver to the transport company or whether the transport company made it available for the regular use of the driver. The arbitrator in that case concluded that the vehicle was made available by the driver to the transport company.

In the arbitration decision of Axa v. ING, May 25, 2006, I arbitrated a case rising similar issues. I concluded that the vehicle was not made available for regular use by the transport company but that in fact the vehicle was made available to the transport company by the individual driver.

Very recently, Arbitrator Shari Novick in June of 2009 gave an arbitration award in the case of Certas v. Insurance Corporation of British Columbia. This case also addressed the issues of whether or not a vehicle was made available for regular use when the vehicle was subject of an owner operator agreement with a transport company. Notably, the driver in that case had incorporated a company of which he was the sole shareholder. The evidence was unclear about whether the corporation or the individual entered into the owner operator agreement but the Arbitrator found that nothing turned on the circumstance. The characteristics of the owner operator agreement seemed to have been essentially the same as the agreement between McK/The Tidy Scott and Pinnacle.

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[3] [1977] O.J. 2186

Arbitrator Novick concluded that the transaction was essentially the same as the transactions addressed by previous decisions and also concluded that the vehicle was not made available for the driver's use by the transport company.

Counsel for Security National has, in a careful argument, drawn attention to some other decisions touching on the deemed insured issue. A case of interest is an arbitration decision of Guy Jones from August of 2002 in the case of Co-operators v. Lloyd's. In that decision, Mr. Jones was looking at an arrangement for the operation of a taxi cab. The owner of the taxi had a policy with Lloyd's and had allowed the injured individual to operate the taxi as a driver. He was not the only driver of the vehicle. The driver and the owner split the receipts from the taxi operations. The Arbitrator was troubled by the regulation requirement about a vehicle being made available to someone by an "other entity". Prior case law tended to indicate that individuals could not be an "other entity". The Arbitrator looked at the relationship between the individual who was an owner and the cab company that she was associated with. That cab company exercised a considerable degree of control over the parties and apparently facilitated various licensing requirements. Therefore the Arbitrator concluded that the owner and the cab company were working as a joint venture. Arbitrator Jones concluded that the joint venture was an "other entity" as contemplated by section 66 of the regulation.

I was also referred to the decision of Arbitrator Jonathan Fidler in Axa v. Markel a decision given December 28, 1998.

This case involved somewhat different facts because in this case the injured individual was the sole employee and operator of a company called Southlake Transportations Systems Inc. Southlake Transportation Systems was in fact a named insured under the policy issued by Markel. It was identified as a legitimate corporation that issued the principal T4 slips and made appropriate employee deductions.

In that case, the Arbitrator concluded that Southlake Transportation Systems Inc. made the vehicle available for the regular use of the individual thereby triggering the predecessor deeming provision found in section 91(4) of the prevailing regulation.

Counsel for Security National submits that it is not necessary for the "other entity" to be an insured under the policy on the vehicle in order to trigger the deeming provisions. I have considered this submission. On first impressions, I would have assumed that the "other entity" making a vehicle available for someone's regular use would also be the entity that is the insured in respect of the policy issued on the vehicle. But that is not a requirement of the regulation. I agree with counsel for Security National in that respect. The deeming provision applies if the vehicle that is the subject of the contract of insurance is made available to an individual for regular use by the sole proprietorship or other entity regardless of whether that sole proprietorship or other entity is a named insured under the policy of insurance on the vehicle.

Based on the evidence and law the vehicle is not being made available to McK by Pinnacle. Therefore, I have turned my mind to the question of whether or not it can be fairly said that the 1998 GMC truck involved in this accident can be said to have been made available to McK for his regular use by a sole proprietorship or other entity.

There are facts in this case which would support, to some extent, an argument that the vehicle was made available to McK by The Tidy Scott. It was also argued that the vehicle was made available to McK by a joint venture between The Tidy Scott and Pinnacle Transport.

In terms of this case I am asked to read section 66 of the regulation as if the vehicle was being made available for Duncan McK's use by Duncan McK/The Tidy Scot. This puts a strain on the wording of the regulation that it cannot reasonably bear in a contextually sensitive analysis. The regulation directs us to look for a relationship between two parties, where one, an entity, has dominion and control over a vehicle, and makes the vehicle available to another, an individual.

I am driven to look at the true essence of the relationship in this matter. The principals, for various business reasons, have chosen to structure their relationships with various formalities. I am not required by the regulation to look at those formalities but I am required to look at what is, in fact, the transaction, and what is being made available. In my view, I should look to the true essence of the transaction to determine whether this vehicle was being made available for McK's use by a sole proprietorship or other entity.

In this regard, I am mindful of the evidence that was clearly indicative of a relationship between Pinnacle Transport and an individual, McK. Pinnacle offered the financing because McK did not have cash. McK considered the sole proprietorship his alter ego. The sole proprietorship was not regarded as a separate entity but simply a device to take advantage of whatever tax benefits might flow. Almost all of the documentation includes both the name The Tidy Scott and Duncan McK. The communications with the WSIB make no mention of The Tidy Scott.

It is my view that the provisions associated with sorting out these priority disputes between insurers should be determined in a way which is sensitive to the context and the factual record. It would be completely artificial to construe the role of The Tidy Scott as anything other than the role of Duncan McK. He was the directing mind. He made the decisions about the financing arrangements. He would make the decisions about where to take the vehicle for service. He was more than the driver. In fact any action by The Tidy Scott construed as making available a vehicle had to be the action of Duncan McK. Accordingly, I conclude that the fact that The Tidy Scott sole proprietorship is involved in this transaction does not alter anything. I specifically distinguish this from the factual circumstances considered by Arbitrator Fidler in the Axa v. Markel case where there is an incorporated entity, an employee relationship, a T4 slip, two officers, a distribution of shares between two individuals, and where the corporation was a named insured on the policy of insurance on the vehicle.

I note that Arbitrator Fidler declined to pierce the corporate veil in that case, but there is no corporate veil in the case at hand. There is nothing here more than a sole proprietorship which, in essence, amounts to a registration of a name.

The notion of "making available" is a grant of permission, or right of usage. In respect of a The Tidy Scot, this can only be done by Duncan McK. A registered name, a sole proprietorship, is not an entity that can grant such availability independently of its directing mind.

I have also considered the submission that the vehicle was made available for regular use by McK by an "other entity" in the form of a joint venture. While it is clear that an argument can be

made that McK ends up doing what he does with the vehicle as a result of Pinnacle and its operations, I see no evidence to establish a joint venture between Pinnacle and McK. The two parties are in a contractual relationship with mutual obligations and responsibilities. This does not create a new "entity" that could be construed as "other entity" for the purpose of the regulation. It is two separate parties performing their respective obligations specifically without the creation of a new entity.

As a result, I find the essence of the transactions in this case to be the same as those considered by Justice Day, Arbitrator Hudson and myself in the cases cited. Accordingly, I conclude that this vehicle was not made available to Duncan McK for his regular use by a sole proprietorship or other entity or otherwise in accordance with section 66 of the regulation. Therefore, Duncan McK is not deemed to be a named insured under the policy of insurance issued by Markel.

I have had the benefit of reviewing the arbitration award of Ken Bialkowski in the case of Kingsway v. Gore, dated October 15, 2009. In his decision he concludes that the legislative intent must be to make the commercial insurer the higher priority insurer, and accordingly gives an interpretation to achieve that end. He might possibly be right about the intent, and I would not be displeased with the result. But I am not clear that this was the legislature's intent, nor am I clear that I should do other than apply the words of the regulation.

As for legislative intent it appears to me that the legislature may well have decided that there were valid interests to be served by keeping the highest priority with the personal insurer, the insurer with the closest relationship with the person who would be making a claim. At least in theory, this insurer would be in the best position to evaluate the risk exposure in terms of understanding the risk characteristics of the person. From the other point of view, the personal insurance transaction allows the insured person to choose which insurer will be administering benefits in the event of a claim. Indeed that is consistent with the larger change implemented in 1990 requiring injured parties to claim Statutory Accident Benefits from their personal auto insurer, and not from the insurer of the vehicle occupied at the time of the accident. Once again I find that sensitivity to context supports an interpretation consistent with Security National being the higher priority insurer.

The legislature has opened the SABS regulation for revisions numerous times since the owner/operator problem was addressed first by Jonathan Fidler in 1996 and reviewed on appeal by Justice Day in May, 1997. Indeed this very section has been amended twice since then by O. Reg. 114/00, s. 7, and O. Reg. 314/05, s. 7, without attacking this issue. This history increases my reluctance to infer a legislative intent different from the caselaw of 1996 and 1997.

I am sympathetic to the suggestion that things should be arranged so that the commercial insurer is the highest priority in "owner/operator" cases, but that is not the state of the law to date. I decline to seize on the sole proprietorship status, or the joint venture supposition, as a device to distinguish earlier caselaw. It would be unsatisfactory to have the law treat essentially identical cases differently as the result of the notional involvement of artificial constructs such as these.

Whether the Vehicle Was Made Available for McK's Regular Use at the Time of the Accident

In the peculiar circumstances of this case, the question is raised whether or not the vehicle could be made available for McK's regular use at the time of the accident since it was, in fact, being driven by somebody else at that moment. This arises out of the recent decision of Justice Belobaba in the case of ACE INA v. Co-operators dealing with the requirement for contemporaneous availability of a vehicle in order for the deeming provision to apply.

In view of the decision which I have come to with respect to the vehicle being made available it is not necessary for me to come to a conclusion on this issue. For the sake of being responsive to the submissions of the parties, I would point out that it is entirely possible that a vehicle could be available for someone's use at the same time that it is available for someone else's use. The mere fact that a vehicle is actually being operated by someone does not mean that the vehicle is not available.

Conclusion

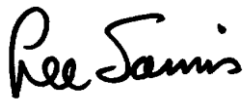
1. Whether or not Duncas McK was an "occupant" of the 1998 GMC truck at the time of the accident? Yes.

2. Whether or not an election was made on behalf of Duncan McK in accordance with section 268 (5.2) of the *Insurance Act* to claim benefits from Security National? No.

3. Was the 1998 GMC truck made available to Duncan McK such as to result in him being a deemed named insured in accordance with section 66 of the regulations? No.

I would ask counsel to advise me within 30 days if they wish me to address costs or any other issues.

Dated at Toronto this 20th day of November, 2009.



LEE SAMIS
Arbitrator