

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8 and Regulation 283/95 made thereunder

AND IN THE MATTER OF THE *ARBITRATIONS ACT*, 1991, S.O. 1991, c.17

AND IN THE MATTER of a claim for Accident Benefits by William Higgs resulting from injuries sustained in a motor vehicle accident which occurred on February 23, 2008

AND IN THE MATTER of an Arbitration:

BETWEEN :

KINGSWAY GENERAL INSURANCE COMPANY

Applicant

- and -

GORE MUTUAL INSURANCE COMPANY

Respondent

## **AWARD**

### **LAWYERS**

Mark S. Wilson  
Anderson Wilson LLP  
Solicitor for the Applicant, Kingsway General Insurance Company

Mark Donaldson  
Dutton Brock LLP  
Solicitor for the Respondent, Gore Mutual Insurance Company

### **ISSUES IN DISPUTE**

Which of the two insurers, Kingsway General Insurance Company ("Kingsway") or Gore Mutual Insurance Company ("Gore"), is the priority insurer for the purposes of paying statutory accident benefits to William Higgs ("Higgs") pursuant to the provisions of Section 268 of the Insurance Act and arising out of a motor vehicle accident which took place on February 23, 2008?

The crucial issue in this priority dispute is whether William Higgs is deemed a "named insured" under the Kingsway policy pursuant to Section 66 of the Statutory Accident Benefits Schedule. It involves an owner/operator situation.

### **AGREED FACTS**

1. On February 23, 2008, William Higgs (Higgs) sustained injuries when the tractor-trailer he was operating left the travelled portion of the roadway while travelling northbound on Highway 81 in the State of Pennsylvania and rolled over.

2. Higgs submitted an Application for Accident Benefits dated March 22, 2008, to the Applicant, Kingsway General Insurance Company (Kingsway), the insurer of the fleet policy issued to Trowbridge Transport Ltd. (Trowbridge) covering the tractor-trailer Higgs was operating at the time of the accident.
3. Higgs was the owner of the 2000 Freightliner tractor involved in that accident and had contracted his services to Trowbridge pursuant to an Owner-Operator Agreement dated January 1, 2008. Trowbridge owned the licence plate for the 2000 Freightliner and Higgs operated under Trowbridge's CVOR. Higgs' tractor had a Trowbridge insignia on the side of it, beneath which was o/a Bill Higgs & Sons.
4. That Owner-Operator Agreement was between Trowbridge and Bill Higgs & Sons, the sole proprietorship operated by Higgs.
5. Higgs was not the named insured under the Kingsway policy though he was a listed driver and the 2000 Freightliner tractor was a scheduled vehicle under the Kingsway policy.
6. Higgs was also the owner of a 1996 Oldsmobile Cutlass Supreme private passenger motor vehicle insured with Gore Mutual Insurance Company (Gore) under Policy no. 1143966, the named insured of which was Higgs.
7. Pursuant to the Application for Accident Benefits, Kingsway has paid Higgs Statutory Accident Benefits, which claim has now been settled further to a Full and Final Release dated March 11, 2009.
8. Following receipt of the Application for Accident Benefits, Kingsway served a Notice of Dispute Between Insurers on Gore dated April 11, 2008, and a Notice of Submission to Arbitration was also served by Kingsway on Gore dated June 26, 2008.
9. Higgs was at all material times hereto a resident of the Province of Ontario.
10. The Applicant, Kingsway, and the Respondent, Gore, were at all material times insurers licensed to carry on business in the Province of Ontario including the issuing of motor vehicle liability policies.

## **LAW**

### **Section 66 (1) - Statutory Accident Benefits Schedule**

*66. (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident:*

- (a) *the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or*
- (b) *the insured automobile is being rented by the individual for a period of more than 30 days.*

### **Section 268 (2) – Insurance Act**

(2) *The following rules apply for determining who is liable to pay statutory accident benefits:*

1. *In respect of an occupant of an automobile:*

*i) the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*

*ii) if recovery is unavailable under subparagraph i), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*

*iii) if recovery is unavailable under subparagraph i) or ii), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose;*

*iv) if recovery is unavailable under subparagraph i), ii), or iii), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

#### **Section 268 (5.2) – Insurance Act**

*(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.*

#### **ANALYSIS & FINDINGS**

Section 268 (2) of the Insurance Act sets out the priority regime relating to the obligation to pay statutory accident benefits where a claimant has statutory accident benefit coverage under more than one policy of automobile insurance.

In the present fact situation, Higgs is clearly an “insured” under his own personal automobile policy with Gore and also an “insured” as occupant of the truck involved in the subject accident insured with Kingsway. Higgs is clearly a “named insured” under the policy insuring his personal automobile with Gore. Higgs is not a “named insured” under the Kingsway policy insuring the truck, unless he becomes a deemed “named insured” pursuant to Section 66 (1) (a) of the Statutory Accident Benefits Schedule (SABS). If Higgs is found to be a deemed “named insured” pursuant to Section 66 (1) (a) of the SABS, then he would be a “named insured” under two separate policies. Section 268 (5.2) of the Insurance Act would then come into play making the vehicle in which he was an occupant at the time of the collision the priority insurer. For the deeming provisions of Section 66 (1) (a) of the SABS to apply, a vehicle must be made regularly available for Higgs’ use at the time of the accident by a “corporation, an incorporated association, partnership, sole proprietorship or other entity”.

The Applicant submits that individuals such as Higgs, who function as owner/operators in the trucking industry are not covered by the deeming provisions of Section 66 of the SABS. This is because it is the owner/operator who makes the vehicle available for the use of the trucking company and not the reverse. In this case, the Applicant Kingsway claims that Higgs made his

2000 Freightliner available to Trowbridge. In this case, the Applicant Kingsway claims that Higgs made his 2000 Freightliner available to Trowbridge and therefore does not meet the requirement of Section 66 (1) (a) that the vehicle be made available to him by the corporation.

The line of reasoning supporting the Applicant Kingsway's contentions that owner/operators in the trucking industry are not covered by the deeming provision of Section 66 of the SABS originates with the decision of Axa Insurance v. Markel Insurance Company of Canada, dated December 9, 1996, arbitrated by Jonathan Fidler and upheld on appeal by Mr. Justice Day. In that case, an owner/operator of a truck (Iakovenko) contracted with a hauling company (CTS) to use his truck to haul their freight. It is important to note that the owner/operator contract involved an individual (Iakovenko) as opposed to a "corporation, unincorporated association, partnership, sole proprietorship or other entity". In the case before me, the owner/operator contract was between a sole proprietorship and the hauling company. Iakovenko was injured when the truck that he was driving was involved in a single vehicle accident. The Arbitrator was asked to decide whether or not the driver was deemed to be a "named insured" under the policy held by the trucking company, pursuant to Section 91 (4) [predecessor to the present Section 66 (1) (a)] of the SABS. Arbitrator Fidler found that the fact situation before him was such that the deeming provisions of Section 91 (4) of the SABS did not apply. It could not be demonstrated that the vehicle was made available to Iakovenko by a "corporation, unincorporated association, partnership, sole proprietorship or other entity", but it was Iakovenko who made the vehicle available to the corporation. On appeal, the Court agreed with the Arbitrator's decision.

It is important to note that Arbitrator Fidler was troubled by the decision that he came to and made references to his concerns in the body of his Decision. This will be dealt with in greater detail later in this Award.

The Applicant Kingsway also relies on the decision of Markel Insurance Company v. State Farm, dated April 12, 2000, a decision of the late Honourable Justice Hudson, sitting as Arbitrator. Arbitrator Hudson came to a similar conclusion. The owner of a van had entered into an agreement with a freight forwarding company along the same lines as in the above case of Axa Insurance v. Markel Insurance Company of Canada. Again, it should be noted the contractual arrangement was between an individual and the hauling company. In the case before me, the contractual arrangement was between a sole proprietorship and the hauling company. Arbitrator Hudson concluded that it was the individual who made the vehicle available for the company's use so that Section 91 (6) [predecessor to the current Section 66 (1) (a) of the SABS] did not apply.

The most recent decision involving the deeming provisions of Section 66 of the SABS is that of Certas Direct Insurance Company v. Insurance Company of British Columbia, a decision of Arbitrator Novick, dated June 2009. The claimant, Mr. Singh, was a passenger in a freightliner insured by ICBC. His personal automobile was insured with Certas. Mr. Singh or his company, J.P. Xpress, was signatory to an owner/operator agreement with RTS Enterprises Ltd. ("RTS"). Singh was hauling freight for RTS. Arbitrator Novick concluded that RTS did not make the freightliner available for the Plaintiff's regular use (Mr. Singh having made his vehicle available for RTS' use) and was therefore not a deemed named insured pursuant to Section 66 of the SABS.

The Respondent attempts to distinguish the case law aforesaid. The Respondent Gore submits that Section 66 of the SABS is applicable in the present fact situation on the basis that the insured automobile was being made available for Higgs' regular use by a "sole proprietorship" or "other entity", as set out in Section 66 of the SABS. The other entity was Bill Higgs & Sons, the sole proprietorship operated by Mr. Higgs and signatory to the owner/operator agreement with Trowbridge. The list of entities in Section 66(1)(a) describes various businesses and organizations which might own automobiles. The list ends with the words "other entity". It is submitted that that Section refers to other varieties of organizations similar to those specified and

would include the sole proprietorship of Bill Higgs & Sons. In other words, as long as the individual has the vehicle made available to him or her by a commercial entity such as a "corporation, unincorporated association, partnership, sole proprietorship or other entity", then Section 66 applies. The Respondent Gore contends that Section 66 applies here because Bill Higgs & Sons made the truck available to Bill Higgs, thereby meeting the requirements of Section 66. In other words, the vehicle was made available to him by a sole proprietorship thereby distinguishing the earlier Decisions of Axa Insurance v. Markel Insurance Company of Canada and Markel Insurance Company v. State Farm earlier referred to.

In the alternative, the Respondent Gore submits that it was the joint venture or "other entity", being comprised of the commercial owner/operator arrangement between Bill Higgs & Sons and Trowbridge, that made the vehicle available to William Higgs so as to meet the requirements of Section 66 (1) (a).

The Respondent refers me to the decision of TD General Insurance Company v. Pilot Insurance Company, a decision of Arbitrator Torrie, dated May 31, 2007. In that decision, a family made a van available to their nanny for her regular use. The nanny was struck while a pedestrian by a vehicle insured with TD. TD took the position that the nanny was a deemed "named insured" under the Pilot policy which insured the family vehicle of the family that had hired the nanny to work. Arbitrator Torrie concluded that the family had made the van available to their nanny for her regular use. It was found that the relationship between the family and the nanny was sufficient to render the family an "other entity" under Section 66 (1) (a).

The Respondent refers me to the decision of Co-operators General Insurance Company v. Cigna Insurance Company of Canada, a decision of Arbitrator Robinson, dated October 26, 1998, as upheld on appeal by Justice O'Leary, in reasons released January 7, 2000. In that decision, it was held that it was irrelevant which corporation made the vehicle available and that the deeming provisions did not require the "corporation" to necessarily be the corporation that insured the vehicle. In that case, the claimant Inderjit Brar regularly drove a transport tractor that was owned jointly by his brother Gursewak Singh and Case Cartage. The owner/operator agreement was entered into between Case Cartage and Gursewak Singh and Dedicated Systems Ltd.. It was Case Cartage and Gursewak that made the vehicle available to the claimant Inderjit Brar. Inderjit Brar was deemed a "named insured" pursuant to Section 91 (4) of the SABS, the predecessor section to the present Section 66 (1) (a) of the SABS.

I have also been referred to the decision of The Co-operators Insurance Company v. M.J. Oppenheim In His Quality as Attorney in fact in Canada for Underwriters, Members of Lloyd's of London, England, Decision of Arbitrator M. Guy Jones, dated August 2002, upheld on appeal in unreported Decision of the Honourable Madam Justice Mesbur, dated November 27, 2002. In that Decision, the claimant Jonathan Wettlaufer was operating a taxicab owned by Janette Bolger. Janette Bolger had purchased the taxicab and a taxi licence. Janette Bolger would not have been able to operate the cab in Kitchener/Waterloo without being a shareholder in the Cambridge Cab Company. She proceeded to acquire shares in the Cambridge City Cab Company. It was held that the claimant Jonathan Wettlaufer had the taxicab made available to him by a joint venture, consisting of Janette Bolger and the Cambridge City Cab Company. It was found that this joint venture constituted an "other entity" as contemplated by Section 66 (1) (a). The Respondent Gore submits that even where the owner of the vehicle holds title to same in their capacity as an individual, such individual could still be considered as an "other entity" for the purposes of Section 66 (1) (a). The nature of the relationship and the purpose behind same must be considered. For example, where an individual owns a vehicle used as a taxicab, the degree of control of the taxicab company over the individual, as well as any other drivers employed by that individual, must be borne in mind. Although the individual owner of the vehicle could withdraw from the business entirely, as long as they wish to operate the vehicle as a taxicab, it had to be in conjunction with the cab company and the corresponding agreement. In such a situation, the

individual and the company will be considered as operating as a "joint venture", which in turn would amount to an "other entity" for the purpose of Section 66 (1) (a). The Respondent Gore contends that Bill Higgs had the subject vehicle made available to him by the joint venture comprised of Bill Higgs & Son and Trowbridge given the degree of control that Trowbridge had by owning the licence plate for the subject 2000 Freightliner and the obligations under the owner/operator agreement to have the Trowbridge insignia on the side of it, beneath which was o/a Bill Higgs & Sons. The Respondent Gore submits that it was this "other entity" which made the vehicle available to Bill Higgs.

I have also been referred to the Decision of AXA Insurance Company v. Markel Insurance Company of Canada, Decision of Arbitrator Jonathan T. Fidler, dated December 18, 1998, overturned on appeal unreported Decision of Justice Matlow, dated April 20, 1999 and Decision of Arbitrator Fidler restored by the Court of Appeal, unreported Decision, dated February 2, 2001. In that Decision, Edward Ferguson suffered fatal injuries when struck by a piece of wood propelled off the back of a tractor-trailer at the Stelco South Billet Yard. Ferguson was at the Stelco yard in order to make a delivery of steel. The truck used for that delivery was owned by Southlake Transportation Systems Inc. ("STS"). This was a limited corporation owned by Mr. Ferguson and his wife. Ferguson was the president of the company and sole employee. On the date of the accident, Ferguson was transporting steel for Torque Transport. Ferguson also owned a personal automobile insured with AXA Insurance Company ("AXA"). The solicitor for Markel argued that the truck was really Mr. Ferguson's personal truck and not Southlake Transportation System Inc.'s truck and was therefore not made available for his regular use by the company. Arbitrator Fidler held that there was no reason why the corporate veil should be pierced. He found that Southlake Transportation Systems Inc., a corporation made the truck available for the regular use of Edward Ferguson and therefore was a deemed "named insured" under the Markel policy.

At first blush, it may appear that this 1998 decision of Arbitrator Fidler is at odds with his earlier decision in AXA v. Markel, a decision dated December 9, 1996, involving separate parties and a different set of facts. In the 1996 decision, the owner of the truck was an individual by the name of Lev Iakovenko. Mr. Iakovenko, as an individual and not as a corporation or sole proprietorship, signed the owner/operator agreement with Canadian Transportation Systems Corp. ("CTS"). Essentially, Arbitrator Fidler found that Iakovenko was not a deemed "named insured" under the Markel policy because the vehicle was not made available to him by a "corporation, unincorporated association, partnership, sole proprietorship, or other entity" as then required by Section 91 (4) of the SABS (precursor to the present Section 66 of the SABS). Arbitrator Fidler found CTS was not making this vehicle available for Iakovenko's regular use, but that Iakovenko was making the vehicle available for the use by CTS. Wording of the statute was not met. In the 1998 Decision, he seized upon the fact that the vehicle had been made available to the driver by a corporation, even though it was a corporation owned by the claimant.

Of significance are the comments made by Arbitrator Fidler in his 1996 Decision with respect to Mr. Iakovenko's claim. He writes at page 7 of his decision:

*"Unfortunately the decision that I have come to does not result in a common sense solution to this problem. It troubles me that when a truck driver has an accident while operating his truck in the course of transporting goods pursuant to an owner/operator agreement, that he should have to go back to his own personal vehicle insurance to claim, when his personal vehicle had nothing to do with the accident. It appears that an attempt is being made to require the insurer of the vehicle that was actually involved in the accident, particularly in a commercial situation, to be responsible for the accident benefits. Unfortunately, the problem appears to be in the wording, particularly of Section 91 (1). If the intention is as I suspect, then a change in the wording is required. I have to make my decision based on the wording that is before me."*

I am satisfied that the legislative intent of Section 66 of the SABS and its predecessor, Section 91 (4) of the SABS, is to place the truck insurer in priority to the individual's private automobile insurer in circumstances where the accident occurred involving the truck in the course of the commercial arrangement between the parties. In the present fact situation, I find that William Higgs had the subject vehicle made available to him by either a sole proprietorship (Bill Higgs & Sons) or "other entity" (the joint venture comprised of Bill Higgs & Sons and Trowbridge pursuant to the owner/operator agreement) so as to meet the requirements of Section 66 (1) (a) of the SABS. I, like Arbitrator Fidler aforesaid, am troubled when a truck driver has an accident while operating his truck in the course of transporting goods pursuant to an owner/operator agreement, that he would have to go to his own personal vehicle insurance to claim, when his personal vehicle had nothing to do with the accident. Insurance premiums are collected on the basis of the particular risk of being insured. The risks of operating a heavy commercial vehicle for distances far in excess of those normally driven by a private automobile should be borne by the insurer insuring the commercial vehicle. Those additional risks would be unknown to the private automobile insurer given the standard information contained in the application for insurance. I am fully satisfied that the legislative intent of Section 66 (1) (a) is to have the commercial insurer responsible for accident benefit claims arising from the commercial operation. When one considers the legislative intent of Section 66 of the SABS, it only makes sense to treat the commercial partnership created by the owner/operator agreement as an "other entity". It should be noted that the initial Arbitration decisions interpreting the predecessor to the present Section 66 (1) (a) of the SABS involved an individual making the tractor available to the hauling company. Consideration was not given to the joint venture and "other entity" theory, which later emerged with the Decisions of Arbitrator Jones in his August 2002 Decision in The Co-operators Insurance Company v. M.J. Oppenheim In His Quality as Attorney in fact in Canada for Underwriters, Members of Lloyd's of London, England and the Decision of Arbitrator Torrie in his May 31, 2007 Decision in TD General Insurance Company v. Pilot Insurance Company. The emerging "joint venture" or "other entity" theory makes total sense and meets what I believe to be the legislative intent of Section 66 (1) (a) of the SABS.

I realize that my decision herein conflicts with the recent decision of Arbitrator Novick in Certas v. ICBC, dated June 2009. It does not appear however that Arbitrator Novick considered the joint venture or "other entity" theory emerging from the TD General Insurance Company v. Pilot Insurance Company and The Co-operators Insurance Company v. M.J. Oppenheim In His Quality as Attorney in fact in Canada for Underwriters, Members of Lloyd's of London, England decisions, nor did she appear to consider the most recent Decision of Arbitrator Fidler in AXA Insurance Company v. Markel Insurance Company of Canada. Most importantly, she did not appear to have considered the legislative intent of the Section and the impact on the insurance industry as a whole when establishing premiums reflective of the risks being assumed.

On the basis of the aforesaid, I am of the view that the joint venture or "other entity" concept ought to apply to owner/operator situations such as the case here. The business relationship created by the owner/operator agreement forms the "other entity", which makes the vehicle available to the operator. It meets the legislative intent of Section 66 (1) (a) of the SABS and allows insurers of private automobiles to establish premiums based on known risks rather than unknown risks of operating heavy commercial vehicles for distances often greater than those one would expect of a personal automobile. It transfers the commercial risk to the insurer of the commercial operation.

**ORDER**

I hereby order that Kingsway is the priority insurer for all accident benefit payments payable to Mr. Higgs.

I order that Kingsway pay Gore its legal costs of this priority dispute on a partial indemnity basis.

I order that Kingsway pay the Arbitrator's costs.

In the event that the parties cannot resolve the issue of costs, I would be pleased to remain involved.

DATED at TORONTO this 15th        )  
day of October, 2009.                )

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KENNETH J. BIALKOWSKI  
Arbitrator