

**CITATION:** Security National Insurance Company v. Markel Insurance Company, 2010 ONSC 5309  
**COURT FILE NO.:** 09-CV-393749  
**DATE:** September 27, 2010

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I.18 and O.Reg. 283/95**

**IN THE MATTER of the *Arbitration Act, 1991*, S.O. 1991, c. I.7**

**IN THE MATTER of an arbitration**

**BETWEEN:**

**Security National Insurance Company**

Applicant

- and -

**Markel Insurance Company**

Respondent

**COUNSEL:**

George Frank for the Applicant  
Kevin S. Adams for the Respondent

**HEARING DATE:** September 23, 2010

**REASONS FOR DECISION**

**PERELL, J.**

**1. Introduction and Overview**

[1] Mr. Duncan McKerchar was injured when he jumped onto a moving truck, fell under it, and was run over. He is receiving accident benefits. There is a dispute between Security National Insurance Company and Markel Insurance Company as to which is responsible to pay the accident benefits.

[2] Applying and adding to a line of authorizes that begins with *Axa Insurance v. Markel Insurance Company of Canada* (Arbitrator Fidler, December 9, 1996), aff'd

[1997] O.J. No. 2186 (Gen. Div.), Arbitrator Lee Samis ruled that Security National should pay. It now appeals.

[3] The appeal concerns the interpretation of s. 66 (1) of the Statutory Accident Benefits Schedule, Ont. Reg. 403/96, enacted pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8 and the correctness of the precedent established by *Axa Insurance v. Markel Insurance Company of Canada*, *supra*, which is now almost 14-years old and an authority regularly followed by arbitrators including Arbitrator Samis several times.

[4] For the reasons that follow, I conclude that *Axa Insurance v. Markel Insurance Company of Canada*, *supra*, is wrong and it should not be followed. Arbitrator Samis' award was incorrect and accordingly Security National's appeal should be allowed.

[5] These reasons are being released with my Reasons for Decision in *Kingsway General Insurance Company v. Gore Mutual Insurance Company*, 2010 ONSC 5308, which is another appeal in which I rule that the *Axa Insurance v. Markel Insurance Company of Canada* decision is wrong. The appeals were argued together, and their Reasons for Decision should be read together.

## **2. Factual Background**

[6] Mr. Duncan McKerchar carries on business as a sole proprietorship with the business name "The Tidy Scot."

[7] The vehicle that was involved in the accident, a 1998 GMC truck, is registered to "Duncan R B McKerchar The Tidy Scot" as the owner, and Pinnacle Transport Ltd. is registered as the owner of the licence plate.

[8] Mr. McKerchar purchased the vehicle from Pinnacle Transport, and he paid for it in bi-weekly installment payments.

[9] The vehicle was used pursuant to an Independent Contractor Agreement between Pinnacle Transport and the Tidy Scott.

[10] Under the Agreement, among other things, the contractor and his drivers agreed not to operate the vehicle exclusively for Pinnacle Transport and not to use it for personal use. The contractor agreed to enroll in Pinnacle Transport's fleet public liability and property damage and cargo insurance coverage. The Tidy Scott paid about \$3,770 per year for insurance.

[11] Markel Insurance issued a motor vehicle liability policy to Pinnacle Transport as named insured, which provided coverage for all vehicles owned, registered, leased, and or operated on behalf of the named insured. Mr. McKerchar was not a named insured nor was he a listed driver.

[12] Pinnacle Transport issued a driver manual setting out rules and guidelines applicable to Pinnacle Transport drivers, and under the Independent Contractor Agreement, the contractor agreed to operate the vehicle in accordance with the laws of

the Province of Ontario and rules and regulations as may be required by Pinnacle Transport.

[13] The Tidy Scott paid \$22.00 bi-weekly for Ontario base plates to Pinnacle Transport.

[14] The vehicle had the Pinnacle Transport name and logo on both sides and the rear of the box and doors of the cab.

[15] Pinnacle Transport assigned the pick-ups and deliveries for which the vehicle was to be used.

[16] The Tidy Scott received 75% of the revenues generated by the vehicle and Pinnacle received 25%.

[17] On April 4, 2006, Mr. McKerchar was injured when he jumped on the running board of his truck, which was then being operated by another driver, who was moving the vehicle to another place on the parking lot.

[18] At the time of the accident, Mr. McKerchar was an owner-operator (an independent contractor) and he was not an employee of Pinnacle Transport. He had at one time been an office employee of Pinnacle Transport.

[19] Mr. McKerchar was a named insured on a motor vehicle liability policy issued by Security National with respect to his personal use vehicle, a 2005 PT Cruiser.

[20] Security National took the position that Markel Insurance Company was the insurer responsible for payment of the accident benefits. It disagreed and their dispute proceeded to arbitration.

[21] The arbitration proceeded before Arbitrator Lee Samis with *viva voce* evidence, documentary evidence and some agreed facts.

[22] Relying on *Axa Insurance v. Markel Insurance Company of Canada, supra*, Arbitrator Samis ruled in favour of Markel Insurance, and Security National appealed.

### 3. Standard of Review

[23] On an appeal from an arbitration award in a priority dispute under the *Insurance Act*, R.S.O. 1990, c. I.8 between insurer companies, the standard of appellate review is correctness in relations to questions of law and reasonableness in relation to questions of mixed fact and law. See *Zurich Insurance Co. v. Personal Insurance Co.*, [2009] O.J. No. 2157 (S.C.J.), in which Justice Brown undertakes a comprehensive and very helpful review of the case law. See also *Oxford Mutual Insurance Co. v. Co-operators* (2006), 83 O.R. (3d) 591 (C.A.).

[24] In the analysis that follows, I intend to apply the correctness standard because the attack and the defence of the arbitrator's award respectively focused on his application of legal principles and on his interpretation of the regulations under the *Insurance Act*.

#### 4. Analysis

[25] The issue in this appeal, as it was in the companion appeal of *Kingsway General Insurance Company v. Gore Mutual Insurance Company*, concerns the interpretation and operation of s. 66 (1) of Ont. Reg. 403/96, which states, with my emphasis added:

66 (1) An individual who is living and ordinary resident 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 the 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 ....**

[26] As I explain in my Reasons for Decision in the companion appeal, Arbitrator Samis was of the opinion that under s. 66 (1) of the Regulation, an insured vehicle cannot be made available for an individual's use by a sole proprietorship when the individual is the sole proprietor. In his opinion, to accept this possibility is to put a strain on the wording of the regulation that it cannot reasonably bear.

[27] I, however, perceive no strain and as I explain in my Reasons for Decision, there is no reason not to give s. 66 (1) its plain meaning that admits of the possibility that an individual who is a sole proprietor may make an insured vehicle available to himself or herself and then be deemed to be a named insured.

[28] In my opinion, it is an error to read in an exception to exclude an individual who is a sole proprietor from making his or her vehicle available to his or her own use.

[29] Therefore, for the reasons that I set out in the companion appeal, which I incorporate by reference, it is my opinion that Arbitrator Samis erred and that his award was legally incorrect because he misinterpreted the Regulation. Based on the facts found by him, and correctly applying the law, he ought to have concluded that Mr. McKerchar was a deemed named insured. It follows that Security National's appeal should be allowed, and I so order.

#### 5. Conclusion

If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Security National's submissions within 20 days from the release of these Reasons for Decision, followed by Markel Insurances submissions within a further 20 days.

[30] Once again, I wish to thank counsel, in this case and in the companion case, for their helpful and well-presented arguments.

*Perell, J.*

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Perell, J.

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**Perell, J.**

**Released:** September 27, 2010