
Court of Appeal Resolves Statutory Accident Benefits Priority Dispute

By: Tyler A. Kaczmarczyk

The Ontario Court of Appeal in its recent decision of *Security National Insurance Company v. Markel Insurance Company*, 2012 ONCA 683, has addressed a contentious area of law concerning who is responsible for paying an injured party's statutory accident benefits. This decision appears to have settled the controversy as to whether an injured owner/operator of a commercial vehicle will have his or her accident benefits paid by the insurance carrier for the commercial vehicle, or whether those benefits will be paid by the insurance carrier for the injured drivers' own vehicle.

This issue, known as a "priority dispute" between insurance companies, involves a consideration of section 66(1) of *Statutory Accident Benefits Schedule* – O. Reg. 403/96 ("SABS"), enacted pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8. Section 66 is titled "Company Automobiles and Rental Automobiles" and reads:

(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...

This provision of the SABS deems certain persons to be named insureds for the purposes of s. 268 of the *Insurance Act*. Section 268, which addresses the priority in which insurers are liable to pay claims for accident benefits, provides that where a claimant is, or is deemed to be, an insured under more than one policy, liability for paying a claim initially falls to the insurer of the vehicle in which the claimant was an occupant. Accordingly, the question of whether or not an owner/operator of a commercial vehicle is deemed to be a named insured by s.66 of the SABS will be determinative of whether the insurance policy taken out on that vehicle must pay the accident benefits of an injured owner/operator.

Prior case law considering this issue concluded that the owner/operator of a commercial vehicle makes their vehicle available for use by the transport company and, for this reason, the company's insurance policy was not required to respond. The owner/operator was, therefore, required to look elsewhere for statutory accident benefits coverage, usually to the insurer of his or her own personal vehicle.

While such a result is arguably consistent with the wording of section 66 of the SABS, it gave rise to a considerable debate as to whether risk was being allocated in a manner reflecting the commercial realities of the industry whereby transport companies derive a tangible commercial benefit from a vehicle leased to it by the owner/operator. Indeed, many transport companies assume some degree of responsibility for these commercial vehicles by obtaining license plates and taking out policies of insurance with the transport company listed as the named insured.

In *Security National*, the Court of Appeal had cause to reconsider this issue. The Court reasoned that, in the cases before it, the owner/operators of the commercial vehicles in question were actually sole proprietors making the vehicle available to themselves for regular use, bringing them within the deeming provision of section 66 of the SABS. Concluding that such a result was evidenced "from the language of the provision and its legislative purpose", the Court of Appeal also acknowledged that to make the insurer of the commercial vehicle responsible for the statutory accident benefits of the owner/operator better reflected the commercial realities of the situation.

While the *Security National* case is a departure from the way in which prior cases had interpreted section 66 of the SABS, it represents the most current and authoritative pronouncement on this area of the law. This decision sends a clear message to the commercial transport industry concerning its obligation to pay statutory accident benefits, and demonstrates the practical necessities of these companies obtaining insurance for the commercial vehicles being made available to them by an owner/operator. This decision also suggests that an owner/operator of a commercial vehicle should insist on verification that a transport company has obtained insurance for the vehicle as part of any lease arrangement for the commercial vehicle in question.

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