

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended

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

AND IN THE MATTER OF an Arbitration

B E T W E E N:

THE ECONOMICAL INSURANCE GROUP

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

AWARD

Scott W. Densem – Arbitrator

Heard: April 28, 2010

Counsel:

Kevin Mitchell for the Applicant

Marlett Dobson for the Respondent

Introduction

The parties appointed me pursuant to the *Arbitration Act, 1991*, and Regulation 283/95 of the *Insurance Act*, to arbitrate a dispute concerning which of the insurers has priority under section 268 of the *Insurance Act* for the payment of Statutory Accident Benefits (SABS) to Amritpal Shergill.

The Arbitration was conducted pursuant to the terms of a written Arbitration Agreement signed and dated in counterpart, August 18, 2009, August 21, 2009, and a March 24, 2009 letter from Densem ADR Solutions Inc. to counsel.

After the commencement of this Arbitration Kingsway became Jevco Insurance Company. Therefore, in this Award I will refer to the Respondent as Jevco.

Factual Background to the Issues

Amritpal Shergill was involved in an accident near Knoxville, Tennessee, on December 22, 2007. He was operating a 2005 Freightliner tractor trailer unit (the tractor trailer). He applied to Economical for SABS. He was a named insured on policy of motor vehicle insurance number 3832104 with Economical for his personal vehicle. Economical paid SABS to Mr. Shergill. Economical's counsel advised in his submissions that approximately \$4,000.00 in SABS had been paid, and that Mr. Shergill's claim was still open.

The tractor trailer operated by Mr. Shergill at the time of the accident was owned by 2017878 Ontario Inc., and insured under fleet policy of motor vehicle insurance number KGHOLH1000304 (the Jevco policy) issued by Jevco to International Truckload Services (ITS).

The Issues

To determine the priority issue between the parties, it is necessary to decide the following:

1) On December 22, 2007, was Amritpal Shergill a deemed named insured under the Jevco policy, as defined in section 66 (1) (a) of the SABS?

If Mr. Shergill was a deemed named insured under the Jevco policy, then by operation of section 268 (5.2) of the *Insurance Act*, Jevco is the priority insurer for payment of SABS to Mr. Shergill because he was an occupant of the tractor trailer at the time of the accident.

If Mr. Shergill is not a deemed named insured under the Jevco policy, then Economical will remain responsible for the payment of SABS to Mr. Shergill.

For Mr. Shergill to be a deemed named insured under the Jevco policy, the following requirements of SABS section 66 must be satisfied at the time of the accident:

- Mr. Shergill must be living and ordinarily present in Ontario
- The tractor trailer occupied by Mr. Shergill must be insured
- The tractor trailer must be available for Mr. Shergill's use
- Mr. Shergill's use of the tractor trailer must be regular
- The tractor trailer must be made available for Mr. Shergill's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity

The Evidence and Factual Findings

By agreement of counsel a two volume Arbitration Record dated April 12, 2010 containing 55 tabs was entered into evidence as Exhibit 1 at the outset of the arbitration hearing.

Economical introduced *viva voce* evidence from Manjeet Pandher, the principal of 2017878 Ontario Inc., the owner of the tractor trailer occupied by Mr. Shergill at the time of the accident.¹

I find on the evidence that the first requirement of SABS section 66 is satisfied. At the material time, Mr. Shergill was living and ordinarily present in Ontario.² In addition, counsel for Jevco acknowledged in her submissions that the residency requirement was not in dispute.

The requirement for the tractor trailer occupied by Mr. Shergill at the time of the accident to be insured has also been satisfied.³

With respect to the requirements that the tractor trailer be made available for Mr. Shergill's use, and that his use of the vehicle be "regular", I find that the evidence in this case satisfies both of these requirements.

In mid-November, 2007, Mr. Shergill approached Mr. Pandher for a job driving a tractor trailer. There is some conflict in the evidence as to whether Mr. Shergill became an employee of Mr. Pandher's company (2017878 Ontario Inc.) or whether he was an employee of ITS, the company with which Mr. Pandher and his company contracted to haul freight. In my view it is not necessary for my decision to make a determination of Mr. Shergill's employment status.⁴

If it were necessary however, I would find that Mr. Shergill was an employee of Mr. Pandher's company, not ITS. The better interpretation of the evidence is that pursuant to its contract with Mr. Pandher's company, ITS had the right to screen and approve or reject drivers proposed to it by Mr. Pandher, the owner/operator. The reason for this was likely insurance based. ITS arranged for the fleet insurance on the owner/operator's vehicles. It wanted to be sure that the operators of these vehicles were qualified and responsible drivers to protect its insurance rates.

ITS's contract with Mr. Pandher's company makes it clear however that Mr. Pandher and his company were responsible for drivers of 2017878 Ontario Inc.'s tractor

¹ Exhibit 1, tab 1, tab 52, p. 9.

² Exhibit 1, tab 51, pp. 11-12, tab 24, pp. 1-2

³ Exhibit 1, tab 5, Jevco Factum, para. 5.

⁴ Exhibit 1, tab 51, pp. 37-40, 43, tab 52, pp. 20-30.

trailers as its employees, not as employees of ITS. Of significance, it is clear that it was 2017878 Ontario Inc. that was responsible to pay for Mr. Shergill's services.⁵

The evidence shows that from November 13, 2007, until the accident on December 22, 2007, Mr. Shergill travelled a total of 17,628 miles in the 2017878 Ontario Inc. tractor trailer in the course of hauling freight on behalf of 2017878 Ontario Inc. and ITS.⁶ This work involved what appears to have been at least 23 days and 12 different deliveries, some long haul, some shorter, in an approximate 5 week period.

Case law has described "regular use" as use that is "habitual, normal, and recurs uniformly according to a predictable time and manner." Regular use does not require exclusive use in the case of fleets, nor does it require any element of personal use.⁷

I find that the evidence establishes that Mr. Shergill's use of the 2017878 Ontario Inc. tractor trailer during this period was regular and his amount of use speaks to the fact that the tractor trailer was made available to him. I do not think that anything turns on the fact that Mr. Shergill was not driving the tractor trailer all of the time. During long distance travel, Mr. Shergill was accompanied by another driver. They would take turns alternately driving and resting to complete the trip. Both the authorities submitted to me in this case on "regular use", and insurance jurisprudence in general, establish that a person can use a vehicle simply by being an occupant. There is no requirement in SABS section 66 that the person be the driver of the vehicle to be a user of the vehicle. If I am in error in that conclusion, I find in any event that the frequency and distance that Mr. Shergill was actually driving the tractor trailer (about 50%)⁸ during this period is sufficient to constitute regular use within the meaning of SABS section 66.

The most contentious issue in this arbitration arises from the SABS section 66 requirement that the tractor trailer has to have been made available to Mr. Shergill by "...a corporation, unincorporated association, partnership, sole proprietorship or other entity..."; to make Mr. Shergill a deemed named insured under the Jevco policy.

Economical submits that this SABS section 66 requirement is met because the tractor trailer was made available to Mr. Shergill by 2017878 Ontario Inc., a corporation. This corporation was the registered owner of the tractor trailer. Mr. Pandher was the principal or directing mind of the corporation. Mr. Shergill had no proprietary interest in

⁵ Exhibit 1, tab 7, tab 51, pp. 49-52, tab 52, pp. 13-18.

⁶ Exhibit 1, tab 54.

⁷ *Zurich Insurance Co. v. Personal Insurance Co.* 73 C.C.L.I. (4th) 301; *The Personal Insurance Company v. ING Insurance Company of Canada*, unreported decision of Justice Morissette, June 12, 2007, Court File No. 53141, ON SCJ.

⁸ Exhibit 1, tab 55.

either the tractor trailer or the corporation making it available to him. For the reasons set out below I accept this submission and find that this requirement of SABS section 66 has been satisfied to make Mr. Shergill a deemed named insured under the Jevco policy.

Jevco submits that this SABS section 66 requirement has not been satisfied for two reasons. First, Jevco argues that Economical has not met its onus of proving that the tractor trailer was made available to Mr. Shergill as an individual. In support of this argument Jevco relies upon evidence that suggests Mr. Shergill had set up a corporation and that he received payment for his services through this corporation. Therefore, I am invited to infer that the tractor trailer was made available to Mr. Shergill's corporation rather than to him as an individual. Alternatively, Jevco submits, at the very least this evidence casts sufficient doubt on whether the tractor trailer was provided to Mr. Shergill in his capacity as an individual that Economical has not discharged its onus of proof in that regard.

Secondly, Jevco submits that it is not sufficient to satisfy SABS section 66 if the tractor trailer was made available to Mr. Shergill by Mr. Pandher's company, 2017878 Ontario Inc. Jevco argues that the proper interpretation of SABS section 66 requires that the corporation making the vehicle available must be the named insured under the policy of insurance. It is common ground that ITS, and not 2017878 Ontario Inc., was the named insured under the Jevco policy. The rationale for this argument as I understand it is that this interpretation is most in keeping with the objective of the *Insurance Act* and the SABS. In this case, Jevco submits that the objective is to ensure that the party responsible for the payment of the insurance premiums, *i.e.* the named insured, have control over whom it may ultimately have to take responsibility for in terms of the use and operation of vehicles insured under the fleet policy for which it is paying.

With respect to Jevco's first submission, the evidence establishes that Mr. Shergill approached Mr. Pandher for a truck driving job. To comply with the terms of his contract with ITS, Mr. Pandher had to get Mr. Shergill approved by ITS to operate the tractor trailer. In the "*New owner operator info sheet*", the information provided to ITS by either Mr. Pandher, Mr. Shergill, or both, describes the "*Driver for owner operator*" as "*Amritpal Shergill*". There is no mention of a corporation being involved for Mr. Shergill.

By contrast, the information provided for Mr. Pandher as "*Owner operator*" makes specific reference to "*Incorp name*" and sets out 2017878 Ontario Inc.⁹

Similarly, the computer records kept by ITS with respect to Mr. Shergill and the trip log records make reference only to Mr. Shergill as an individual, there is no corporation identified.¹⁰

⁹ Exhibit 1, tab 7.

Mr. Shergill was interviewed February 28, 2008 by a representative of Economical. The interview was recorded. He stated that he was driving for the owner-operator of the tractor trailer and reported that he was paid 23 cents per mile for driving. No mention is made of Mr. Shergill having a corporation or of any payments going through a corporation.¹¹

Mr. Shergill was examined under oath November 10, 2009. He testified that he was paid based on the mileage run sheets that he submitted. He thought that he was to have been paid weekly, but recalled receiving only 2 or 3 cheques from Mr. Pandher during the approximate 5 to 6 week period that he worked for him. According to Shergill, at least one of the cheques was returned non-sufficient funds. In the course of Mr. Shergill's testimony about the payment arrangements, this exchange took place:¹²

Q. *"Okay. So, is it your understanding that ITS would pay the money to Pandher that they owed and then Pandher was supposed to pay his drivers?"*

A. *"Yeah" ...*

Q. *"And did you have a company name that you were responsible for?"*

A. *"No, no. I have the company, but he didn't pay me on my company."*

Q. *"He paid you personally?"*

A. *"Yeah."*

Mr. Pandher was examined under oath November 10, 2009. His evidence as to the payment arrangements with Mr. Shergill was as follows:

Q. *"So when ITS would pay you, then you were supposed to pay the drivers?"*

A. *"Yeah".*

Q. *"When you paid the drivers, did you deduct monies from their cheques?..."*

A. *"Actually, I didn't pay under the personal names. I paid them their company name, in the corporation...."*

Q. *"We're talking about Shergill in particular now".*

A. *"...it's the same for all drivers. I'm not sure, but Shergill—I think Shergill did ask me to pay only one or two cheque under his personal name. After that, I'm going to pay him under his corporation."*

¹⁰ Exhibit 1, tab 54.

¹¹ Exhibit 1, tab 24, pp. 10-11.

¹² Exhibit 1, tab 51, pp. 51-52.

Q. *“But in Shergill’s case—”*

A. *“That’s why I call my wife, so I’m not pretty sure like. I’m adding under his name or is it company but its supposed to be under his corporation name.”*

Q. *“But the cheques that you paid to him, you paid him personally?”*

A. *“I’m not sure. But I can find because I can find that out. I can call my bank so I can produce you that, too.”*

Mr. Pandher gave evidence at the arbitration hearing. On this issue he testified that he was unable to find out the payee reference on the cheques for Mr. Shergill’s compensation because his company had entered into Chapter 11 bankruptcy so the information was not available. Like his evidence on examination under oath, he had no independent recollection as to how the cheques for Mr. Shergill were made out.

Considering this evidence in its entirety, I find that is more likely than not whatever cheques Mr. Shergill received in his brief tenure of employment with Mr. Pandher were made payable to him personally. In my view the evidence suggesting that Mr. Shergill received payment for his services through a corporation is vague and uncertain, compared to Mr. Shergill’s sworn testimony that he was paid personally, not through his company. It is insufficient to displace the evidence supporting the conclusion that the tractor trailer was made available to Mr. Shergill as an individual.

Other than the evidence regarding the manner of payment to Mr. Shergill for his services, no other evidence was put before me that would establish the tractor trailer was made available to a corporation, or in some fashion other than to Mr. Shergill in his individual capacity.

Therefore, I find that the evidence is sufficient to establish on a balance of probabilities that the tractor trailer was made available to Mr. Shergill in his capacity as an individual. There is both *viva voce* and documentary evidence to support this conclusion.

With respect to Jevco’s second submission, principles of statutory interpretation require that statutory provisions are to be read in their grammatical and ordinary sense harmoniously with the objective of the legislation. Words in a statutory provision should be given effect when their meaning is plain and no ambiguity arises from the context.¹³

To interpret SABS section 66 (1) (a) as meaning that “ a corporation” making the vehicle available for an individual’s regular use must be a named insured on the policy of insurance covering the vehicle requires either adding words into the section that are

¹³ See *Wicken v. Harssar et. al.*, 186 O.A.C. 344. On S.C.D.C.

not there or changing the plain meaning of the words. The relevant part of the provision refers only to, *inter alia*, “a corporation”. I do not find any ambiguity in the wording that would support interpreting “a corporation” to mean the named insured, and effectively requiring that for SABS section 66 to apply, it would have to be ITS which made the tractor trailer available to Mr. Shergill, not 2017878 Ontario Inc.

In any event, if ambiguity was found in the wording requiring an interpretation of the section that preserves the legislative objectives, I find on the evidence in this case that giving the words “a corporation” their plain and ordinary meaning accomplishes the objective of the legislation as submitted by Jevco.

The tractor trailer was owned by 2017878 Ontario Inc., an Ontario corporation. That corporation made the tractor trailer available to Mr. Shergill for his regular use. The tractor trailer was insured under the Jevco policy, a fleet policy placed with Jevco by ITS. Through its contract with 2017878 Ontario Inc. and Manjeet Pandher, ITS had a great deal of control over matters that would affect its insurance rates with Jevco. Most significantly, it had the right to approve or reject operators of the tractor trailers insured under the Jevco policy. It is clear in this case that ITS exercised this control because it initially approved Mr. Shergill as an operator of the tractor trailer, and after the December 22, 2007 accident it no longer allowed him to operate tractor trailers insured under the Jevco policy.¹⁴

It is also important to note that the contract between ITS and 2017878 Ontario Inc./Manjeet Pandher required 2017878 Ontario Inc./Manjeet Pandher to contribute to the cost of the insurance premium for the Jevco policy. The contribution increased if the tractor trailer operators were involved in any “at fault” accidents.¹⁵ There could be no greater control being exercised over its insurance costs by ITS, the named insured on the Jevco policy, than being contractually entitled to transfer some of those costs to 2017878 Ontario Inc./ Manjeet Pandher.

In its brief of authorities Jevco submitted 2 decisions dealing with the SABS section 66 deemed named insured issue.¹⁶ Like this case, the result in those cases turned on whether the vehicle in question had been made available to an individual by a corporation. In both of these decisions, it was held that the individual involved was the owner of the vehicle in question. He had made the vehicle available for use by a corporation, not the other way around as required by SABS section 66 to make the individual a deemed named insured.

¹⁴ Exhibit 1, tab 52, p. 52.

¹⁵ Exhibit 1, tab 6, pp. 5-6, 12-13.

¹⁶ *AXA Insurance v. Markel Insurance Company of Canada*, Arbitrator Fidler, December 9, 1996 and January 7, 1997; [1997] O.J. No. 2186, May 29, 2007, O.J.C., Day J.; *Markel Insurance Company of Canada v. State Farm Automobile Insurance Company*, Arbitrator Hudson, April 12, 2000.

I find that those decisions are distinguishable from the case before me. In this case, neither Mr. Shergill nor any company of which he was the directing mind had a proprietary interest in the tractor trailer made available to him. In both of the decisions submitted by Jevco, the individual was the actual or “true owner” of the vehicle for which a finding was sought that it was being provided to him by a corporation. The *ratio* of those decisions was essentially that the individual was making his own vehicle available to himself, rather than it being made available to him by arms length corporate entity. That is not what happened in this case. Not only did Mr. Shergill have no proprietary interest in the vehicle made available to him, he also had no connection with 2017878 Ontario Inc., the company making the tractor trailer available.

Conclusion

For the foregoing reasons I conclude that the requirements of SABS section 66 have been satisfied and that Amritpal Shergill was a deemed named insured under the Jevco policy.

It follows that Jevco is responsible for the payment of SABS to Mr. Shergill. It was part of my arbitration mandate to, if appropriate, deal with the quantum issues of reimbursement to Economical by Jevco for SABS paid, and interest. The presentation of evidence and submissions on those issues was deferred pending my decision on the SABS section 66 issue. If counsel are not able to resolve those issues then I invite them to contact me to discuss suitable arrangements for them to be dealt with.

Economical, as the successful party, is entitled to costs. Both counsel conducted this arbitration efficiently and effectively. Subject to considering offers to settle, I would order costs payable on a partial indemnity scale. If counsel cannot agree on costs, counsel may make written submissions on costs to be received within 30 days of the date of this Award.

Dated at Toronto, August 9, 2010

Scott Densem, Arbitrator