IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 268 and REGULATION 283/95;

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17 as amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Kevin Mitchell for the applicant

Marlette Dobson for the respondent.

ISSUES:

1. Was Elizabeth Mensah a "spouse" of Prince Aygenim-Boateng as defined by section 224 of the Insurance Act, and if so, what amounts and expenses is Wawanesa to entitle to recover, relating to Ms. Mensah, from Kingsway?

2. What amounts is Wawanesa entitled to recover from Kingsway regarding the accident benefit claim paid by Wawanesa regarding Mr. Aygenim-Boateng resulting from the accident of May 15, 2003?

DECISION:

1. Elizabeth Mensah was not a spouse of Mr. Aygenim-Boateng at the time of the accident therefore Wawanesa cannot recover from Kingsway with regard to monies paid out on her behalf.

2. Wawanesa is entitled to be compensated for the cost of independent medical examinations, D.A.C. report and surveillance with regard to the Aygenim-Boateng claim.

HEARING:

This arbitration was held on March 11, 2005 in the city of Toronto, in the province of Ontario.

FACTS & ANALYSIS:

On May 15, 2003 Prince Aygenim-Boateng and Elizabeth Mensah were passengers in a motor vehicle insured by Wawanesa which was involved in an accident. Mr. Aygenim-Boateng was a taxi driver and was a listed driver on a taxi policy held by Kingsway. The parties agreed by Aygenim-Boateng had the taxi available for his regular use within the meaning of section 66 of the statutory accident benefits schedule and accordingly Mr. Aygenim-Boateng is a named insured under the Kingsway policy. As such, Kingsway is first in priority with regard to Mr. Aygenim-Boateng's claim, and Kingsway is therefore responsible to compensate Wawanesa for

monies paid out for accident benefits, subject to what I will say below regarding various expenditures incurred by Wawanesa in handling the claim.

WAS ELIZABETH MENSAH A "SPOUSE" OF MR. AYGENIM-BOATENG AT THE TIME OF THE ACCIDENT?

Since Mr. Aygenim-Boateng was a named driver, pursuant to section 66 of the statutory accident benefits schedule, Kingsway would be responsible to pay the accident benefits regarding Elizabeth Mensah if she were the spouse of Mr. Aygenim-Boateng within the meaning of section 224 of the Insurance Act. The parties have agreed that if Ms. Mensah were a spouse, it would only be pursuant to section 224 (1)(c) of the Insurance Act, which states:

> Spouse means either a man and a woman who . . . are not married to each other and have cohabited continuously for a period of not less than 3 years, or have cohabited in a relationship of some permanence if they are the natural or the adoptive parents of a child

The parties agreed that the onus is upon Wawanesa to show that Mr. Aygenim-Boateng and Ms. Mensah cohabited continuously for three years before the accident, or since May 15, 2000.

What constitutes cohabitation has been considered by a number of arbitrators. They have looked at a number of factors such as: the duration of the relationship, the existence of children, stability

of the relationship, the interdependence of the parties, the conjugal relationship, personal relationship, responsibilities for household services, financial relationships, physical living arrangements as well as the intentions and expectations of the parties. Not all of these components have to exist in order for there to be a spousal relationship and some individual components may be more important than others. Each case must be determined on its own set of facts.

Kingsway took the position that based on the evidence before me, there was insufficient evidence to find that Mr. Aygenim-Boateng and Ms. Mensah "cohabited" within the meaning of section 224 and that even if they did, the evidence did not show that it had existed before May 15, 2000. Wawanesa takes the position that not only did they cohabit before the accident, but they did so for at least three years prior to the accident.

Despite the vigorous efforts of counsel for Wawanesa, neither Mr. Aygenim-Boateng or Ms. Mensah attended at the hearing and accordingly the hearing proceeded by way of documentary evidence alone. While the documentary evidence was somewhat contradictory in places, I am satisfied that Mr. Aygenim-Boateng and Ms. Mensah did "cohabit" within the meaning of section 224 (1)(c) of the Insurance Act prior to the accident.

Mr. Aygenim-Boateng moved into a one-bedroom apartment at 79 Clearview Heights, Apartment 49, Toronto in November, 1999. At some point in 2000 Ms. Mensah moved from Montreal and directly into the apartment with Mr. Aygenim-Boateng. I will deal with the exact

date on which she moved later in this decision. Based on the signed statements of Mr. Aygenim-Boateng and Ms. Mensah as well as the examination for discovery evidence of a friend, Charles Owusu, and an "in home assessment" interview with both Mr. Aygenim-Boateng and Ms. Mensah conducted by Lory Fernandez, a kinesiologist hired by the accident benefit carrier, it is clear that Mr. Aygenim-Boateng and Ms. Mensah satisfied most of the criteria for cohabiting within the meaning of section 224 of the Insurance Act. They lived together as boyfriend and girlfriend in the one-bedroom apartment. They shared various household duties such as cleaning, cooking, shopping, laundry, etcetera. They shared expenses. Their friend, Charles Owusu confirmed at his examination that they acted as a couple and were openly affectionate with one another in public. They went on vacation with one another. To the best of Mr. Owusu's knowledge, they were not dating or going out with anyone else. Based on this, I have no hesitation in finding that they were cohabiting within the meaning of section 224.

In order to be considered a spouse pursuant to section 224, they must not only have cohabited but must have done so for at least 3 years prior to the accident, or on May 15, 2000.

The evidence before me confirms that Ms. Mensah and Mr. Aygenim-Boateng were living together at 79 Clearview Heights at least as early as July 26, 2000. The clinical notes of Ms. Mensah's physician, Dr. Hussein, indicates that he first saw her on July 26, 2000 and his notes

list her residence as 79 Clearview Heights, Apartment 49. The Ministry of Health and long-term care records indicate that they have Ms. Mensah's address as 79 Clearview Heights, Apartment

49 as of September 21, 2000. Mr. Owusu, when questioned at his examination for discovery testified that Ms. Mensah moved directly into Mr. Aygenim-Boateng's apartment when she moved from Montreal, although he was unsure of the exact date. Ms. Mensah, in a signed statement, dated July 16, 2003 stated that she had lived at 79 Clearview Heights for 2 or 3 years. Mr. Aygenim-Boateng in a signed statement dated the same day indicated that he had lived with Ms. Mensah for 2 ½ years.

While I am satisfied on the evidence that Ms. Mensah and Mr. Aygenim-Boateng cohabited as far back as July 26, 2000 this is, of course, not sufficient. Counsel for Wawanesa submitted that one should infer that the relationship must have pre-existed the July 26, 2000 date, as Ms. Mensah was listed in Dr. Hussein's notes as already living at that address at that point. Counsel also pointed out that on that date Ms. Mensah had an OHIP number which would have taken some time to obtain after arriving in Toronto from Montreal.

I am prepared to accept that Ms. Mensah and Mr. Aygenim-Boateng cohabited prior to July 26, 2000 for some period of time. It is, however impossible, in my view, to determine how long prior to that date they cohabited. There is insufficient evidence before me to conclude that they were cohabiting as early as May 15, 2000. The onus is upon the applicant to prove cohabitation at least 3 years prior to the accident. Despite a vary vigorous and able efforts of counsel for the applicant, I am unable to conclude that they cohabited as of May 15, 2000 and accordingly Wawanesa cannot recover any accident benefit payments made to or on behalf of Ms. Mensah.

MR. AYGENIM BOATENG'S ACCIDENT BENEFITS

The priority situation with regard to Mr. Aygenim-Boateng is somewhat clearer. Mr. Aygenim-Boateng's accident benefits were initially paid to him by Wawanesa who put Kingsway on notice that they believed Kingsway was in priority. In or about June, 2003, Mr. Sam Grisafi, a claims representative with Kingsway agreed that Kingsway was in priority with regard to Mr. Aygenim-Boateng and agreed to take over the file, subject to receiving a copy of the entire file. Subsequent to that, Kingsway changed its position and advised Wawanesa that it was no longer prepared to take over the Aygenim-Boateng file. It was not until December 15, 2004, long after Mr. Aygenim-Boateng's accident benefit file had been settled, and shortly before the arbitration hearing, that Kingsway agreed to take over priority for Mr. Aygenim-Boateng's accident benefit claim. As of the date of the hearing, Kingsway had not yet paid Wawanesa for Mr. Aygenim-Boateng's claim. I am of the view that Wawanesa is entitled to interest on the Aygenim-Boateng claim.

AMOUNTS RECOVERABLE

Kingsway has agreed to reimburse Wawanesa for monies paid for I.R.B.'s, medical benefits, and housekeeping. It takes the position, however, that it is not responsible for payment of the cost of examinations and investigations. The cost of examinations for Mr. Aygenim-Boateng amounted to $7,773.18 and investigations $963.21. While the breakdown of the expenses incurred by Wawanesa attributable to Ms. Mensah's claim were filed at the hearing, I have already decided that Wawanesa is not entitled to be compensated for those and I will therefore not comment on

them. With regard to Mr. Aygenim-Boateng's cost of examinations and investigations, no breakdown was given to me and accordingly I cannot say definitively what amount, if any, is attributable to the cost of the examinations and investigations that should be paid. Because of the importance of the issue to the industry, however, I will make the following general comments which may assist the parties in resolving the issue.

Counsel for the respondent takes the position that the cost of I.M.E.'s, DAC reports and the cost of surveillance are not "benefits" within the meaning of the statutory accident benefits schedule and therefore are not subject to recovery in priority disputes. Counsel for the applicant on the other hand takes the position that they should be recoverable as expenses incurred while adjusting the file that should have properly been handled by the respondent.

Arbitrator Malach in Certas Direct Insurance Company vs. Allstate Insurance Company, (unreported decision dated November 10, 2004) took the position that the cost of F.S.C.O. mediations and arbitrations incurred by the insurer were not recoverable in a priority dispute. Arbitrator Malach held that the Regulation was silent with regard to the handling cost and that the legislation only intended that "benefits" be subject to reimbursement by way of priority

dispute arbitration. With the greatest of respect, I do not interpret section 268 of the Insurance Act and Regulation 283/95 as restrictively as Arbitrator Malach.

Section 268 of the Insurance Act sets out the priority system in effect in Ontario and determines which insurer should pay accident benefits. It recognizes that in certain situations there may be

disputes as to which insurer should pay. Section 268 (8) provides that an insurer should make the payments pending resolution of any dispute as to which insurer should pay.

One then moves to Regulation 283/95 which governs priority dispute between insurers. Section 1 of the Regulation states:

> All disputes as to which insurer is required to pay benefits under section 268 shall be settled in accordance with this Regulation.

Section 7(1) of the Regulation states:

> If the insurer cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement between insurers that an insurer other than the insurer selected by the insured person shall claim benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991.

The mere fact that sections 1 and 7 of the Regulation refer to a dispute as to who is to pay "benefits" does not necessarily restrict the arbitration to the actual "benefit" paid. The dispute is really as to who is first in priority and who should be paying and handling the claim.

There are good policy reasons why the priority insurer should be reimburse the adjusting insurer for costs such as I.M.E's, DAC's and surveillance. In cases where the injured party has clearly

chosen the wrong insurer there would be a disincentive for the adjusting firm to spend money properly adjusting the file if they were not going to reimbursed for the expenses at the end of the day. Similarly, there would be an incentive for companies who should properly have taken over priority to refuse to do so, or delay as long as possible, in order to save on such expenses if they are not recoverable at the end of the day. It would not be within the spirit and meaning of the Regulation to encourage such behaviour. The entire system is designed to encourage the proper and rapid handling of accident benefit claims and to exclude recovery for such expenses would run contrary to that goal. It would be totally inequitable to allow an insurer to avoid accepting priority as long as possible in order to allow it to avoid incurring the expenses of paying for I.M.E.'s, DAC's and surveillance. Arbitrators have equitable jurisdiction granted to them pursuant to the provisions of the Arbitration Act, 1991, and to the extent that it is required in such a situation I would exercise such authority.

I am mindful of the decision of Arbitrator Brown in State Farm vs. ING Insurance Company, (unreported decision dated February 16, 2005) in which the arbitrator held that such expenses were not recoverable. That case involved loss transfer pursuant to section 275 of the Insurance

Act and Regulation 664. There is, in my view, a fundamental difference between loss transfer and priority disputes. In loss transfer the paying insurer handles the file throughout, and the dispute is as to which fault determination rules apply or whether the ordinary rules of law apply. In priority disputes on the other hand, the entire issue is as to which insurer should have been handling the file. The arbitrator decides not only which insurer should pay, but which insurer

should be handling the file. For these reasons I do not think that the reasoning in State Farm vs. ING Insurance case is applicable here.

Counsel at the hearing discussed whether there was a distinction to be made with regard to the recovery of I.M.E.'s, DAC's and surveillance. I.M.E.'s and DAC's are, of course, specifically referred to, or allowed, under the schedule and are used to confirm or deny the need for various benefits. They are certainly ancillary to the providing of benefits and as such should be recoverable. Surveillance, while not mentioned in the schedule, is part of the normal cost of determining entitlement and should be recoverable. The question of whether the cost of the adjuster handling the file should be recoverable was not before me and while I think there are valid reasons for not being able to recover such amounts, I make no findings in this regard.

COST OF THE ARBITRATION

There were two claims before in this arbitration, one for Mr. Aygenim-Boateng and one for Ms. Mensah. The claim for Mr. Aygenim-Boateng was settled shortly before the hearing with

Kingsway taking over responsibility for it. Accordingly Wawanesa will have its costs for that part of the arbitration and Kingsway for Ms. Mensah's claim. In the event that the parties cannot agree on such costs, I may be spoken to.

Dated at Toronto this _____ of April, 2005.

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M. Guy Jones
Arbitrator