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

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 -

AVIVA INSURANCE COMPANY OF CANADA INC.

Respondent

DECISION

COUNSEL:

Abby J. Tenenbaum for the Applicant

Joseph L. Griffiths for the Respondent

ISSUES:

1. Was Khadije Zeitoun an "occupant" of the Wawanesa insured motor vehicle for the purposes of the Statutory Accident Benefits Schedule, such that Wawanesa would be responsible for payment of benefits to or on her behalf?

RESULT:

1. Khadije Zeitoun was an "occupant" of the Wawanesa insured motor vehicle and accordingly Wawanesa is responsible for payment of the statutory accident benefits to, or on behalf of Khadije Zeitoun.

HEARING:

The hearing in the matter took place in the City of Toronto in the province of Ontario on July 3, 2009. Viva voce evidence was called.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle/pedestrian accident which occurred on June 5, 2006. On that date, Ms. Khadije Zeitoun was approaching her brother's parked motor vehicle when she was struck by a motor vehicle insured by the respondent Aviva Insurance Company of Canada ("Aviva"). Ms. Zeitoun's brother's vehicle was insured by Wawanesa Insurance Mutual Insurance Company ("Wawanesa"). As a result of the accident, Ms. Zeitoun suffered injuries and she applied for and received statutory accident benefits from her brother's insurer, Wawanesa, as she herself had no motor vehicle liability policy. Wawanesa would be responsible for payment of the accident benefits pursuant to Section 268 (2) (2) (ii) of the Insurance Act. That subsection states:

> ***Liability to pay***
>
> *(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.

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

Wawanesa takes the position that Ms. Zeitoun was a "non-occupant" at the time of the motor vehicle accident and therefore Section 268 (2) (2) (ii) should apply and since the Aviva vehicle hit Ms. Zeitoun, Aviva should pay the accident benefits. Aviva, on the other hand, takes the position that Ms. Zeitoun was an "occupant" of her brother's motor vehicle insured by Wawanesa at the time of accident and pursuant to Section 224 (1) of The Insurance Act, Wawanesa should be responsible for payment of accident benefits.

For the purpose of accident benefits priority determination, "occupant" is defined in Section 224 (1) of The Insurance Act as

"occupant", in respect of an automobile, means,

(a) the driver,

(b) a passenger, whether being carried in or on the automobile,

(c) a person getting into or on or getting out of or off the automobile;

The issue to be determined in this hearing is whether Ms. Zeitoun, on the facts of this particular case, was an occupant of the Wawanesa insured motor vehicle. Ms. Zeitoun testified at the hearing. While her testimony was at times somewhat confusing, I find on the evidence before me, that Ms. Zeitoun had been driven by her brother, Mohammad Bassel, to visit her other brother, Fayez Bassel's residence for coffee and a chat. Ms. Zeitoun and her brother, Mohammad, stayed at Fayez's home for a period of a few hours. Upon leaving the residence, Ms. Zeitoun intended to be driven home by her brother, Mohammad, in the Wawanesa insured motor vehicle. She exited Fayez's home, walked across the front lawn and was approaching Mohmmad's car. She was approximately one to two metres from the rear of the car, on the roadway, when she was struck by the Aviva insured motor vehicle. While she was approaching it, she had not yet turned to get into the car. At no time immediately prior to the accident, had she or her brother actually touched the vehicle.

Counsel for Aviva conceded that if Ms. Zeitoun is to be considered an occupant of the Wawanesa, it is pursuant to Section 224 (1) of The Insurance Act. Counsel provided me with a number of cases that deal to a greater or lesser degree, with this issue.

Counsel for Wawanesa referred my to Crosbie v. Co-operators General Insurance Company et al, [1995] O.I.C.D. No. 162, a decision of Arbitrator Blackman of the Ontario Insurance Commission. In that case the injured party was standing beside a tow truck which was struck by another vehicle. The tow truck then struck the insured party. In that case both sides agreed that the injured party was not an occupant within the definition set out in Section 224 (1) of The Insurance Act, and Arbitrator Blackman agreed that the person in question was a non-occupant. I do not find this case particularly persuasive as the parties had agreed upon the point, and the arbitrator did not give any reasons for agreeing with the parties.

Counsel for Wawanesa also relied upon Kyriazis v. Royal Insurance Company of Canada, [1191] O.J. No. 1189. In that case the plaintiff had just stepped out of the vehicle he had been driving and was removing snow from the windshield when he was hit by another car. Justice Abbey, of the Ontario Court of Justice, General Division, held that the plaintiff was not an occupant of the

car, but rather a pedestrian. Justice Abbey discussed the "zone of connection" test, that had been accepted in some jurisdictions. He stated:

> "The theory, generally, is that a person even though not actually inside the vehicle at the time of the injury may nevertheless be considered an occupant if upon consideration of a number of factors, he is within a "zone of connection" in relation to the vehicle. These factors include whether the plaintiff occupied the vehicle before the accident and if so for how long before, whether the plaintiff exited the vehicle finally or only temporarily, intending to resume occupancy and whether the actions of the plaintiff at the time of the accident were related in some way to the continued use of the vehicle."

Justice Abbey went on to find that the "zone of connection" test did not apply in this type of case in Ontario. He stated:

> "The word "occupant" is defined by reference to various physical activities or processes. An "occupant" is a person who is driving an automobile, being carried in or upon an automobile, entering or getting onto an automobile or alighting from an automobile. The plain meaning of the words used, it seems to me, suggests an intention to draw the line between an occupant and a non-occupant at the point that an individual, who is not driving, can no longer be said to be either entering or getting on to an automobile or, alternatively, alighting from an automobile."

Counsel for Aviva relied upon 3 decisions of the Ontario Court of Appeal, AXA Insurance v. Markel Insurance Company of Canada , [2001] O.J. No. 294; McIntyre Estate v. Scott , [2003] O.J No. 3997; and Djepic et al v. Kuburobic et al , 8 O.R. (3rd) 21.

In AXA v. Markel the insured party had driven the vehicle which was insured by Markel into a delivery yard. He exited the vehicle and waited to unload the truck. While he was about 30 feet from the truck a piece of wood was propelled off the back of another vehicle. The Court of Appeal held that while the injured person could not be considered a passenger in the truck or person getting in or out of the truck, he was at the time of the accident, a driver of the truck. The Court held that Section 224 (1) (a) of the Insurance Act definition of occupant;

> "focuses on the description of the person claiming the benefit. It does not turn on the activity being engaged in nor the person's precise location. There is nothing in the statutory definition that requires the person at the time of the incident to be

> engaged in the act of driving or be in the vehicle. The requirement is merely that he or she be the driver of the vehicle……..”

It is to be noted in that in the AXA the Court was dealing with Section 224 (1) (a) “driver”.

The Court adopted what might be referred to as the “objective observer test”. The Court took into account such criteria as the degree of physical connection with the vehicle, the fact that there could be only one driver of a vehicle at a time, as well as other circumstances at the time. In the AXA case, control over the vehicle, as the driver, was considered important. In McIntyre Estate vs. Scott, a person had been a passenger on her husband’s motorcycle and both had dismounted during a rainstorm and found shelter at the side of the road by the motorcycle. Just as the passenger approached the motorcycle to retrieve some dry clothing from it, she was struck by another vehicle. It was not clear if she was touching the motorcycle at the time she was hit. In holding that the injured person was a passenger of the automobile pursuant to Section 224 (1) (b) of the Insurance Act, it confirmed that the appropriate approach was the “reasonable observer” test. The Court noted that the words “driver” and “passenger” in Section 224 (1) (a) and (b) denoted a status rather than a physical activity.

The Court rejected the idea that the “plain language” of the statute required a different approach. The term “whether” in Section 224 (1) indicated an expansion rather than a contraction of the class of persons to be considered a passenger. The Court also noted that one need not be actually in or on the vehicle in order to be a passenger.

In finding the injured person to be a passenger under Section 224 (1) (b), the Court stated:

> “I would apply the AXA “objective observer test”. In my view an objective observer of the accident would describe Deborah McIntyre as a passenger of the motor vehicle at the time she was struck by the uninsured vehicle. Her presence at the scene was entirely explained by the fact that she was the passenger on the motorcycle…..she intended to resume the journey as soon as the rain stopped. She remained in close proximity to the motorcycle and did not leave it for any other purpose. Finally she did not engage in any other activity except waiting for the rain to abate.”

In Djepic vs. Kuburobic the Court of Appeal dealt with a situation where a person was injured while attaching a bungee cord to a vehicle in order to secure a mattress on the roof of the vehicle. The bungee came loose and hit the passenger in the eye. The Court held that the injured person would not become an occupant simply by stepping onto the running board solely for the purpose of attaching the mattress to the roof. Mr. Justice Rouleau stated:

> "The definition of occupant of a vehicle focuses on the persons are, are about to or have been transported in the vehicle. It is not intended to cover some one who simply steps onto a part of the vehicle when that action is not connected in anyway with being transported by that vehicle."

From the above case log, I concluded that it is the "objective observer" test that must be applied to this situation. It is clear that Ms. Zeitoun would not come within the provisions of Section 224 (1) (a) "driver" provision.

I do not think that Ms. Zeitoun would be considered to be getting into or on or getting out of or off the automobile at the time of the accident. She was still one or two metres from the car and had not yet turned to get in when she was struck. To consider her actions to be "getting into…the automobile" would be to stretch the plain meaning of the words beyond what is reasonable.

The question then is, was she a "passenger" within the meaning of Section 224 (1) (b) of the Act? Using the criteria set out by the Court of Appeal, Ms. Zeitoun clearly had been a passenger when she was driven by her brother to her other brother's residence. She then stayed at her brother's for a few hours. This makes Ms. Zeitoun's situation somewhat different than the McIntyre case where the person moved just a few feet from the motorcycle and the accident occurred shortly after she got off the motorcycle. I am satisfied that Ms. Zeitoun, after she went into her brothers house and had tea, was no longer a passenger. Any such status that existed as a result of travelling to her brother's had been lost by the time she entered her brother's house.

The question then becomes would the "objective observer" conclude that Ms. Zeitoun had reacquired the passenger status by walking across the lawn, stepping out onto the roadway and travelling to within one or two metres of the car before being struck.

It is clear that Ms. Zeitoun had the intention of getting into the car and being driven home and this is one of the criteria to be considered. She was not physically touching the car but this is not strictly required by the section. What the objective observer would have seen was a person who intended to get into her brother's car and had travelled some distance towards that car. She was on the roadway for no other purpose than to get into the car. Accordingly when considering all the relevant criteria, I am of the view that Ms. Zeitoun had achieved the status of passenger for the purposes of Section 224 (1) of the Insurance Act and was therefore an occupant of the Wawanesa insured vehicle at the time of the accident. While I make this finding, I would stress that I consider this fact situation to be very close to the line of what would be considered an occupant. In so deciding, I would caution that each particular case must be determined on its own individual set of facts. Clearly, in other cases, what be determinative in one case may be only one of a number of considerations in another case.

In light of the above, Ms. Zeitoun was an occupant of the Wawanesa insured motor vehicle and accordingly Wawanesa is responsible for payments to or on behalf of Ms. Khadije Zeitoun. In the event that the parties cannot agree with regard to the issue of costs I may be spoken to.

Dated at Toronto, this _____ day August 2009.

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M. Guy Jones
Arbitrator