IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, as amended

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

AND IN THE MATTER OF an Arbitration

BETWEEN:

AVIVA GENERAL INSURANCE COMPANY
(FORMERLY "RBC GENERAL INSURANCE COMPANY")

Applicant

and

NORTHBRIDGE INSURANCE COMPANY

Respondent

AWARD

Heard: May 9, 2018

Counsel:

Harry P. Brown for the Applicant

Amanda M. Lennox for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Overview and Issue

This Award concerns s. 268 of the *Insurance Act* (R.S.O. c. I.8, as amended), and specifically the priority of payment responsibilities set out therein for the payment of statutory accident benefits ("SABS") by automobile insurers.

The question for determination is whether the Applicant ("Aviva") or the Respondent ("Northbridge") has the highest priority obligation to pay SABS to Surinder Dosanjh ("the claimant") on whose behalf a claim for SABS has been advanced as a result of an accident occurring October 21, 2014 in Fremont, California. The claimant, along with one Gurjit Singh who was a co-driver (the co-driver"), had driven a tractor-trailer to Tesla Motors from Halton Hills, Ontario to deliver auto parts.

At the time of the accident the claimant was a named insured in respect of his personal automobile pursuant to a policy of motor vehicle liability insurance issued by Aviva. Aviva's position is that at the time of the accident the claimant was also a deemed named insured pursuant to a policy of motor vehicle liability insurance issued by Northbridge to Royal Logistics. Royal Logistics is an association of owners of tractors and trailers used in the operation of a commercial trucking business, including the tractor trailer unit which the claimant and the co-driver had driven to Tesla Motors in California.

Aviva submits that the claimant is a deemed named insured under the Northbridge policy because Royal Logistics made available to the claimant for his regular use one or more of its tractors used in the commercial trucking business (SABS s. 3 (7) (f)).

If the claimant is a named insured under both the Aviva and Northbridge policies, then the determination of which policy has the highest priority for the payment of SABS is resolved by reference to s. 268 (5.2). That section stipulates that the claimant shall claim SABS against the insurer of the automobile in which the person was an occupant.

Aviva's position is that at the time of the accident the claimant was "the driver" of the tractor trailer unit, which qualifies him as an "occupant" as those terms are defined in s. 224 (1) of the *Insurance Act*.

Northbridge takes the position that the claimant was not a deemed named insured under its policy because there is insufficient evidence to establish that the tractor trailer unit was made available for the claimant's regular use, and he was not named on a list of Royal Logistics drivers maintained by Dalton Timmis Insurance Group ("the broker").

Northbridge also disputes the suggestion that the claimant was "the driver" of the tractor trailer unit at the time of the accident, and thus he would not meet the definition of "occupant" to require the application of s. 268 (5.2). Instead, Northbridge argues, even if the claimant is a named insured under both the Aviva and Northbridge policies, but not an occupant of either insured vehicle, s. 268 (5.1) permits the claimant to choose the insurer to which he wishes to submit a SABS claim. In this case, Northbridge takes the position that the claimant chose to submit his SABS claim to Aviva and that is where it should remain.

There is also an issue as to whether Northbridge deflected the claimant's SABS claim and what the appropriate remedy should be in the event that deflection is found.

The Evidence

The following documents were marked as exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement, executed May 4, 2018.

Exhibit 2: Factum of the Applicant (Tabs A - T).

Exhibit 3: Written Submissions of the Respondent (Tab B, Tabs 1 - 11).

Exhibit 4: Response of the Applicant.

Exhibit 5: Google Maps – Halton Hills to Fremont California Route.

Exhibit 6: Google maps – site map 45500 Fremont Blvd. (Tesla property).

The Facts

In or about the beginning of July, 2014, the claimant was hired by Paramjit Koonar, the owner of a Freightliner tractor, to drive his tractor on long distance deliveries of auto parts from Canada to the United States. Mr. Koonar, along with other independent owner – operators of tractor-trailers had formed a commercial trucking organization called Royal Logistics and their vehicles were insured with Northbridge.

The Freightliner tractor owned by Mr. Koonar was described on a list of vehicles insured by Royal Logistics with Northbridge at the material time, although it appears that the claimant's name may not have been on a "drivers list" provided to the broker.

Records concerning the operation of this Freightliner tractor indicate that starting in July, 2014, and up to the date of the accident on October 21, 2014, the claimant used

this vehicle to make 17 long distance deliveries from Canada to the United States generally requiring 5 to 6 days travel time round-trip. The length of these trips required two drivers of the vehicle. When one driver was operating the vehicle the other would generally be sleeping or resting. These trips were made approximately weekly.

All of Mr. Koonar, the owner of the Freightliner tractor used by the claimant, the claimant's dispatcher at Royal Logistics, Mohammad Farooqui, the co-driver, and even a representative of Northbridge (on examination under oath), described the claimant as a "regular user" of the Freightliner tractor.

The claimant and the co-driver departed Halton Hills, Ontario on October 19, 2014 and arrived at Tesla Motors in Fremont California on October 21, 2014. As had been the case with many other trips, their assignment was to transport auto parts from Canada and deliver the auto parts to the Tesla Motors plant in California.

The co-driver drove the tractor trailer for the approximate 10 hour final leg of the journey from Deeth, Nevada, to the Tesla Motors in Fremont. According to the driver logs, the claimant and the co-driver arrived at Tesla Motors at approximately 4:15 AM (Pacific time) on October 21, 2014, before the premises were open for tractor-trailers to enter the loading dock area to off-load their shipments. Generally the loading dock area at Tesla Motors opened around 5:30 AM to 6 AM. Since the loading dock was not yet open, the claimant and the co-driver parked their tractor-trailer on Contractor Road in the immediate vicinity of gate 8.

The drivers log shows that the co-driver then went "off duty" and went to sleep in the cab of the tractor. Had the accident not occurred, the evidence indicates that it was

the claimant who would have been responsible to operate the tractor trailer to manoeuvre through gate 8 of Tesla Motors to the loading dock to be off-loaded. Once their cargo was off-loaded, the claimant and the co-driver would begin the return trip from Fremont California to Halton Hills, Ontario.

The claimant spoke to the dispatcher at Royal Logistics at approximately 4:20 AM to confirm their arrival at Tesla Motors and advise that they were waiting to unload. After speaking to the Royal Logistics dispatcher, the claimant exited the tractor trailer. The keys for the tractor were left in the tractor. Sometime between 4:20 AM and 4:54 AM the claimant was struck by an automobile being operated by one David Gomez while he was walking on Tesla Frontage Road in the vicinity of gate 5. This was approximately 800 metres to 1 kilometre from where the claimant and the co-driver had parked their tractor-trailer. The claimant was walking in a direction away from the tractor trailer when he was struck. This road is located on private property owned by Tesla Motors.

Other than the fact that he was walking along Tesla Frontage Road when struck by a car, there is no evidence to indicate what the claimant was doing between 4:20 AM and 4:54 AM. There is also no evidence to indicate that the claimant intended to do anything other than return to his tractor trailer when the Tesla Motors loading dock opened and drive it to the loading dock to complete the auto parts delivery.

As a result of the accident the claimant sustained a catastrophic impairment. A claim for Statutory Accident Benefits ("SABS") was made to Aviva, the insurer of the claimant's personal automobile. Aviva has been handling the claimant's claim for SABS,

and served a Notice of Dispute between Insurers ("NDBI") on Northbridge asserting that Northbridge was the priority insurer in the circumstances.

Analysis

Deflection

I will deal first with the issue of deflection. Aviva argues that Northbridge deflected the claimant's SABS claim to Aviva because it failed to provide a SABS application package to the claimant's representatives, and also by actively encouraging the claimant's representatives to submit a SABS application to Aviva as the insurer of the claimant's personal automobile.

I do not agree that Northbridge deflected the claimant's SABS claim to Aviva by failing to provide a SABS application package to the claimant's representatives.

The broker was responsible for dealing with the Royal Logistics fleet policy for their vehicles insured with Northbridge. The broker was advised of the accident the day after it occurred, on October 22, 2014. The broker advised Northbridge of the loss the next day on October 23, 2014.

The evidence indicates that although consideration was given to sending an unsolicited SABS application package to the claimant's representatives, Northbridge did not have a current address or driver's license information for the claimant to enable Northbridge to send a SABS application package.

The evidence indicates that Northbridge made repeated efforts to obtain information that would enable it to send a SABS application package to the claimant or

his representatives by contacting Royal Logistics and in particular, a Royal Logistics dispatcher, Harjit Gill, who is the claimant's brother-in-law. Ultimately however, it was not until November 14, 2014 that Northbridge spoke with Harjit Gill and obtained his address. Northbridge sent a SABS application package for the claimant to Harjit Gill the same day. According to the evidence, Aviva had already sent a SABS application package to the claimant's family two days earlier, on November 12, 2014.

There is no evidence that Northbridge was ever notified by the claimant or representatives on his behalf that the claimant wished to apply to Northbridge for SABS. When considered in the context of the requirements of s. 2.1 (1) of Regulation 283/95, this is insufficient to establish deflection. S. 2.1 (1) requires an insurer to promptly provide a SABS application package to a prospective claimant, "*who notifies the insurer that he or she wishes to apply for benefits*". The section is clear that although a SABS insurer may provide a SABS application package to a prospective claimant without having received notification that the prospective claimant wishes to apply to the insurer for SABS, there is no statutory requirement on the insurer to do so in the absence of such a request.

In this case, there is no evidence upon which I could make a finding that the claimant or his representatives notified Northbridge that the claimant wished to apply to Northbridge for SABS prior to November 12, 2014 by which date Aviva had provided a SABS application package to the claimant's representatives.

Aviva's second deflection argument is based on evidence it suggests proves Northbridge or its representatives actively encouraged the claimant's representatives to

submit a SABS application to Aviva rather than Northbridge. A letter of December 17, 2014 from Royal Logistics to the broker forms the basis for this argument. The letter states in part, "*we also discussed this with our broker...who stated that this claim has to go through the Car Insurance, in this case, RBC*".

One problem with this evidence is that the date of the referenced discussion between Royal Logistics and the broker is not identified. The date of the letter is more than a month after Aviva had provided a SABS application package to the claimant's representatives (November 12, 2014), and when Northbridge had provided a similar package to the claimant's representatives (November 14, 2014). Evidence from the broker categorically denies any conversations with Royal Logistics wherein the broker advised Royal Logistics that the claimant's SABS claim should be directed to Aviva.

This in itself creates enough doubt for me to conclude that there is insufficient evidence of an effort made by Northbridge or its representatives prior to any requests for or delivery of SABS application packages to have the claimant direct his SABS application to Aviva instead of Northbridge.

In addition to this evidence however, it must also be noted that the author of the Royal Logistics letter of December 17, 2014 to the broker was examined under oath and when asked if he discussed with the broker whether Aviva or Northbridge should be the insurer that pays the claim he answered that he did not have such a discussion.

I was also asked by Aviva to draw an adverse inference from the fact that the broker had not produced information regarding commission agreements between the broker and Northbridge on the grounds of confidentiality. It is suggested that this

information would have confirmed that Royal Logistics premiums could have increased if the claimant's SABS claim was processed on the Northbridge policy and that this would have cost the broker commission income – the implication therefore being that the broker must have encouraged the claimant's representatives to direct the SABS claim to Aviva.

I find this proposition to be complete speculation. Even if it could be proven that Royal Logistics' premium may have increased as a result of the SABS claim being processed on the Northbridge policy, it would require the imputation of motives most unethical to the broker to draw the conclusion suggested. In my view, to draw such an inference the evidence would not only have to be sound, but seriously compelling, and that is certainly not the case here.

In summary on this issue, I find that there was no deflection of the claimant's SABS claim by Northbridge to Aviva.

Deemed Named Insured ("Regular Use")

The second issue that I will address is the question of whether the claimant was a deemed named insured on the Northbridge policy. This does not require extensive analysis. In my view the evidence is clear that the tractor trailer was made available by Royal Logistics for the claimant's regular use at the time of the accident, and the claimant is a deemed named insured under the Northbridge policy.

The claimant had made at least 17 long distance trips of 5 to 6 days duration with the tractor trailer on average of once per week in three to four months leading up to the accident.

The evidence in this case clearly establishes "regular use" when considered in the context of the law on the issue. With respect to the meaning of the words "regular use", the following propositions can be derived from the case law:

1) "regular" is intended to describe "periodic, routine, ordinary or general" as opposed to "irregular, or out of ordinary, or special"[1]

2) the language of s. 3 (7) (f) (formerly section 66 (1) (a)) does not require that the use be frequent, exclusive (in the case of fleets), or personal, to be regular.[2]

3) "regular use" has been defined in several arbitration decisions as being use that is "habitual, normal and recurred uniformly according to a predictable time and manner." However, the cases where the individuals have been found not to be regular users" of the subject vehicles were only those cases where the characterization of the use was "irregular at best and out of the ordinary" ...[3]

4) "regular use" does not require that the person for whom the vehicle is being made available be driving or operating the vehicle being made available. The person could be a pedestrian, or even a passenger in someone else's car. [4]

5) The wording of s. 3 (7) (f) requires an examination of whether a vehicle is available for regular use, not whether there was actual regular use of the vehicle. The section does not appear to require that the individual actually uses the

---

[1] see *Canadian General Insurance Company* v. *State Farm Mutual Insurance*, [1957] O.R. 257, (C.A.), as quoted in the *Personal Insurance Company* v. *ING Insurance Company of Canada* (unreported decision of Madam Justice Morrissette, June 12, 2007), Court file number 53141, at paragraph 26.
[2] *Resiner v. Liao* (1995) O.J. No 2489 (Ont. C.A.), *State Farm Mutual Automobile Insurance Company v. Kingsway General Insurance Company* (Arbitrator Samis, October 20, 1999), *Schneider v. Maahs et al.*2001, CanLII 3018 (ONCA).
[3] See *Zürich Insurance Company* v. *Personal Insurance Company*, 2009 CanLII 26362 (ONSC), at page 9, and the cases referred to therein.
[4] *Wawanesa Mutual Insurance Company* v. *Royal and SunAlliance Insurance Company*, (Arbitrator Jones, May 13, 2009) at page 5; *ACE-INA Insurance* v. *The Cooperators General Insurance Company*, (2009), CanLII 13625, (ONSC), at para. 19.

vehicle regularly but rather that it is made available should he wish to use it regularly. Actual use is evidence of the availability of the vehicle. [5]

6) "regular use" within the meaning of s. 3 (7) (f) is not limited in its operation to users of vehicles who are employees of the Corporation making the vehicle available for use - the section speaks of an "individual", not an "employee".[6]

Northbridge's argument on this issue did not seriously challenge a "deemed named insured" finding in the context of the above principles; its argument was focused more on the fact that the broker had not been informed that the claimant was driving for Royal Logistics and that he was not on the broker's "drivers list". Accepting this evidence to be accurate, I do not believe that it prevents the claimant from meeting the definition of "deemed named insured". At most, there was an oversight on the part of Royal Logistics in its reporting requirements which amounts to nothing more than an administrative deficiency. In any event it would certainly not come within any of the SABS s. 31 exclusionary grounds to vitiate an obligation to pay SABS.

In my opinion having the claimant's name on a drivers list is not a condition precedent to concluding that a Royal Logistics vehicle was made available for the claimant's regular use. In a case where the evidence of "regular use" was weak, the fact that the claimant was not on the drivers list could be more important factor. It is still only one factor to consider however, and in the face of the overwhelming evidence in this case supporting a finding of the automobile being made available for the claimant's regular use, I find that it does not affect my conclusion on the issue.

---

[5] *Unifund Assurance Company* v. *St. Paul Fire & Marine Insurance Company*, Arbitrator Samworth, August 9, 2000, at p. 10, *State Farm v. Kingsway, supra,* note 4.
[6] *Zürich Insurance Company v. The Personal Insurance Company, supra*, note 5, at page 11.

"Occupant"

This is by far the most challenging issue to determine in this case. Section 224 (1) of the *Insurance Act* defines occupant as follows:

> 224 (1) "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 outcome of this priority dispute turns on whether the claimant is found to have been "the driver" of the tractor trailer at the time of the accident.

Guidance with respect to this issue is provided in two decisions from Ontario Courts. The first case which I will discuss and which is the most relevant for the issue is *AXA Insurance Company v. Markel Insurance Company of Canada* ([2001] O.J. No. 294), a decision of the Ontario Court of Appeal.

In that case the SABS claimant had driven a tractor-trailer to a Stelco Billet Yard to deliver steel. He stopped his vehicle outside the loading bay, exited his vehicle and entered the loading bay to wait his turn to unload. He was standing about 30 feet outside his truck waiting in the loading bay when he was struck and killed by a piece of wood propelled from the back of another tractor-trailer exiting the loading bay.

The Court began its analysis by considering the Oxford Dictionary definition of driver, and noting that it means, "one who drives". The Court interpreted section 224 (1) (a) as containing no requirement that the person be engaged in the act of driving at the

time of the incident. In other words, "driver" is to be interpreted as describing the status of a person at the time of an incident, as opposed to describing an activity engaged in by a person at the time of an incident.

> By using this criterion the Act focuses on the description of the person claiming benefits. 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 to be in the vehicle. The requirement is merely that he or she be the driver of the vehicle (*AXA v. Markel* paragraph 14).

The Court then seems to place some limits on how expansively this definition should be applied.

First, it notes that because the definition of "driver" has been placed in the *Insurance Act* alongside two other subsections which appear to require a physical connection to or proximity with the automobile, the Court concludes, "*it suggests that there must be some degree of physical connection with the vehicle for the person to be the driver*" (*AXA v. Markel*, paragraph 18).

Second, because section 268 (5.2) requires that the person be the driver "at the time of the incident", "*...suggests that this is not a status that attaches permanently to a person but, rather, something that depends on the circumstances at the time*" (AXA v. Markel paragraph 19).

Third, since section 268 (5.2) uses the status of driver as a means to determine priority between two insurers in respect of whose policies the claimant is a named insured, "*...This suggests that although a person may be a named insured in respect of two vehicles in two separate policies, at the time of the incident the person can be the*

driver of only one but not both of those vehicles, ...otherwise this criterion of being "the driver" would be ineffective in determining which insurer pays" (*AXA v. Markel* paragraph 20).

The Court then prescribes the proper method for applying the criteria set out above to the circumstances:

> Keeping in mind these considerations, the question is whether in all the circumstances at the time of the incident (the claimant) was the driver of the tractor trailer. Would an objective observer of this incident...who had in mind these considerations answer affirmatively if asked whether (the claimant) was the driver of the tractor trailer? (*AXA v. Markel* paragraph 21).

In *AXA v. Markel* the Court of Appeal found that the claimant was the driver of the tractor trailer, reasoning as follows:

> When he was injured (the claimant) was in close physical proximity to the vehicle. He had driven it there and was waiting to unload it after which he undoubtedly would have driven it away. It is also safe to infer that at the time he was hit he maintained some element of control over the vehicle. Certainly there is no evidence that anyone else had taken over control of it nor had assumed the role of driver. (*AXA v. Markel* paragraph 22).

About two and a half years later in *McIntrye Estate* v. *Scott* ([2003] O.J. No. 3997) the Court of Appeal once again had to consider the section 224 (1) definition of "occupant", this time in relation to the 224 (1) (b) definition of "passenger".

The Court overturned a lower Court ruling finding that the definition of "passenger" was limited to a person actually engaged in the physical activity of being in or on an automobile at the time of an accident. The Court applied its "objective

observer" test to find that the claimant in that case was a passenger in respect of a motorcycle at the time of the accident.

The facts in *McIntrye Estate v. Scott* involved a husband and wife travelling on a motorcycle. The husband was operating the motorcycle and the wife was seated behind him. A rainstorm started and they stopped the motorcycle under a highway overpass. Both of them dismounted the motorcycle and waited on an embankment in what was described as "close proximity" to the motorcycle intending to resume their journey as soon as the rain cleared. The wife was returning to the motorcycle to retrieve some dry clothing from a saddlebag when an uninsured motorist struck both she and her husband. The evidence was clear that the wife was not mounted on or operating the motorcycle when the accident occurred.

In reaching its conclusion the Court stated the following:

> 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 motorcycle at the time she was struck by the uninsured driver. Her presence at the scene of the accident was entirely explained by the fact that she was a passenger on the motorcycle. She and her husband had stopped by the roadside to avoid the rain. 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 to wait for the rain to abate (*McIntyre v. Scott* paragraph 19).

In *McIntyre v. Scott* the Court commented on the requirement for "*some degree of physical connection with the vehicle*" stipulated by the Court of Appeal in *AXA v. Markel* as arising from the 224 (1) (b) definition of passenger and the 224 (1) (c)

additional definition of occupant which appear to imply the need for some physical connection with the automobile.

The Court in *McIntyre v. Scott* states that at no point in *AXA v. Markel* did the Court require that, *"...the required degree of connection for a passenger is that of actually being in or on the vehicle"* (*McIntyre v. Scott* paragraph 17)

The Court noted that:

> ...in *AXA* itself, the Court did not require such a stringent physical connection between the person and his vehicle in finding that the plaintiff was a "driver". Despite the requirement for a degree of physical connection, the result in AXA indicates that a person can be a driver while standing beside the vehicle (*McIntyre v. Scott* paragraph 17).

I was referred to one other authority, an October 2, 2016 Arbitration Award of Arbitrator Ken Bialkowski in *Intact Insurance Company v. AIG Insurance Company of Canada.*

The SABS claimant had driven a tractor-trailer to a highway service centre parking lot and had spent the night sleeping in the sleeping berth of the tractor. He was returning from delivering a load of goods to the United States. In the morning he exited his truck and was struck by another truck moving through the service centre parking lot. There was conflicting evidence as to the claimant's exact activity and position at the time of the accident.

Arbitrator Bialkowski concluded he did not have to determine the claimant's exact activity and position at the time of the accident because all versions of the event placed the claimant in close physical proximity to the truck. Arbitrator Bialkowski reviewed the

Court of Appeal cases to which I have referred and he applied the "objective observer" test to conclude that the claimant was "the driver" of the tractor trailer at the time of the accident.

In addition to finding that the claimant was in close physical proximity to the truck at the time of the accident, Arbitrator Bialkowski made the following comments in applying the "objective observer" test:

> At no time had Mr. Li relinquished control of the vehicle or handed over the keys to the vehicle to another individual. Even if an objective observer saw him exit the driver's door of the truck and saw him make his way inside the service centre to have a coffee, when asked who was the driver of that truck, the objective observer would likely say the individual they saw exiting the driver's door of the truck. With the additional facts of having driven to the service centre and intending to drive away from the service centre and with no second driver to take over control of the vehicle, the answer would be clear as can be. To an objective observer Mr. Li would be considered, in my view, the driver of that vehicle.

The overarching *ratio* of the *AXA v. Markel* and *McIntyre v. Scott* decisions is that the subcategories of "occupant" in section 224 (1) – "driver", and "passenger" are to be interpreted as describing the person's status at the time of an accident, and not the specific activity the person is engaged in at the time of the accident.

It is also important to note, as the Court did in *McIntyre v. Scott* (paragraph 18) that insurance legislation defining coverage should be liberally construed in favour of the insured (*i.e.* finding – not excluding coverage). The Court deemed this to be the proper interpretive approach even though the Court noted that the claimant would have

had SABS coverage under another automobile policy had she not been found to be a "passenger" and therefore insured under the motorcycle policy.

The "objective observer" test should be applied with these principles as the foundation for the inquiry.

The Court in *AXA v. Markel* makes it clear that applying this test also requires the decision maker to decide whether a person was "the driver" in the context of "*all the circumstances at the time of the incident.*" The analysis in the cases demonstrates that this requires the decision maker to examine all of the circumstances for a reasonable period of time leading up to the incident; and to consider what likely would have happened had the accident not occurred. The decision maker cannot simply focus on the circumstances immediately contemporaneous with the event itself. Except for a consideration of post-accident circumstances, the analysis is similar to the dependency priority cases. The decision-maker must take a holistic view of the entirety of the circumstances for a reasonable period of time leading up to and including the incident, and not restrict the analysis to a mere "snapshot" in time.

As the Court of Appeal reasoned in *McIntrye v. Scott*, in deciding whether an "objective observer" would describe the claimant in this case as "the driver" of the tractor trailer that was parked on Tesla Frontage Road, outside the Tesla factory gates, it is relevant to consider the circumstances which would explain the claimant's presence at the accident scene. To put it another way, why was the claimant in the location that he was when he was struck and injured by a vehicle, and how did the claimant come to be at that location?

In my view, this analysis necessarily involves a consideration of the reason why the claimant was in Fremont, California on the grounds of the Tesla factory. The answer to that question is that the claimant and the co-driver, as part of their employment with Royal Logistics, had undertaken to drive a tractor-trailer from Canada to the United States for the purpose of delivering to the Tesla factory a trailer loaded with automobile parts. The critical part of the job was to ensure that the trailer safely arrived at the Tesla factory and that the parts were successfully off-loaded there. Although this could be considered the most important part of the endeavour, their employment task was not actually complete until they had driven the tractor trailer unit back to Canada from California and returned the units to the Halton Hills depot where their journey began or to whatever location was the proper one as designated by their dispatcher.

This undertaking required at least 5 to 6 days more or less continuous travel to complete the round trip. Both the claimant and the co-driver would take turns operating the tractor trailer unit. While one was operating the unit the other would be "off duty" which meant either resting or sleeping in the sleeping berth of the tractor.

In my view, the "on-duty", or "off-duty" designation describes the activity of who was operating the tractor trailer at any given time, rather than defining "the driver" status. Whether "on-duty" or "off-duty" the nature of this transcontinental delivery mission was such that both the claimant the co-driver should be considered "the driver" of the tractor trailer until the entire journey was complete, unless there is a compelling reason to find that this status was interrupted or lost along the way.

I do not believe it is necessary to narrowly interpret section 224 (1) (a) to mean that only one person at a time could hold the status as "the driver" of a tractor trailer unit being used for a transcontinental journey the demands of which required a driving "team". Such an interpretation would be unduly narrow, and would fail to take into account the common practice in transcontinental trucking of there being more than one driver for such lengthy assignments. This would also require interpreting the words "the driver" to mean "the only driver", which is not necessary to give reasonable meaning to the definition.

In this case, it is clear to me that both the claimant and the co-driver were "the driver" of the tractor trailer unit from the time they left the depot in Halton Hills, Canada, until they arrived at the Tesla factory in Fremont California. I do not think that status which each of them held was ended or interrupted during any times when one of them was "off duty" and was either resting or sleeping while the other was physically operating the tractor trailer. Nor do I think this status was interrupted during times when they may have stopped at a service centre to have a rest break or a meal.

In my opinion, when the claimant and his co-driver arrived at the Tesla factory shortly after 4 AM on October 21, 2014, they were both "the driver" of the tractor trailer unit. In my view, the co-driver retained the status of "the driver" notwithstanding the fact that when they arrived at the Tesla factory he went "off duty" and turned responsibility for the off-loading phase of the journey over to the claimant.

In any case, if I am wrong in my conclusion that both the claimant and the co-driver could concurrently satisfy the definition of "the driver" throughout the

circumstances of this transcontinental mission, I find that the claimant, having assumed the responsibility from the "off-duty" co-driver to ensure the tractor trailer unit was driven to the Tesla loading dock to be offloaded when the shipping/receiving gate opened, held the status of "the driver" at that point in the journey. He had taken control by contacting his dispatcher advising that he and Mr. Gill had safely arrived at the Tesla factory and that they were waiting to complete the off-loading phase of the journey. The accident occurred within a half hour or forty-five minutes of the claimant going "on-duty" and assuming responsibility to complete the delivery when the shipping-receiving gate opened.

It is relevant to then ask: was the claimant's status as "the driver" interrupted or temporarily lost when he exited the tractor trailer unit and went for a walk while waiting the hour to hour and a half until the shipping/receiving gate opened and the delivery could be completed?

In my view the claimant's status as "the driver" of the tractor trailer unit was not interrupted or lost on these facts. A consideration of "all the circumstances" I have outlined reasonably leads to the conclusion that the claimant retained his status as "the driver" up until he was struck by the vehicle on Tesla Frontage Road.

An objective observer would have come to that conclusion by taking into account that the claimant and the co-driver had arrived outside the Tesla factory shipping/receiving gate and parked their tractor trailer outside that gate. The objective observer would be aware that the claimant and the co-driver were waiting until the Tesla loading dock opened to complete a delivery of goods. It would have been in this context

that the objective observer would have seen the claimant exit the tractor trailer and walk from its location to the point on Tesla Frontage Road where the accident occurred.

Other than walking on what was still Tesla property, there is no evidence to suggest to an objective observer that the claimant engaged in any other activity inconsistent with his status as the driver of the tractor trailer waiting to complete a delivery. There would be no reason for the objective observer to conclude that the claimant was likely to do anything else other than return to the tractor trailer at some point to complete his task.

One difference in this case from the cases to which I have been referred is the distance the claimant had walked away from the tractor trailer. At the time he was struck by the vehicle on Tesla Frontage Road he was at least 800 metres distance from the tractor trailer. The accidents in the other cases occurred much closer to the vehicle of which the claimant was found to have been either the driver or the passenger.

I am not persuaded that the additional distance in this case caused the claimant to have his status as "the driver" of the tractor trailer interrupted or lost. I note that in *AXA v. Markel* the Court of Appeal discussed a requirement for "*some degree of physical connection*" with a vehicle. It did not specify that a person had to be within a certain distance of the vehicle to be considered "the driver" of the vehicle or a "passenger".

This makes sense for obvious reasons. The Court of Appeal has made clear that definition of "driver" connotes a status and not an activity. Would it be logical to consider a person "the driver" of the vehicle if the person was 30 feet away from the vehicle at

the time of an incident, but to say that the person's status as driver ceased for no other reason than the person had exceeded that distance from the vehicle at the time of an incident? I think not. If distance from the vehicle was the key criterion to determine whether a person was "the driver", how would it ever be possible to determine the allowable distance a person could be from a vehicle before the person's status as "the driver" ceased?

In my view, one must interpret the need for a "physical connection" with the vehicle in the broader sense of whether the person has some measure of control or authority in connection with a vehicle at a particular time, rather than focusing on the physical distance the person may be from the vehicle at the time of an incident.

In this case, the claimant and the co-driver had arrived at the Tesla factory and parked their tractor trailer on Tesla Frontage Road, waiting for shipping/receiving gate 8 to open to complete their delivery.

The claimant had gone "on-duty". He communicated their arrival to the Royal Logistics dispatcher, and he had assumed responsibility to complete the off-loading phase of their assignment which would involve driving the tractor trailer through gate 8 to the Tesla shipping/receiving dock when it opened about an hour and fifteen minutes to an hour and a half after their arrival.

His co-driver had gone "off-duty" and went to sleep in the bunk of the tractor. The claimant left the keys in the tractor trailer when he went for a walk while waiting to complete the off-loading phase of the job, not because he was relinquishing control, but

for the practical reason that he could not lock his co-driver in the tractor trailer unit and leave him without keys.

The claimant remained in control of, and he had authority over the tractor trailer unit at all times after he exited the unit to go for a walk. He could have returned to the unit at any time to perform any function in connection with the tractor trailer and to complete the delivery assignment. Indeed the evidence indicates that is what the claimant intended to do when the Tesla shipping receiving gate opened had the accident not intervened.

Although I will acknowledge that there is no direct evidence on the point, I also think it a reasonable inference from all of the other evidence – specifically that this was a five to six day transcontinental trucking assignment, that the claimant in all likelihood had personal effects in the tractor trailer which would have remained there until he and his co-driver had returned the tractor trailer unit to the Halton Hills depot in Canada after the assignment was completed. This would also give the claimant "some physical connection" with the tractor trailer.

In my opinion an "objective observer", keeping in mind the relevant considerations, and knowing all of the circumstances would answer affirmatively if asked whether the person who was struck by the vehicle on Tesla Frontage Road was the driver of the tractor trailer parked on Contractors' Road near gate 8 of Tesla Motors.

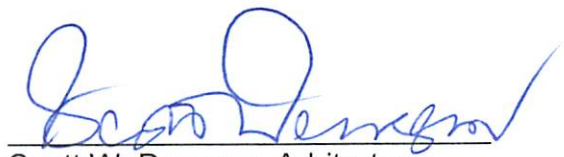
Conclusion

For the foregoing reasons I conclude that Northbridge is the highest priority *Insurance Act* s. 268 insurer by operation of 268 (5.2), as the claimant was "the driver" of the tractor trailer at the time of the incident.

Aviva is entitled to indemnity from Northbridge for past SABS paid, and Northbridge is responsible for any future SABS to be paid to or on behalf of the claimant.

As the successful party, Aviva is entitled to its costs of the arbitration, including the arbitrator's fees and disbursements. If the parties are unable to agree on costs I invite them to contact my office to arrange a telephone conference to discuss my involvement in their resolution.

Dated at Toronto, May 31, 2019



Scott W. Densem, Arbitrator