Khaled, Mohamed Bahaa Family Medicine CPSO #59465

Addendum

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Atkinson v. Economical, 2025 ONSC 6463 (CanLII), <https://canlii.ca/t/kgl63

RE: PATRICIA ATKINSON

AND:

ECONOMICAL ET AL

BEFORE: Justices Corbett, Faieta and LeMay, JJ

COUNSEL: *Ashu Ismail,* Counsel for the Appellant, Patricia Atkinson

Christine Windsor, Counsel for the Respondent, Dr. Mohamed Khaled

Martin Smith, Counsel for the Respondent, Direct IME

Melinda Baxter, Counsel for the Respondents, Sarah Miazga and Economical

Stephen Whibbs, Counsel for the Respondent, Economical (File Nos. 625/23 and 084/25)

Mindy Noble, Counsel for the Respondent, Human Rights Tribunal

Jesse Boyce, Counsel for the Respondent, Licence Appeal Tribunal

HEARD: November 18, 2025

ENDORSEMENT

[1] On consent of the Human Rights Tribunal of Ontario ("HRTO") and the named respondents, we are granting the Order quashing the decision of the HRTO dated December 31st, 2024 and the reconsideration decision dated April 24th, 2025. We are remitting the matter back to the HRTO for further adjudication. Contrary to the request of the Appellant/Applicant, we are not providing any directions to the HRTO as to how the further adjudication is to be conducted.

[2] We are also quashing the decision of the Licence Appeal Tribunal ("LAT") dated October 3rd, 2023, the reconsideration decision dated January 18th, 2024, and the September 12th, 2025, decision "cancelling" the previous two decisions. All of these decisions are quashed and the matter is remitted to the LAT for a hearing on all issues before a different adjudicator.

Given the length of time that this matter has been outstanding, we strongly encourage the LAT to schedule a prompt hearing in this matter, subject to the availability of counsel.

[3] Our reasons for quashing the decisions of the LAT and our disposition of costs are reserved, and reasons will be released in due course.

Also see:

Atkinson v Economical Insurance Company, 2025 CanLII 94821 (ON LAT), https://canlii.ca/t/kfh0l

Atkinson v. Economical, 2025 ONSC 6463 (CanLII), <https://canlii.ca/t/kgl63

Atkinson v. Economical Mutual Insurance Company, 2025 HRTO 1044 (CanLII), https://canlii.ca/t/kbrr1

Atkinson v. Economical Mutual Insurance Company, 2024 HRTO 1919 (CanLII), https://canlii.ca/t/k8k29

Tsouchlakis v Intact Insurance Company, 2025 CanLII 97772 (ON LAT), https://canlii.ca/t/kfm32

[23] The respondent submits that the treatment plan for concussion therapy is not reasonable and necessary and by letter dated June 8, 2023, denied entitlement to the treatment plan based on the IE report of Dr. Khaled, dated April 12, 2023.

[27] I further give little weight to the IE report of Dr. Khaled in support of the respondent's position that the treatment plan is not reasonable and necessary. I find that the applicant reported that, "He gets "dizzy" when he has to pay attention, focus, concentrate and when he is in a car or bus. He also has photophobia and phonophobia. The headaches are improving but the dizziness is still about the same. He now only gets one or two headaches a week." Dr. Khaled diagnosed the applicant with mechanical low back pain as well as grade 2 whiplash of the neck with associated headaches and left shoulder sprain/strain, which he found to be uncomplicated soft tissue injuries without evidence of significant orthopedic or neurological sequela. I find that while Dr. Khaled noted the applicant's reported dizziness and related difficulties in his report, other than finding that the applicant has associated headaches, he did not address the applicant's complaints nor the diagnosis of concussion by Dr. Nastis, summarized within his report. I further find that the IE assessment assessed a previous treatment plan for physiotherapy, but did not address this specific treatment plan in dispute.

Atkinson v Economical Insurance Company, 2025 CanLII 94821 (ON LAT), https://canlii.ca/t/kfh0l

Decisions Under Review

[13] At paragraphs 10 – 13 of the initial decision, the adjudicator addressed the applicant's oral motion to exclude all of Dr. Mohamed Khaled's s. 44 reports. The basis of this motion was the applicant's complaint that Dr. Khaled did "not attend to testify" at the hearing. The respondent opposed the motion, claiming that the applicant had plenty of notice of its intention to rely on this evidence, and it would be procedurally unfair to disallow it from relying on the reports.

[14] The adjudicator dismissed the motion, finding the applicant "had notice of the respondent's intention to submit Dr. Khaled's reports for a significant period of time and first requested their exclusion at the hearing". He further concluded that it would be unfair to require the respondent to proceed without the reports, and the applicant had not shown it "will suffer prejudice by their admission."

[15] Following on this ruling, the adjudicator went on to rely on the opinion of Dr. Khaled in several sections of the initial decision.

[16] In her reconsideration request, one of the alleged errors claimed by the applicant under Rule 18.2(b) was the adjudicator's "acceptance of Dr. Khaled's s.44 reports, without permitting cross-examination". This ground, along with the rest of the request, was dismissed. Specifically, the adjudicator found at paragraph 21 of the reconsideration decision:

Lastly, during the hearing I heard submissions from the parties on the inclusion of Dr. Khalid's [*sic*] s.44 reports as evidence. At paragraphs 10 to 13 of my decision, I found that Dr. Khalid's [*sic*] reports could be admitted as evidence even if he was not called as a witness by the respondent and the applicant was having difficulty getting Dr. Khalid [*sic*], who was summoned by the applicant, to appear before the Tribunal and give testimony. I made no error of law in allowing Dr. Khalid's [*sic*] report to be admitted pursuant to s. 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

[17] The applicant has filed a Notice of Appeal and an Application for Judicial Review concerning this proceeding.

[21] On the specific question of Dr. Khaled's reports, the respondent submits that the applicant has mischaracterized this part of the decision as a refusal to allow for cross-examination. According to the respondent, there was no refusal. Instead, the applicant listed Dr. Khaled on her witness list, obtained a summons, and then attended the hearing with "no evidence whatsoever that [she] served Dr. Khaled personally with the summons". Additionally,

the respondent claims that the applicant later asked for the respondent to undertake to call Dr. Khaled (which it did not undertake), and then brought a motion for exclusion (as opposed to requesting an adjournment to allow for service of the summons). Further, the respondent challenges the applicant's reliance on her case law, claiming that the facts of these prior cases are significantly different than the matter at hand.

[22] In the alternative, the respondent submits that, even if a breach is found, Dr. Khaled's evidence was "not determinative to [the adjudicator's] decisions on the issues in dispute". Beyond the fact that this evidence was not referenced in his denials of the ACB, HHB, and a number of medical benefits, the respondent claims that, even when his opinion was referenced, the adjudicator did not rely heavily on this evidence. Finally, the respondent adds that Dr. Khaled's reports were treated in a similar fashion to the applicant's late-filed evidence from Dr. R. Van Reekum (who was also not presented for cross-examination).

[23] The respondent did not expressly address the applicant's requests for additional information about the Rule 18.5 review, nor did it mention her request for costs and disbursements.

[24] In reply, the applicant claims she provided the respondent with ample notice of her intention to challenge the opinion of Dr. Khaled. The applicant also highlights the inclusion of Dr. Khaled on the respondent's witness list (dated May 26, 2023).

Analysis

[25] By admitting Dr. Khaled's expert evidence into the hearing (evidence that he later went on to rely on in his denial of several benefits), I find the adjudicator committed a material breach of procedural fairness, pursuant to Rule 18.2(a). This breach was not remedied in the reconsideration decision.

[26] Dr. Khaled's evidence played a key role in the adjudicator's denial of several treatment plans. For instance, at paragraphs 43 – 45 of the initial decision, the adjudicator explained his denial of the occupational therapy services treatment plan (dated January 27, 2021) as follows [emphasis added]:

The applicant submits that the OT plan dated January 27, 2021, is reasonable and necessary because its goal is to promote her safety and re-engagement in pre-accident activities including self-care with a view to return to her activities of normal living.

In its denial letter dated February 10, 2021, the respondent relied on the findings of Dr. Khaled, general physician, in his s. 44 report dated December 9, 2020. Dr. Khaled indicated that from his physical examination he did not identify any valid indicators to support residual or ongoing or permanent musculoskeletal, neurological or orthopedic accident-related injury or

impairment. He also stated that there is no objective evidence of ongoing permanent accident-related impairment and concluded that the treatment plan was not reasonable and necessary.

I find that Dr. Khaled's opinion is more consistent with the bulk of the other evidence. As mentioned earlier, none of the application's treating healthcare professionals at the time recommended that she would benefit from OT services to promote her safety and re-engagement in pre-accident activities. In addition, an OCF-18 is not sufficient on its own to prove that the treatment is reasonable and necessary. There needs to be contemporaneous evidence in support of the OCF-18, and I have not been directed to evidence to support that the applicant requires this treatment. Therefore, I am not persuaded that this OT treatment plan is reasonable and necessary.

[27] Similar findings were used by the adjudicator to deny the two treatment plans for case management services: see paragraphs 52 and 53 of the initial decision.

[28] I accept the respondent's comment that this evidence did not factor into the adjudicator's denials of the ACB, HHB, and a number of medical benefits. However, as the quotation above demonstrates, the adjudicator relied heavily on this evidence to reach his conclusions about several disputed treatment plans. The centrality of this opinion in his reasons, therefore, shows the adjudicator materially breached the applicant's right to procedural fairness by admitting this evidence without then allowing the applicant to test it through cross-examination.

[29] A key aspect of procedural fairness is to ensure that all parties have a fair chance to respond to the other side's arguments and evidence. As noted by the Court in *Plante*, cross-examination is an essential tool for testing the veracity of a party's evidence. By not allowing the applicant to use this tool to test Dr. Khaled's expert opinion—an opinion that went on to form a key part of the resulting decision—the adjudicator breached the applicant's right to procedural fairness.

[30] I recognize the expansive control over the admission of evidence that is provided to the Tribunal through both its Rules and the *Statutory Powers Procedure Act*. This authority allows the Tribunal to handle documents and testimony in a manner that does not require strict adherence to the courts' evidentiary rules—flexibility that aligns with the more responsive nature of administrative justice.

[31] However, despite this broad discretion, the Tribunal is still required to protect a party's right to procedural fairness. Dr. Khaled's non-attendance at the hearing—non-attendance that deprived the applicant of her right to test his opinion through cross-examination—should have resulted in the exclusion of his reports. That was the only reasonable option available to the

adjudicator to ensure that the hearing was conducted in a procedurally fair fashion for both parties.

[32] I also do not accept the respondent's position that it was unreasonable for the applicant to believe that Dr. Khaled would have been present for cross-examination. While it is not clear whether the respondent was aware of the efforts the applicant made to summons this expert, I find Dr. Khaled's inclusion on the respondent's witness list provided the applicant with reasonable grounds to assume he would testify. I also note that the correspondence sent by applicant's counsel to respondent's counsel during the hearing (i.e., e-mail dated June 28, 2023) provides further proof to show that the applicant assumed the witness would attend. Therefore, when Dr. Khaled did not appear, the procedurally fair way to proceed was for the adjudicator to accept her motion to exclude his reports.

[33] In a similar vein, I do not accept the respondent's submission that the applicant should have requested an adjournment. Once again, the applicant could have reasonably assumed that the respondent would call Dr. Khaled, as he was included on its witness list. It was not reasonable to then expect the applicant to delay this proceeding—a delay that would have prejudiced her right to a timely determination of her claim.

[37] Due to the adjudicator's reliance on Dr. Khaled's evidence to deny several of the disputed benefits (evidence that was admitted without cross-examination), I find the most appropriate remedy under Rule 18.4 is to cancel both the initial decision and the reconsideration decision.

Also see:

Atkinson v. Economical, 2025 ONSC 6463 (CanLII), <https://canlii.ca/t/kgl63

Atkinson v. Economical Mutual Insurance Company, 2025 HRTO 1044 (CanLII), https://canlii.ca/t/kbrr1

Atkinson v. Economical Mutual Insurance Company, 2024 HRTO 1919 (CanLII), https://canlii.ca/t/k8k29

Landrey v Economical Insurance, 2025 CanLII 49170 (ON LAT), https://canlii.ca/t/kcc2r

[115] The respondent did not re-address the applicant's entitlement to the April 2022 OCF-18 completed by Mr. Shah until nine months later on May 1, 2023 when Dr. Khaled completed an IE paper review. I agree that this review was deficient insofar as the goods and services recommended by Mr. Shah. Dr. Khaled determined that the OCF-18 was not reasonable and necessary. I find the bulk of Dr. Khaled's analysis serves only to recite a series of findings from

studies that offer little insight because he does not apply them to applicant's medical conditions. Further, I find his conclusion that the applicant had appropriate and adequate facility-based soft tissue rehabilitation therapy is unsupported. His analysis does not contemplate treatment the applicant had undertaken, or her response to that treatment. Similarly, the findings he relies on from the in-person examination he conducted in December 2022 do not address physiotherapy or any treatment for that matter.

[116] Similar deficiencies appear in Dr. Khaled's assessment of the OCF-18 completed by Ms. Taylor. Dr. Khaled bases his assessment on the understanding that this OCF-18 proposes physiotherapy services and assessment. I find this is incorrect because the OCF-18 clearly indicates the proposed services are an assessment of hearing and auditory processing skills and counselling on test results. Further, Dr. Khaled's opinion that custom earplugs are not reasonable and necessary is unsupported. While Dr. Khaled says his earlier conducted in-person examination did not identify any objective evidence of ongoing accident-related impairment, I find his paper review does not establish a clear nexus between the applicant's noise sensitivity complaints and the result of the musculoskeletal examination and range of motion testing he performed.

[117] I am unclear as to the extent that the respondent relied on Dr. Khaled's paper review to deny these OCF-18s because the parties did not point to the corresponding denial notices in evidence. However, the position of the respondent is that the OCF-18s were reasonably adjusted in conjunction with the medical records and expert assessments available to it, inclusive of the IEs it obtained. Given my analysis of Dr. Khaled's assessment of at least two of the disputed OCF-18s, I find the respondent's adjustment of the applicant's claim could not have been reasonable.

[118] The applicant seeks an award of 50 per cent of all benefits payable on the basis of blameworthiness, the applicant's vulnerability, the impact of her delayed treatment on her recovery, the need for deterrence, and the financial advantage accrued by the respondent's withholding of payment. I agree most of these factors merit consideration but disagree that the severity of the respondent's conduct in this case rises to the maximum threshold permitted by law. Further, while I am satisfied the respondent relied to some extent on Dr. Khaled's IE to adjust the applicant's claim and maintain its OCF-18 denials, the degree to which Dr. Khaled's assessment informed its denials is unclear. In my view, an award of 10 per cent is proportional for this case.

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[6] Relying on Rule 26.5(c), the applicant submits that the Decision conflicts with established jurisprudence, because the Tribunal misapplied the principles set out in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("*Penner*"), in the following respects:

1. The Tribunal concluded that the LAT proceedings were not unfair, even though the applicant was denied the opportunity to challenge Dr. Khaled's evidence before the LAT – "the very definition of an unfair proceeding," according to the applicant – contrary to the Supreme Court's caution at para. 40 of *Penner* that holding a party to an unfair result would "compound the unfairness" to that party; and

2. The Tribunal failed to consider the differing purposes, processes, and stakes of the LAT and the Tribunal, and failed to give effect to the reasonable expectations of the parties, in accordance with the principles governing the doctrine of issue estoppel as set out in *Penner*.

[12] The applicant submits that the Tribunal's conclusion that the proceeding before the LAT was fair conflicts with these principles. She submits that the LAT proceeding was "the very definition of an unfair proceeding," because the LAT adjudicator admitted the expert report of personal respondent Dr. Mohamed Khaled in his absence and the applicant had no opportunity to cross-examine him.

[13] At para. 23 of the Decision, the Tribunal observed that in her application to the LAT, the applicant was afforded "the procedural and evidentiary safeguards" typical of administrative Tribunals in Ontario: she was assisted by counsel, she had the opportunity to request reconsideration and availed herself of that opportunity, and when her reconsideration request was denied, she could and did seek judicial review. On this basis, the Tribunal concluded that the LAT proceeding was fair to the applicant.

[14] The applicant appears to be conflating procedural fairness with substantive fairness. She disagrees with the LAT adjudicator's decision to admit Dr. Khaled's report. That evidentiary ruling does not, in my view, make the adjudicator's ultimate decision arbitrary or unfair in the sense contemplated by the Supreme Court in *Penner*. The LAT adjudicator provided reasons for admitting Dr. Khaled's report: see *Atkinson v. Economical Mutual Insurance Company*, 2023 ONLAT 22-002008/AABS, at paras. 10 to 13. LAT decisions are subject to judicial review and appeal, and the applicant is pursuing that review. Judicial review and appeal is the remit of the Divisional Court. This Tribunal does not sit in review of the decisions of other administrative bodies, and the Tribunal will not offer the applicant an "institutional detour" to attack the validity of the LAT adjudicator's order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Figliola*, at para. 28.

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Foster v Co-operators General Insurance Company, 2025 CanLII 18208 (ON LAT), https://canlii.ca/t/k9ws2

[42] Finally, I find that the s. 44 reports of Drs. Khaled, Kiss and Dimitriakoudis, are of little evidentiary value for the following reasons.

[43] I acknowledge the respondent's argument that Dr. Khaled concluded that no further such treatment was required. I disagree. Dr. Khaled concluded that the applicant sustained uncomplicated soft tissue injuries and that from a physical medicine perspective, in relation to her soft tissue injuries, no further facility treatment was required. However, the treatment before me is for vestibular physiotherapy which largely addresses the applicant's vestibular impairments, arising from her brain injury. Significantly, Dr. Khaled concluded that the applicant sustained "no more than a mild traumatic brain injury". He then concluded that his physical examination demonstrated no ongoing neurological impairment, but notably he did not conduct any neurological testing for the physical examination portion of the assessment. Therefore, it is unclear to me how Dr. Khaledconcluded that the applicant has no ongoing neurological impairment when he conducted no neurological testing, the applicant requested that the lights be turned off during the assessment, and reported ongoing headaches, confusion, difficulty focusing, poor memory, and significant cognitive dysfunction.

[44] I also acknowledge that a portion of the vestibular physiotherapy sessions is to address the applicant's pain. Critically, the respondent's own s. 44 assessor, Dr. Levy has concluded that the applicant has a chronic pain disorder, and an interdisciplinary pain management program is recommended, which would include treatment from a physiotherapist, which Ms.Souliere is qualified as.

[45] I am alive to the respondent's argument that Dr. Levy proposed an interdisciplinary pain management program over 6-8 weeks, 5 to 6 hours a day with the goal of the applicant becoming independent and learning to live with her condition. However, the applicant is not pursuing infinite vestibular physiotherapy but rather she is seeking funding for eight treatment sessions which are an hour and half long per session, which is a total of 12 hours. I find that this is consistent with Dr. Levy's recommendation that the applicant receive treatment from a variety of specialists, including a physiotherapist, which is Ms. Souliere, because it fits within his proposed timeline of 6-8 weeks, for 5-6 hours a day, which accumulates to a maximum of 336 hours. Here, the applicant is seeking vestibular physiotherapy for a faction of the time recommended by Dr. Levy.

[46] Moreover, while Dr. Levy noted the usual goals of the program which were to increase the patient's function and to teach them to safely engage in activities despite their pain, he did not provide an opinion of whether these goals will be met for the applicant's case after six-eight

weeks. Respectfully, he could not provide such an opinion, as this would be dependant on the progress that the applicant made with various specialists, including a physiotherapist.

[47] Finally, I place little weight on the conclusions of Drs. Khaled, Kiss and Dimitriakoudis that the applicant is overtreating and that her residual impairments are primarily psychological. First, Dr. Khaled generally remarked that there is evidence that prolonged facility based rehab therapies can contribute to a prolongation of symptoms, but he made no comment on whether this was the case for the applicant, and if so, why. Moreover, Dr. Khaled provided no rationale on why the applicant's symptoms were significantly affected by psychological conditions only when he diagnosed her with "no more than a mild traumatic brain injury" and the applicant reported neurocognitive symptoms as indicated above. I also place limited weight on Dr. Khaled's opinion because his report was completed in 2019, which was before the applicant was receiving psychological treatment.

Mahmood v Intact Insurance Company, 2025 CanLII 56 (ON LAT), https://canlii.ca/t/k8jfd

[18] The respondent relies on the s. 44 report conducted by Dr. Khaled on March 25, 2021. I do not find this report to be persuasive. Dr. Khaled conducted a 60 minute in-person examination with the applicant and concluded that she sustained uncomplicated soft tissue injuries and that there was no objective evidence of an ongoing permanent accident-related impairment. I note that Dr. Khaled's report was completed in 2021 and, therefore, does not speak to how the applicant's symptomology has developed over time. His report does not address the applicant's current functional limitations or consider whether the injuries she sustained have since evolved into chronic pain syndrome. Furthermore, Dr. Khaled's conclusion that the applicant had not sustained any objective injuries is not inconsistent with a diagnosis of chronic pain syndrome by Dr. Louvish as chronic pain does not require the presence of objective injuries. As such, I do not find the report of Dr. Khaled to be persuasive with respect to the applicability of the MIG.

[19] I am persuaded by the report of Dr. Louvish, the affidavit of Ms. Mahmood, and the CNRs of Dr. Arif and find, on a balance of probabilities, that the applicant has demonstrated that she suffers from chronic pain with functional impairment that warrants removal from the MIG.

[20] As I have already found the applicant to be removed from the MIG based on chronic pain, it is not necessary to consider whether the applicant's headaches or psychological impairments form a basis for removal from the MIG.

The applicant is entitled to the treatment plan for an occupational therapy assessment

[21] I find on a balance of probabilities that the treatment plan for an occupational therapy assessment is reasonable and necessary.

[22] To receive payment for a treatment plan under sections 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

[23] The OCF-18 in dispute was submitted by Rehab First Inc. on December 23, 2020. It identifies the applicant's injuries as low back pain, shoulder pain, upper arm pain, malaise and fatigue, headache, sleep disorders, emotional difficulties, and limitation of activities due to disability. It lists the goals as pain reduction, return to activities of normal living, and to facilitate safe functional participation in activities of daily living. It notes that the applicant experiences significant barriers in her ability to participate in her pre-collision activities of daily living and school related tasks, resulting in emotional difficulties and social isolation. The treatment plan seeks to remediate and compensate for identified occupational performance issues in order to increase the applicant's safety, her participation in daily tasks, and allow reintegration into her family life and the rest of society.

[24] The applicant relies on Dr. Arif's CNRs which indicate that the applicant suffers from pain in her neck, back, and shoulder; anxiety and panic attacks; fatigue; and that she has limited range of motion in her shoulders. Furthermore, the applicant reported having difficulty maintaining her position during school hours and noted that she uses multiple pillows to help alleviate pain in her right upper arm, neck, and back. In addition, the applicant advised Dr. Arif that she is unable to participate in household chores to pre-accident levels.

[25] In denying the treatment plan, the respondent relies on the report of Dr. Khaled. In his report, Dr. Khaled found that there is no objective evidence of ongoing accident-related impairment, that the applicant functions independently, safely and normally at home and at school, and that there is no indication whatsoever for an in-home assessment.

[26] In weighing the report of Dr. Khaled and the CNRs of Dr. Arif, I am persuaded by the CNRs of Dr. Arif. While Dr. Khaled's report notes that he reviewed the CNRs of Dr. Arif in their entirety, he did not address or comment on the various impairments listed in the CNRs which seem to contradict his assertions. For example, Dr. Khaled states that the applicant has returned to all her pre-loss activities while the evidence in Dr. Arif's CNRs clearly suggests otherwise. In addition, Dr. Khaled found that the applicant's sleep and energy level were normal without providing a basis for this finding and notwithstanding that the applicant reported fatigue issues to Dr. Arif. As such, I find that Dr. Khaled's assessment underreports the applicant's impairments in light of the contemporaneous reports in the CNRs. Moreover,

Dr. Khaled's finding of an absence of objective injuries does not imply that the applicant is not suffering from the impairments she reported to her doctor.

[27] Given the impairments outlined in the CNRs of Dr. Arif above, there are grounds on which to believe that the applicant is experiencing functional limitations that would warrant further investigation by way of an occupational therapy assessment. The cost of the treatment plan is within the limits prescribed by the *Schedule* and the hourly rates proposed are in line with those payable under the Financial Services Commission of Ontario's Professional Services Guideline.

[28] Based on the foregoing, I find that the applicant is entitled to the treatment plan for an occupational therapy assessment.

The applicant is entitled to interest

[29] Interest applies on the payment of any overdue benefits pursuant to section 51 of the *Schedule*. An amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the time required under the *Schedule*.

[30] As I have found that the applicant is entitled to the treatment plan for an occupational therapy assessment, interest is payable on that plan in accordance with section 51 of the *Schedule* from the date payment became overdue to the date that payment is made.

The applicant is not entitled to an award

[31] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. An award is only given where the delay or withholding of benefits by the insurer is unreasonable, meaning behaviour, which is excessive, imprudent, stubborn, inflexible, unyielding, or immoderate. The applicant has the onus to demonstrate entitlement to an award on a balance of probabilities.

[32] The applicant submits that an award is appropriate because the respondent unreasonably withheld payment of the treatment plan and failed to provide due consideration to the medical records which showed that the applicant suffered from chronic pain, psychological distress, and numerous conditions outside the MIG.

[33] I do not agree.

[34] First, I was not pointed to any evidence which suggested that the respondent failed to provide due consideration to the medical records.

[35] Second, the applicant is not entitled to an award simply because the insurer did not approve the benefits in dispute. The respondent's decision to deny the treatment plan was based on its ongoing adjusting of the file and its interpretation of Dr.Khaled's report. While I did not find Dr. Khaled's report to be persuasive, the insurer's reliance on it cannot be said to rise to the threshold of excessive, imprudent, stubborn, inflexible, unyielding, or immoderate.

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Atkinson v. Economical Mutual Insurance Company, 2024 HRTO 1919 (CanLII), https://canlii.ca/t/k8k29

[6] The applicant applied for benefits from the respondent Economical Mutual Insurance Company. (Although the company has since become Definity Insurance Company, for consistency I will refer to "Economical" throughout this decision.) Economical engaged personal respondent Dr. Mohamed Khaled to provide an assessment of the applicant's injuries.

[7] In his report to Economical, Dr. Khaled concluded that the applicant suffered only uncomplicated soft tissue injuries. He ruled out "orthopaedic or neurological sequelae" and identified no "valid" indicators of ongoing permanent musculoskeletal, neurological, or orthopaedic accident-related injury or impairment.

[8] The applicant alleges that Dr. Khaled excluded "non-objective injuries" such as migraines, chronic pain, and psychological symptoms from his assessment. She speculates that he did so at the direction of the respondents Economical, Direct IME, "and/or" Sarah Miazga.

[9] In his Response, Dr. Khaled submits that while he did include the applicant's migraines and visual disturbance in his report, the scope of his mandate was to assess the applicant's physical condition, not her psychological symptoms. The applicant appears to submit that this limitation on the doctor's mandate is itself discriminatory, because it has an adverse effect on her as a person with "non-objective injuries."

[10] Relying on Dr. Khaled's report that the applicant lacked "evidence of ongoing accident-related impairment," Economical denied the applicant certain benefits. The applicant applied to the LAT for review of Economical's decision.

[11] Economical submitted Dr. Khaled's report to the LAT prior to the hearing. At the outset of the hearing, the applicant sought to exclude the report from evidence because Dr. Khaled had not responded to a summons and was not available to be cross-examined. The applicant did not allege, then or thereafter, that Dr. Khaled's report contravened the *Code* or that Dr. Khaled engaged in discriminatory conduct when he conducted his examination.

[12] The judgment of the LAT adjudicator is reported at *Atkinson v. Economical Mutual Insurance Company*, 2023 ONLAT 22-002008/AABS, 2023 CanLII 91458 (ON LAT). At paras. 10 to

13, the adjudicator admitted Dr. Khaled's report in evidence, because Economical gave ample notice that it intended to rely on the report, and the applicant did not seek its exclusion until the hearing began. At paras. 44 and 45, the adjudicator accepted the report's contents. At paras. 52 and 53, he noted that Dr. Khaled's conclusions were consistent with those of the applicant's family physician, neurologist, psychiatrist and psychologist. The application was dismissed.

[13] The applicant requested that the LAT reconsider its decision. The request was denied: see *Atkinson v. Economical Mutual Insurance Company*, 2024 ONLAT 22-002008/AABS - R, 2024 CanLII 2641 (ON LAT).

The Issues before the LAT were the same as those before this Tribunal

[20] The applicant maintains that her Application to this Tribunal is not about benefits entitlement or her disagreement with Dr. Khaled's conclusions, but about his "intentionally" limited examination. She submits that by omitting "non-objective injuries" from his assessment, Dr. Khaled and the other respondents subjected her to unequal treatment because of her disability.

[21] Economical submits that the applicant has reframed a dispute over benefits entitlement as an allegation of discrimination to evade the exclusive jurisdiction of the LAT. Economical cites *Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615 in support of its contention that jurisdiction is determined not by the applicant's characterization of the claim but by the facts that give rise to it.

[22] I need not determine whether the applicant is deliberately attempting to circumvent the LAT's jurisdiction, as Economical suggests. I agree that the facts underlying the applicant's claim at the LAT are fundamentally the same as those before me. I do not agree with the applicant that her Application to this Tribunal differs in substance from her application to the LAT because she now alleges that the respondents colluded to discriminate against those with "non-objective" disabilities. The distinction is a hollow one. Even if the allegedly discriminatory act is ascribed to Dr. Khaled for limiting his assessment, or to the other respondents for colluding with Dr. Khaled to limit his assessment, the adverse effect alleged – that is, the consequence to the applicant that gives rise to her Application – is the denial of accident benefits. This is the preserve of the LAT.

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[40] With respect to Dr. Khaled's report, dated May 25, 2023, it appears to be an outlier in that it did not identify any valid indicators to support residual or ongoing or permanent musculoskeletal, neurological, or orthopaedic accident-related injury or impairment. Dr. Khaled concluded that there was no objective evidence of ongoing permanent accident-related impairment, and that the applicant should be reassured that it is safe to resume all aspects of life that she was engaged in prior to the motor vehicle accident without restrictions.

[41] I am not persuaded by Dr. Khaled's report because his findings are inconsistent with those of the other assessors, including the other insurer's assessors. Moreover, it appears that even the respondent put little weight on Dr. Khaled's report as it approved the applicant's post-104 IRBs notwithstanding Dr. Khaled's opinion that the applicant could resume her employment without restriction.

[56] Again, the only report which does not indicate that the applicant suffers from functional impairments is that of Dr. Khaled who concluded that there was no objective evidence of ongoing permanent accident-related impairment and that it is safe to resume all aspects of life that she was engaged in prior to the motor vehicle accident without restrictions. I put little weight on this report for the reasons previously stated in my analysis of the physiatry assessment.

[57] I find that the bulk of the medical reports indicate that the applicant suffers from functional impairments in several domains of her life and that there is a sufficient basis upon which further investigation by way of an OT assessment is warranted.

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Also see: http://www.fairassociation.ca/wp-content/uploads/2024/12/Khaled-Mohamed-Bahaa-Family-Medicine.pdf

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