

Case In Point

Court Upholds Two-Year Limit on LOE Benefits for Workers Age 63 or Older

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The Ontario Divisional Court's recent decision upholding the two-year limitation on loss of earnings ("LOE") benefits for workers age 63 and older should reassure employers that Ontario courts take notice that LOE benefits are not meant to be paid for life.

Section 43(1)(c) of the *Workplace Safety and Insurance Act* ("WSIA") limits LOE entitlement for workers age 63 or older to two years. This section reflects expert evidence that 90% of Ontario workers retire by age 65, and that almost 90% of workers injured after the age of 61 return to work within two years. By limiting LOE entitlement to two years, s. 43(1)(c) recognizes that the majority of Ontario workers do not remain in the workforce past age 65, and even if injured after age 61, a worker will most likely return to the workforce within two years. In [Gouthro v. Workplace Safety and Insurance Appeals Tribunal](#), a worker challenged s. 43(1)(c) alleging it discriminated on the basis of age and therefore violated s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("Charter").

The Ontario Divisional Court dismissed the worker's appeal from a decision of the Workplace Safety and Insurance Tribunal ("WSIAT") in which the majority concluded that s. 43(1)(c) did not violate s. 15(1) of the *Charter*. The WSIAT panel had considered expert evidence that relatively few Canadians work past age 65. It also noted that the *WSIA* operates as an insurance scheme (not a social program for workers) which is to be administered in a financially responsible and accountable manner.

The Court agreed with the WSIAT panel's findings, stating:

"If the *Workplace Safety and Insurance Act* provided that injured workers were to receive LOE benefits until they died, that would imply that people work until they die. Both intuitively and statistically this seems incorrect."

The Court found that while the impugned provision created a distinction based on age, it did not create a disadvantage based on a stereotypical attribute. Rather, the provision "is grounded in the statistically verifiable facts referred to earlier; namely that as of 2008 90% of Canadian workers stop working at age 65 years and 90% of workers injured after the age of 61 return to work within two years."

While there has been, and may continue to be, litigation regarding the age limitation in s. 43 of the *WSIA*, courts have continually acknowledged the statistical reality of the Canadian workforce, and that workers' compensation is an insurance program. These realities enforce that provinces are entitled, as a matter of policy, to decide how they will compensate injured workers.