

## Case In Point

# Appellate Court Upholds Finding that Injured Worker who Returned to Full-Time Work Entitled to Receive 100% FEL Benefits to Age 65

**Date:** February 8, 2019

In [\*Hydro Ottawa v. Ontario \(Workplace Safety and Insurance Appeals Tribunal\)\*](#), the Divisional Court has upheld a decision of the Workplace Safety and Insurance Appeals Tribunal (Tribunal) that concluded an injured worker remained entitled to his 100% future economic loss (FEL) benefits until age 65 despite the fact he returned to full-time work in 2013.

After a 1996 injury, the worker was granted a 100% FEL benefit in May 2003 on the basis that he was unemployable. He was advised at the time that the FEL benefit was locked in. In May 2013, however, the worker was found fit to return to full-time work in the same position he had at the time of the accident. The employer unsuccessfully argued, both before the Workplace Safety and Insurance Board (WSIB) and then the Tribunal, that the FEL benefits should be discontinued. The argument was in part based on policy grounds, namely that the legislation could not have intended that a worker receive both full wages and an ongoing FEL benefit. That argument was rejected on the basis that the Act was unambiguous: the FEL award was not reviewable and none of the exceptions which would permit review existed in this case.

Section 44 of the *Workplace Safety and Insurance Act, 1997* (Act) governs the WSIB's ability to review a determination of the amount of compensation payable to a worker for FEL earnings and limits the time for that review to 72 months after the worker's injury, subject to specific exceptions. [It should be noted that as the accident occurred in 1996, the benefits awarded were governed by the pre-1997 *Workplace Safety and Insurance Act*. Therefore, any reference to 72-months was read as 60-months, which coincides with the pre-1997 legislation.]

The Divisional Court agreed with the Tribunal's reasoning that none of the exceptions in the Act applied and further commented: "had the legislators intended for the Board to continue to maintain administrative control over injured workers perpetually, which could potentially cause large scale uncertainty, they would have done so explicitly under the legislation."

In other words, it was reasonable for the Tribunal to interpret the legislation in a way that provided finality of an employee's FEL benefits, and not for the WSIB to maintain control for an indefinite period (i.e. greater than 60 months).