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LOVELACE V. CITY OF LINCOLN

By: Christopher M. Reid

When you receive a permanent impairment rating, do you need to fill in gaps in indemnity benefits from the date of accident forward?

Determining how much money is owed to an injured worker to bring him or her current on permanent disability benefits (either permanent partial or permanent total) once permanent disability is established can be a difficult task. If the date of *injury* is used, the employer or insurer may run the risk of overpaying permanent indemnity benefits or paying such a large amount that there is insufficient leverage to achieve a favorable settlement outcome. Employers and insurers have been reluctant in recent years to pay an impairment rating from the *date the rating is received* forward for fear that waiting time penalties would be assessed if they didn't "fill in the gaps" in indemnity benefits beginning with the date of the accident. Gaps in indemnity benefits may exist when an employee returns to full time work after the accident as indemnity benefits wouldn't be owed during that time. The Nebraska Supreme Court may have recently clarified this issue to some degree in ***Lovelace v. City of Lincoln***¹ in which the Court held the *date of disability* controls the date when permanent disability benefits commence.



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Confusion as to the employer's obligation centered around a case decided twelve years ago, ***Hobza v. Seedorff Masonry, Inc***ⁱⁱ, and a subsequent legislative revision to Neb. Rev. Stat. § 48-119. The Court in ***Hobza*** decided that based upon Neb. Rev. Stat. § 48-119, as it existed at that time, permanent disability benefits were owed from the date of injury, regardless of when the worker actually became disabled. Section § 48-119 was amended in 1999 (this change did not apply in ***Hobza*** as he was receiving benefits before the amendment) to provide that "compensation shall be computed from the date disability began." For several years, there remained legal tension between the new revision of § 48-119 and ***Hobza***. The Court's recent opinion in ***Lovelace*** provides guidance that the focus in such situations should be on paying permanent disability benefits from the date disability begins.

In ***Lovelace***, the worker slipped at work sustaining a knee injury in March 2006. She continued to work until June 2006 when she had knee surgery. She returned to work in October 2006 and continued to work with some restrictions until December 2007 when she had another knee surgery. The claimant did not return to work after the second surgery. The trial court determined that she was entitled to receive temporary total disability benefits from June 22, 2006 through October 1, 2006, and from December 19, 2007 until August 19, 2009, and thereafter became permanently and totally disabled. The trial court then revised its order, finding that permanent benefits should have been computed from the date of injury, minus the time she was receiving temporary benefits, and that she was therefore entitled to waiting time

penalties. Judge Van Norman assessed a waiting time penalty for the employer's failure to fill in a gap of indemnity benefits with permanent total disability during the time Lovelace continued working after the accident.

On appeal, the City of Lincoln argued that permanent benefits should be computed from the date of *disability*, as stated in the amended version of Neb. Rev. Stat. § 48-119. The Nebraska Supreme Court agreed that permanent disability benefits are computed from the date the injured worker becomes disabled.

Still, questions remain as to when a person becomes disabled for purposes of computing permanent disability benefits. The Court in **Lovelace** did not squarely answer this question, but fixed the date of disability for purposes of computing permanent total disability benefits as the day after the last day the claimant worked prior to a medical determination that she had permanent disability. Lovelace underwent the first surgery in June 2006, was off work while she healed, then returned to work. She continued to work for over a year before she stopped working on December 19, 2007, to have a second surgery. After the second surgery, she never returned to work.

Counsel for the employee used **Hobza** to argue the employer had to go back to the date of injury and pay the employee permanent total disability benefits for every week she was not receiving temporary total indemnity benefits – even during those weeks when the employee was working. The Supreme Court disagreed.

In its opinion, the Court specifically clarified that Lovelace was not entitled to permanent total disability benefits for the time period between October 2006 and December 2007 when she was working either part time or full time and receiving temporary partial disability benefits. The Court explained that its prior case law dictated that a worker cannot be permanently and totally disabled for a period of time when he or she has returned to work either part time or full time at the same job held at the time of the workplace accident.

The effect of the decision is that employers and insurers now have an argument that they do not have to compute permanent benefits owed based on the date of injury. Permanent indemnity benefits may not need to be paid during times after the accident when the injured employee returns to work. Permanent disability benefits will be owed as of “the date disability began.” Recognize, though, that when the **Lovelace** decision is applied to injuries that occur after the amendment of § 48-119, there will be **many** variations as to when “disability” begins. Employers will need to apply the **Lovelace** decision with caution to make sure they carefully identify the “date of disability” based on the facts of each individual claim.

ⁱ *Lovelace v. City of Lincoln*ⁱ 283 Neb. 12, ___ N.W.2d ___ (2012).

ⁱⁱ *Hobza v. Seedorff Masonry, Inc.*ⁱⁱ, 259 Neb. 671, 611 N.W.2d 828 (2000).