

**H. B. 2011**

(By Delegates Hanshaw, Shott, E. Nelson, Rohrbach,  
Sobonya, Weld, Espinosa, Statler, Fast and Miller)

[Introduced January 14, 2015; referred to the  
Committee on the Judiciary.]

A BILL to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating to disbursements from the Workers' Compensation Fund where an injury is self inflicted or intentionally caused by the employer and permitting recovery in a private lawsuit; requiring the trier of fact to find that the alleged specific unsafe working condition in issue was a violation of a state or federal safety statute, rule or regulation, or of a commonly accepted and well-known safety standard within the industry or business of the employer, that was intended to address the specific hazard(s) presented by the alleged specific unsafe work condition; requiring that the trier of fact to also find that any governmental agency regulating the safety practices or the premises of an employer has confirmed in a written investigative report the existence of the other specified facts that the trier of fact must find; providing that the "actual knowledge" requirement of a safety statute, rule, regulation, or commonly accepted and well-known safety standard may not be presumed by its mere existence; and requiring that "actual knowledge" must be proven by the employee, or other person(s) entitled to recover, in order that the employer's immunity from a lawsuit is lost.

1 *Be it enacted by the Legislature of West Virginia:*

2 That §23-4-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted  
3 to read as follows:

4 **ARTICLE 4. DISABILITY AND DEATH BENEFITS.**

5 **§23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer;**  
6 **legislative declarations and findings; “deliberate intention” defined.**

7 (a) Notwithstanding anything contained in this chapter, no employee or dependent of any  
8 employee is entitled to receive any sum from the Workers’ Compensation Fund, from a self-insured  
9 employer or otherwise under the provisions of this chapter on account of any personal injury to or  
10 death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon  
11 the occurrence of an injury which the employee asserts, or which reasonably appears to have,  
12 occurred in the course of and resulting from the employee’s employment, the employer may require  
13 the employee to undergo a blood test for the purpose of determining the existence or nonexistence  
14 of evidence of intoxication pursuant to rules for the administration of the test promulgated by the  
15 board of managers: *Provided*, That the employer must have a reasonable and good faith objective  
16 suspicion of the employee’s intoxication and may only test for the purpose of determining whether  
17 the person is intoxicated.

18 (b) For the purpose of this chapter, the commission may cooperate with the Office of Miners’  
19 Health, Safety and Training and the State Division of Labor in promoting general safety programs  
20 and in formulating rules to govern hazardous employments.

21 (c) If injury or death result to any employee from the deliberate intention of his or her  
22 employer to produce the injury or death, the employee, the widow, widower, child or dependent of

1 the employee has the privilege to take under this chapter and has a cause of action against the  
2 employer, as if this chapter had not been enacted, for any excess of damages over the amount  
3 received or receivable in a claim for benefits under this chapter, whether filed or not.

4 (d)(1) It is declared that enactment of this chapter and the establishment of the workers'  
5 compensation system in this chapter was and is intended to remove from the common law tort  
6 system all disputes between or among employers and employees regarding the compensation to be  
7 received for injury or death to an employee except as expressly provided in this chapter and to  
8 establish a system which compensates even though the injury or death of an employee may be caused  
9 by his or her own fault or the fault of a coemployee; that the immunity established in sections six and  
10 six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the  
11 intent of the Legislature in providing immunity from common lawsuit was and is to protect those  
12 immunized from litigation outside the workers' compensation system except as expressly provided  
13 in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to  
14 create a legislative standard for loss of that immunity of more narrow application and containing  
15 more specific mandatory elements than the common law tort system concept and standard of willful,  
16 wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt  
17 judicial resolution of the question of whether a suit prosecuted under the asserted authority of this  
18 section is or is not prohibited by the immunity granted under this chapter.

19 (2) The immunity from suit provided under this section and under sections six and six-a,  
20 article two of this chapter may be lost only if the employer or person against whom liability is  
21 asserted acted with "deliberate intention". This requirement may be satisfied only if:

22 (i) It is proved that the employer or person against whom liability is asserted acted with a

1 consciously, subjectively and deliberately formed intention to produce the specific result of injury  
2 or death to an employee. This standard requires a showing of an actual, specific intent and may not  
3 be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically  
4 intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C)  
5 willful, wanton or reckless misconduct; or

6 (ii) The trier of fact determines, either through specific findings of fact made by the court in  
7 a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the  
8 following facts are proven:

9 (A) That a specific unsafe working condition existed in the workplace which presented a high  
10 degree of risk and a strong probability of serious injury or death;

11 (B) That the employer, prior to the injury, had actual knowledge of the existence of the  
12 specific unsafe working condition and of the high degree of risk and the strong probability of serious  
13 injury or death presented by the specific unsafe working condition;

14 (C) That the specific unsafe working condition was a violation of a state or federal safety  
15 statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety  
16 standard within the industry or business of the employer, ~~as demonstrated by competent evidence~~  
17 ~~of written standards or guidelines which reflect a consensus safety standard in the industry or~~  
18 ~~business, which statute, rule, regulation or standard was specifically applicable to the particular work~~  
19 ~~and working condition involved,~~ which statute, rule, regulation, or standard was specifically  
20 applicable to the work and working condition involved and was intended to address the specific  
21 hazard(s) presented by the alleged specific unsafe working condition, as contrasted with a statute,  
22 rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

1 (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through  
2 (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an  
3 employee to the specific unsafe working condition; ~~and~~

4 (E) That the employee exposed suffered serious compensable injury or compensable death  
5 as defined in section one, article four, chapter twenty-three whether a claim for benefits under this  
6 chapter is filed or not as a direct and proximate result of the specific unsafe working condition; and

7 (F) With respect to an employer which is subject to regulation of its safety practices or its  
8 premises by one or more governmental agencies, that such an agency has confirmed in the written  
9 report of its investigation of the incident causing injury to the employee the existence of all of the  
10 facts set forth in subparagraphs (A) through (E), inclusive, of this paragraph.

11 (iii) In cases alleging liability under the provisions of paragraph (ii) of this subdivision:

12 (A) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;

13 (B) Notwithstanding any other provision of law or rule to the contrary, and consistent with  
14 the legislative findings of intent to promote prompt judicial resolution of issues of immunity from  
15 litigation under this chapter, the court shall dismiss the action upon motion for summary judgment  
16 if it finds, pursuant to rule 56 of the rules of civil procedure that one or more of the facts required  
17 to be proved by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this  
18 subdivision do not exist, and the court shall dismiss the action upon a timely motion for a directed  
19 verdict against the plaintiff if after considering all the evidence and every inference legitimately and  
20 reasonably raised thereby most favorably to the plaintiff, the court determines that there is not  
21 sufficient evidence to find each and every one of the facts required to be proven by the provisions  
22 of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision; ~~and~~

1           (C) The “actual knowledge” requirement established in subparagraph (B), paragraph (ii),  
2 subdivision (2) of this subsection shall not be satisfied by “constructive knowledge” or by proof of  
3 what an employer should have known had it exercised reasonable care or been more diligent;

4           (D) The “actual knowledge” required in subparagraph (B), paragraph (ii), subdivision (2) of  
5 this subsection may not be presumed under any circumstances and must specifically be proven by  
6 the employee or other person(s) entitled to recover under this section in every case; and

7           (⊖) (E) The provisions of this paragraph and of each subparagraph thereof are severable from  
8 the provisions of each other subparagraph, subsection, section, article or chapter of this code so that  
9 if any provision of a subparagraph of this paragraph is held void, the remaining provisions of this  
10 act and this code remain valid.

11           (e) The reenactment of this section in the regular session of the Legislature during the year  
12 ~~1983~~ 2015 does not in any way affect the right of any person to bring an action with respect to or  
13 upon any cause of action which arose or accrued prior to the effective date of the reenactment.

14           (f) The amendments to this section enacted during the ~~2005~~ 2015 session of the Legislature  
15 shall apply to all injuries occurring and all actions filed on or after July 1, ~~2005~~ 2015.

NOTE: The purpose of this bill is to address disbursements from the Workers' Compensation Fund where an injury is self inflicted or intentionally caused by the employer and permitting recovery in a private lawsuit. The bill requires the trier of fact to find that the alleged specific unsafe working condition in issue was a violation of a state or federal safety statute, rule or regulation, or of a commonly accepted and well-known safety standard within the industry or business of the employer, that was intended to address the specific hazard(s) presented by the alleged specific unsafe work condition. The bill requires that the trier of fact to also find that any governmental agency regulating the safety practices or premises of an employer has confirmed in a written investigate report the existence of the other specified facts that the trier of fact must find. The bill provides that the "actual knowledge" requirement that a safety statute, rule, regulation, or commonly accepted and

well-known safety standard may not be presumed by its mere existence. The bill and requires that "actual knowledge" must be proven by the employee, or other person(s) entitled to recover, in order that the employer's immunity from a lawsuit is lost. The bill overrules the decision of the Supreme Court of Appeals of West Virginia in the case of McComas v. ACF Industries, LLC, Case No. 12-0548 (October 17, 2013).

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.