

E N G R O S S E D

COMMITTEE SUBSTITUTE

FOR

H. B. 2011

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STATLER AND MILLER)

(Originating in the Committee on the Judiciary.)
(January 30, 2015)

A BILL to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, generally relating to a workplace employee injury caused by the deliberate intention of the employer required for the employer to lose immunity from a lawsuit; defining actual knowledge; providing that actual knowledge must be specifically proven by direct evidence and cannot be established by inference, constructive knowledge or proof of what should have been known; establishing that proof of actual knowledge of prior accidents, near

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misses, safety complaints or citations must be proven by direct evidence and cannot be established by inference or circumstantial evidence; providing that proof of failure to inspect for safety violations must be specifically related to the cause of the worker's injury or death; defining a commonly accepted and well-known safety standard within the industry or business of the employer; requiring that if the unsafe working condition relates to a violation of a state or federal safety provision that safety provision must address the specific work, working conditions and hazards involved; defining serious compensable injury; and, providing for consideration of bifurcation of discovery in certain circumstances.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 4. DISABILITY AND DEATH BENEFITS.

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

- 1 (a) Notwithstanding anything contained in this chapter, no
- 2 employee or dependent of any employee is entitled to receive

3 any sum from the Workers' Compensation Fund, from a
4 self-insured employer or otherwise under the provisions of this
5 chapter on account of any personal injury to or death to any
6 employee caused by a self-inflicted injury or the intoxication of
7 the employee. Upon the occurrence of an injury which the
8 employee asserts, or which reasonably appears to have, occurred
9 in the course of and resulting from the employee's employment,
10 the employer may require the employee to undergo a blood test
11 for the purpose of determining the existence or nonexistence of
12 evidence of intoxication pursuant to rules for the administration
13 of the test promulgated by the board of managers: *Provided*,
14 That the employer must have a reasonable and good faith
15 objective suspicion of the employee's intoxication and may only
16 test for the purpose of determining whether the person is
17 intoxicated.

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

23 (c) If injury or death result to any employee from the
24 deliberate intention of his or her employer to produce the injury
25 or death, the employee, the widow, widower, child or dependent
26 of the employee has the privilege to take under this chapter and
27 has a cause of action against the employer, as if this chapter had
28 not been enacted, for any excess of damages over the amount
29 received or receivable in a claim for benefits under this chapter,
30 whether filed or not.

31 (d)(1) It is declared that enactment of this chapter and the
32 establishment of the workers' compensation system in this
33 chapter was and is intended to remove from the common law tort
34 system all disputes between or among employers and employees
35 regarding the compensation to be received for injury or death to
36 an employee except as expressly provided in this chapter and to
37 establish a system which compensates even though the injury or
38 death of an employee may be caused by his or her own fault or
39 the fault of a co-employee; that the immunity established in
40 sections six and six-a, article two of this chapter is an essential
41 aspect of this workers' compensation system; that the intent of
42 the Legislature in providing immunity from common lawsuit

43 was and is to protect those immunized from litigation outside the
44 workers' compensation system except as expressly provided in
45 this chapter; that, in enacting the immunity provisions of this
46 chapter, the Legislature intended to create a legislative standard
47 for loss of that immunity of more narrow application and
48 containing more specific mandatory elements than the common
49 law tort system concept and standard of willful, wanton and
50 reckless misconduct; and that it was and is the legislative intent
51 to promote prompt judicial resolution of the question of whether
52 a suit prosecuted under the asserted authority of this section is or
53 is not prohibited by the immunity granted under this chapter.

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

59 (i) It is proved that the employer or person against whom
60 liability is asserted acted with a consciously, subjectively and
61 deliberately formed intention to produce the specific result of
62 injury or death to an employee. This standard requires a showing

63 of an actual, specific intent and may not be satisfied by
64 allegation or proof of: (A) Conduct which produces a result that
65 was not specifically intended; (B) conduct which constitutes
66 negligence, no matter how gross or aggravated; or (C) willful,
67 wanton or reckless misconduct; or

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

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

75 (B) That the employer, prior to the injury, had actual
76 knowledge of the existence of the specific unsafe working
77 condition and of the high degree of risk and the strong
78 probability of serious injury or death presented by the specific
79 unsafe working condition. Actual knowledge is a direct,
80 conscious and clear awareness, perceived, recognized and
81 understood clearly and with certainty by the employee's
82 immediate supervisor or any management personnel who have

83 authority to direct and control the workforce or safety in the area
84 or areas where a specific unsafe working condition is alleged to
85 have existed.

86 (1) In every case actual knowledge must specifically be
87 proven by the employee or other person(s) seeking to recover
88 under this section, and shall not be presumed under any
89 circumstances.

90 (2) Actual knowledge is not established by constructive
91 knowledge or by proof of what an employee's immediate
92 supervisor or management personnel should have known had
93 they exercised reasonable care or been more diligent.

94 (3) Any proof of the immediate supervisor or management
95 personnel's knowledge of prior accidents, near misses, safety
96 complaints, or citations from regulatory agencies must be proven
97 by documentary or other credible evidence.

98 (C) That the specific unsafe working condition was a
99 violation of a state or federal safety statute, rule or regulation,
100 whether cited or not, or of a commonly accepted and well-known
101 safety standard within the industry or business of the employer.

102 (1) If the specific unsafe working condition relates to a
103 violation of a commonly accepted and well-known safety
104 standard within the industry or business of the employer, that
105 safety standard must be a consensus written rule or standard
106 promulgated by the industry or business of the employer, such
107 as an organization comprised of industry members, not any state
108 or federal body;

109 ~~(b) cannot include equipment or machinery operator's~~
110 ~~manuals, maintenance manuals, or similar product materials~~
111 ~~unless those manuals and materials are specifically adopted in~~
112 ~~writing as a commonly accepted and well-known safety standard~~
113 ~~within the industry or business of the employer, by an~~
114 ~~organization comprised of industry members, not any state or~~
115 ~~federal body.~~ as demonstrated by competent evidence of written
116 standards or guidelines which reflect a consensus safety standard
117 in the industry or business, which statute, rule, regulation or
118 standard was specifically applicable to the particular work and
119 working condition involved,

120 (2) If the specific unsafe working condition relates to a
121 violation of a state or federal safety statute, rule or regulation
122 that statute, rule, or regulation:

123 (a) Must be specifically applicable to the work and working
124 condition involved; and

125 (b) Must be intended to address the specific hazard(s)
126 presented by the alleged specific unsafe working condition, as
127 contrasted with a statute, rule, regulation or standard generally
128 requiring safe workplaces, equipment or working conditions;

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

133 (E) That the employee exposed suffered serious
134 compensable injury or compensable death as defined in section
135 one, article four, chapter twenty-three whether a claim for
136 benefits under this chapter is filed or not as a direct and
137 proximate result of the specific unsafe working condition. For
138 the purposes of this section, serious compensable injury may
139 only be established by one of the following three methods:

140 (1) Receipt of a final award in the employee's workers
141 compensation claim confirming that the employee sustained a
142 permanent physical injury or a combination of physical and

143 psychological injury rated at a total whole person impairment
144 level of at least ten percent (10%). Should the employee's
145 permanent physical injury rating for total whole person
146 impairment not be final at the time a deliberate intention action
147 is initiated, in order to ascertain whether the employee had
148 suffered a serious compensable injury rated at a total whole
149 person impairment level of at least ten percent (10%), then:

150 (a) Upon motion and notice, the court in which the action is
151 pending may order the employee to submit to a physical
152 examination by a physician or examiner suitably licensed or
153 certified to evaluate permanent physical injury impairment. The
154 court shall specify the time, place, manner, condition and scope
155 of the examination, and the person or persons by whom it is to
156 be made;

157 (b) The examining physician or other qualified expert shall
158 deliver a written report to the court and all parties setting out the
159 examiner's findings, including the results of all tests made,
160 diagnoses, impairment rating methodology, any other
161 information the court deems appropriate or necessary, and

162 conclusions, together with any available reports of earlier
163 examinations of the same condition;

164 (c) All costs and expenses for the examination shall be
165 shared by the parties equally; and,

166 (d) The findings of this court ordered examination are not
167 binding upon any further administrative proceedings related to
168 a final award in the employee's workers compensation claim.

169 (2) Written certification by a licensed physician that the
170 employee is suffering from an injury or condition that is likely
171 to result in death within eighteen (18) months or less from the
172 date of the filing of the complaint. The certifying physician must
173 be engaged or qualified in a medical field in which the employee
174 has been treated, or have training and/or experience in
175 diagnosing or treating injuries or conditions similar to those of
176 the employee. Upon request by the employer, this physician
177 certification shall be confirmed by an independent medical
178 examination, in the same manner as noted in sections (1)(a)-(d),
179 above, except that the cost of such examination shall be paid by
180 the employer.

181 (3) If the employee suffers from an injury for which no
182 impairment rating is established in the edition of the American
183 Medical Association's Guides to the Evaluation of Permanent
184 Impairment then being used by the West Virginia Workers
185 Compensation Commission, serious compensable injury may be
186 established if the injury results in significant disfigurement or
187 permanent loss of use of a body organ, function or system.

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

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

192 (B) Notwithstanding any other provision of law or rule to the
193 contrary, and consistent with the legislative findings of intent to
194 promote prompt judicial resolution of issues of immunity from
195 litigation under this chapter, ~~the court shall dismiss the action~~
196 upon motion for summary judgment if it finds the employer may
197 request and the court shall give due consideration to the
198 bifurcation of discovery in any action brought under the
199 provisions of subparagraphs (A) through (E), of paragraph (ii)
200 such that the discovery related to liability issues be completed

201 before discovery related to damage issues. The court shall
202 dismiss the action upon motion of summary judgment if it finds
203 pursuant to rule 56 of the rules of civil procedure that one or
204 more of the facts required to be proved by the provisions of
205 subparagraphs (A) through (E), inclusive, paragraph (ii) of this
206 subdivision do not exist, and the court shall dismiss the action
207 upon a timely motion for a directed verdict against the plaintiff
208 if after considering all the evidence and every inference
209 legitimately and reasonably raised thereby most favorably to the
210 plaintiff, the court determines that there is not sufficient
211 evidence to find each and every one of the facts required to be
212 proven by the provisions of subparagraphs (A) through (E),
213 inclusive, paragraph (ii) of this subdivision; and

214 (C) The provisions of this paragraph and of each
215 subparagraph thereof are severable from the provisions of each
216 other subparagraph, subsection, section, article or chapter of this
217 code so that if any provision of a subparagraph of this paragraph
218 is held void, the remaining provisions of this act and this code
219 remain valid.

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

225 (f) The amendments to this section enacted during the ~~2005~~
226 2015 session of the Legislature shall apply to all injuries
227 occurring and all actions related to such injuries filed on or after
228 July 1, ~~2005~~ 2015.

