

H. B. 4566

(By Delegates McCuskey, Craig, Shott,
Espinosa, Pasdon and Lane)
[Introduced February 17, 2014; referred to the
Committee on Industry and Labor then the Judiciary.]

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A BILL to amend and reenact §23-4-2 of the Code of West Virginia,
1931, as amended, relating to workers' compensation death and
disability benefits; when an injury is self inflicted or
intentionally caused by the employer; proof of actual
knowledge; and specific requirements to establish actual
knowledge of an unsafe working condition in workers'
compensation claims for injuries caused by deliberate intent.

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.**

24

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

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

21 (c) If injury or death result to any employee from the
22 deliberate intention of his or her employer to produce the injury
23 or death, the employee, the widow, widower, child or dependent of
24 the employee has the privilege to take under this chapter and has

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

5 (d)(1) It is declared that enactment of this chapter and the
6 establishment of the workers' compensation system in this chapter
7 was and is intended to remove from the common law tort system all
8 disputes between or among employers and employees regarding the
9 compensation to be received for injury or death to an employee
10 except as expressly provided in this chapter and to establish a
11 system which compensates even though the injury or death of an
12 employee may be caused by his or her own fault or the fault of a
13 coemployee; that the immunity established in sections six and
14 six-a, article two of this chapter is an essential aspect of this
15 workers' compensation system; that the intent of the Legislature in
16 providing immunity from common lawsuit was and is to protect those
17 immunized from litigation outside the workers' compensation system
18 except as expressly provided in this chapter; that, in enacting the
19 immunity provisions of this chapter, the Legislature intended to
20 create a legislative standard for loss of that immunity of more
21 narrow application and containing more specific mandatory elements
22 than the common law tort system concept and standard of willful,
23 wanton and reckless misconduct; and that it was and is the
24 legislative intent to promote prompt judicial resolution of the

1 question of whether a suit prosecuted under the asserted authority
2 of this section is or is not prohibited by the immunity granted
3 under this chapter.

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

9 (i) It is proved that the employer or person against whom
10 liability is asserted acted with a consciously, subjectively and
11 deliberately formed intention to produce the specific result of
12 injury or death to an employee. This standard requires a showing
13 of an actual, specific intent and may not be satisfied by
14 allegation or proof of: (A) Conduct which produces a result that
15 was not specifically intended; (B) conduct which constitutes
16 negligence, no matter how gross or aggravated; or (C) willful,
17 wanton or reckless misconduct; or

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

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

1 (B) That the employer, prior to the injury, had actual
2 knowledge of the existence of the specific unsafe working condition
3 and of the high degree of risk and the strong probability of
4 serious injury or death presented by the specific unsafe working
5 condition;

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

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

24 (E) That the employee exposed suffered serious compensable

1 injury or compensable death as defined in section one, article
2 four, chapter twenty-three whether a claim for benefits under this
3 chapter is filed or not as a direct and proximate result of the
4 specific unsafe working condition.

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

7 (A) No punitive or exemplary damages ~~shall~~ may be awarded to
8 the employee or other plaintiff;

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

1 (C) The "actual knowledge" required in subparagraph (B),
2 paragraph (ii) of this subdivision may not be presumed through the
3 mere existence of a safety statute, rule, regulation or commonly
4 accepted and well-known safety standard, the application of which
5 would have provided constructive knowledge to the employer or
6 person against whom liability is asserted;

7 (D) The "actual knowledge" required in subparagraph (B),
8 paragraph (ii) of this subdivision may not be presumed under any
9 circumstances and must be proven by the employee or other person
10 entitled to recover under this section in every case; and

11 ~~(C)~~ (E) The provisions of this paragraph and of each
12 subparagraph thereof are severable from the provisions of each
13 other subparagraph, subsection, section, article or chapter of this
14 code so that if any provision of a subparagraph of this paragraph
15 is held void, the remaining provisions of this act and this code
16 remain valid.

17 (e) The reenactment of this section in the regular session of
18 the Legislature during the year 1983 does not in any way affect the
19 right of any person to bring an action with respect to or upon any
20 cause of action which arose or accrued prior to the effective date
21 of the reenactment.

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

NOTE: The purpose of this bill is to provide more specific requirements to establish "actual knowledge" of an unsafe working condition in workers' compensation claims for injuries caused by deliberate intent.

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