

SECOND ENGROSSMENT

COMMITTEE SUBSTITUTE

FOR

H. B. 2011

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

(Originating in the Committee on the Judiciary.)

(January 30, 2015)

11 A BILL to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, generally
12 relating to a workplace employee injury caused by the deliberate intention of the employer
13 required for the employer to lose immunity from a lawsuit; defining actual knowledge;
14 providing that actual knowledge must be specifically proven by direct evidence and cannot
15 be established by inference, constructive knowledge or proof of what should have been
16 known; establishing that proof of actual knowledge of prior accidents, near misses, safety
17 complaints or citations must be proven by direct evidence and cannot be established by
18 inference or circumstantial evidence; providing that proof of failure to inspect for safety
19 violations must be specifically related to the cause of the worker's injury or death; defining
20 a commonly accepted and well-known safety standard within the industry or business of the
21 employer; requiring that if the unsafe working condition relates to a violation of a state or
22 federal safety provision that safety provision must address the specific work, working
23 conditions and hazards involved; defining serious compensable injury; and, providing for
24 consideration of bifurcation of discovery in certain circumstances.

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 co-employee; that the immunity established in sections six
10 and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that
11 the 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. Actual knowledge is a direct,
14 conscious and clear awareness, perceived, recognized and understood clearly and with certainty by
15 the employee's immediate supervisor or any management personnel who have authority to direct and
16 control the workforce or safety in the area or areas where a specific unsafe working condition is
17 alleged to have existed.

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

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

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

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

7 (1) If the specific unsafe working condition relates to a violation of a commonly accepted
8 and well-known safety standard within the industry or business of the employer, that safety standard
9 must be a consensus written rule or standard promulgated by the industry or business of the
10 employer, such as an organization comprised of industry members, not any state or federal body:
11 Provided, That the National Fire Protection Association Codes and Standards shall not be cited as
12 an industry standard for Volunteer Fire Departments and Emergency Medical Response Personnel
13 as an unsafe working condition as long as the Volunteer Fire Departments and the Emergency
14 Medical Response Personnel have followed the Rules that have been promulgated by the Fire
15 Commission.

16 ~~(b) cannot include equipment or machinery operator’s manuals, maintenance manuals, or~~
17 ~~similar product materials unless those manuals and materials are specifically adopted in writing as~~
18 ~~a commonly accepted and well-known safety standard within the industry or business of the~~
19 ~~employer, by an organization comprised of industry members, not any state or federal body. as~~
20 ~~demonstrated by competent evidence of written standards or guidelines which reflect a consensus~~
21 ~~safety standard in the industry or business, which statute, rule, regulation or standard was specifically~~
22 ~~applicable to the particular work and working condition involved,~~

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

3 (a) Must be specifically applicable to the work and working condition involved; and,

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

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

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

15 (1) Receipt of a final award in the employee's workers compensation claim confirming that
16 the employee sustained a permanent physical injury or a combination of physical and psychological
17 injury rated at a total whole person impairment level of at least ten percent (10%). Should the
18 employee's permanent physical injury rating for total whole person impairment not be final at the
19 time a deliberate intention action is initiated, in order to ascertain whether the employee had suffered
20 a serious compensable injury rated at a total whole person impairment level of at least ten percent
21 (10%), then:

22 (a) Upon motion and notice, the court in which the action is pending may order the employee

1 to submit to a physical examination by a physician or examiner suitably licensed or certified to
2 evaluate permanent physical injury impairment. The court shall specify the time, place, manner,
3 condition and scope of the examination, and the person or persons by whom it is to be made;

4 (b) The examining physician or other qualified expert shall deliver a written report to the
5 court and all parties setting out the examiner's findings, including the results of all tests made,
6 diagnoses, impairment rating methodology, any other information the court deems appropriate or
7 necessary, and conclusions, together with any available reports of earlier examinations of the same
8 condition;

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

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

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

19 (3) If the employee suffers from an injury for which no impairment rating is established in
20 the edition of the American Medical Association's Guides to the Evaluation of Permanent
21 Impairment then being used by the West Virginia Workers Compensation Commission, serious
22 compensable injury may be established if the injury results in significant disfigurement or permanent

1 loss of use of a body organ, function or system.

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

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

4 (B) Notwithstanding any other provision of law or rule to the contrary, and consistent with
5 the legislative findings of intent to promote prompt judicial resolution of issues of immunity from
6 litigation under this chapter, ~~the court shall dismiss the action upon motion for summary judgment~~
7 if it finds the employer may request and the court shall give due consideration to the bifurcation of
8 discovery in any action brought under the provisions of subparagraphs (A) through (E), of paragraph
9 (ii) such that the discovery related to liability issues be completed before discovery related to damage
10 issues. The court shall dismiss the action upon motion for summary judgment if it finds pursuant

11 to rule 56 of the rules of civil procedure that one or more of the facts required to be proved by the
12 provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not
13 exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the
14 plaintiff if after considering all the evidence and every inference legitimately and reasonably raised
15 thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to
16 find each and every one of the facts required to be proven by the provisions of subparagraphs (A)
17 through (E), inclusive, paragraph (ii) of this subdivision; and

18 (C) The provisions of this paragraph and of each subparagraph thereof are severable from
19 the provisions of each other subparagraph, subsection, section, article or chapter of this code so that
20 if any provision of a subparagraph of this paragraph is held void, the remaining provisions of this
21 act and this code remain valid.

22 (e) The reenactment of this section in the regular session of the Legislature during the year

1 ~~1983~~ 2015 does not in any way affect the right of any person to bring an action with respect to or
2 upon any cause of action which arose or accrued prior to the effective date of the reenactment.

3 (f) The amendments to this section enacted during the ~~2005~~ 2015 session of the Legislature
4 shall apply to all injuries occurring and all actions related to such injuries filed on or after July 1,
5 ~~2005~~ 2015.