

Senate Bill No. 11

(By Senators Gaunch, M. Hall, Karnes, Blair, Sypolt and Cole (Mr. President))

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

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

1 a lawsuit is lost.

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

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

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

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

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

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

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

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

21 (2) The immunity from suit provided under this section and under sections six and six-a,

1 article two of this chapter may be lost only if the employer or person against whom liability is
2 asserted acted with “deliberate intention”. This requirement may be satisfied only if:

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

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

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

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

17 (C) That the specific unsafe working condition was a violation of a state or federal safety
18 statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety
19 standard within the industry or business of the employer, ~~as demonstrated by competent evidence~~
20 ~~of written standards or guidelines which reflect a consensus safety standard in the industry or~~
21 ~~business, which statute, rule, regulation or standard was specifically applicable to the particular work~~

1 ~~and working condition involved,~~ which statute, rule, regulation, or standard was specifically
2 applicable to the work and working condition involved and was intended to address the specific
3 hazard(s) presented by the alleged specific unsafe working condition, as contrasted with a statute,
4 rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

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

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

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

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

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

17 (B) Notwithstanding any other provision of law or rule to the contrary, and consistent with
18 the legislative findings of intent to promote prompt judicial resolution of issues of immunity from
19 litigation under this chapter, the court shall dismiss the action upon motion for summary judgment
20 if it finds, pursuant to rule 56 of the rules of civil procedure that one or more of the facts required
21 to be proved by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this

1 subdivision do not exist, and the court shall dismiss the action upon a timely motion for a directed
2 verdict against the plaintiff if after considering all the evidence and every inference legitimately and
3 reasonably raised thereby most favorably to the plaintiff, the court determines that there is not
4 sufficient evidence to find each and every one of the facts required to be proven by the provisions
5 of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision; ~~and~~

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

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

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

16 (e) The reenactment of this section in the regular session of the Legislature during the year
17 ~~1983~~ 2015 does not in any way affect the right of any person to bring an action with respect to or
18 upon any cause of action which arose or accrued prior to the effective date of the reenactment.

19 (f) The amendments to this section enacted during the ~~2005~~ 2015 session of the Legislature
20 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.