

Senate Bill No. 251

(By Senators Mullins, Karnes, Leonhardt and Gaunch)

[Introduced January 16, 2015; referred to the Committee on the Judiciary.]

**FISCAL
NOTE**

A BILL to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating to modifying the private cause of action for deliberate intention claims under workers' compensation claims; providing for enhanced benefits for certain deliberate intention claims; and requiring specific findings by the Office of Judges for an award of enhanced benefits.

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.

(a) Notwithstanding anything contained in this chapter, no employee or dependent of any employee is entitled to receive any sum from the Workers' Compensation Fund, from a self-insured employer or otherwise under the provisions of this chapter on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon

1 the occurrence of an injury which the employee asserts, or which reasonably appears to have,
2 occurred in the course of and resulting from the employee's employment, the employer may require
3 the employee to undergo a blood test for the purpose of determining the existence or nonexistence
4 of evidence of intoxication pursuant to rules for the administration of the test promulgated by the
5 board of managers: *Provided*, That the employer must have a reasonable and good faith objective
6 suspicion of the employee's intoxication and may only test for the purpose of determining whether
7 the person is intoxicated.

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

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

16 (d) (1) It is declared that enactment of this chapter and the establishment of the workers'
17 compensation system in this chapter was and is intended to remove from the common law tort
18 system all disputes between or among employers and employees regarding the compensation to be
19 received for injury or death to an employee except as expressly provided in this chapter and to
20 establish a system which compensates even though the injury or death of an employee may be caused
21 by his or her own fault or the fault of a coemployee; that the immunity established in sections six and
22 six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the

1 intent of the Legislature in providing immunity from common lawsuit was and is to protect those
2 immunized from litigation outside the workers' compensation system except as expressly provided
3 in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to
4 create a legislative standard for loss of that immunity of more narrow application and containing
5 more specific mandatory elements than the common law tort system concept and standard of willful,
6 wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt
7 judicial resolution of the question of whether a suit prosecuted under the asserted authority of this
8 section is or is not prohibited by the immunity granted under this chapter.

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

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

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

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

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

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, as demonstrated by competent evidence~~
7 ~~of written standards or guidelines which reflect a consensus safety standard in the industry or~~
8 ~~business, which statute, rule, regulation or standard was specifically applicable to the particular work~~
9 ~~and working condition involved, as contrasted with a statute, rule, regulation or standard generally~~
10 ~~requiring safe workplaces, equipment or working conditions;~~

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

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

17 ~~(iii) (3) In cases alleging liability under the provisions of subparagraph (ii) (2) of this~~
18 ~~subdivision in which an actual, specific intent must be shown: (A) no punitive or exemplary~~
19 ~~damages shall may be awarded to the employee or other plaintiff.~~

20 ~~(B) Notwithstanding any other provision of law or rule to the contrary, and consistent with~~
21 ~~the legislative findings of intent to promote prompt judicial resolution of issues of immunity from~~
22 ~~litigation under this chapter, the court shall dismiss the action upon motion for summary judgment~~

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

8 (e) If an employee has been granted a permanent total disability under this chapter, or a
9 widow, widower, child or dependent has been granted dependent benefits under this chapter and the
10 Workers' Compensation Office of Judges determines, through specific findings of fact:

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

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

16 (3) That the specific unsafe working condition was a violation of a state or federal safety
17 statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety
18 standard within the industry or business of the employer, which statute, rule, regulation or standard
19 was specifically applicable to the work and working condition involved and was intended to address
20 the specific hazard presented by the alleged specific unsafe working condition, as contrasted with
21 a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working
22 conditions;

1 (4) That notwithstanding the existence of the facts set forth in this subsection , the employer
 2 nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition;
 3 and

4 (5) That the employee exposed suffered serious compensable injury or compensable death
 5 as a proximate result of the specific unsafe working condition;

6 (6) That, with respect to an employer which is subject to regulation of its safety practices or
 7 its premises by one or more governmental agencies, such an agency has confirmed in the report of
 8 its investigation of the incident causing injury to the employee the existence of all facts set forth in
 9 subsections (1) through (5) of this paragraph;

10 Then the employee, the widow, widower, child or dependent may be granted an award of
 11 enhanced benefits of up to an additional thirty percent of the amount otherwise received or receivable
 12 in a claim for benefits for permanent total or dependent benefits under this chapter as the case may
 13 be. Any claim made pursuant to this subsection must be filed with the Workers' Compensation
 14 Office of Judges no later than one year following the date of the permanent total or dependent
 15 benefits award.

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

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

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

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

NOTE: The purpose of this bill is to remove the ability to pierce workers' compensation immunity by filing a private cause of action and proving through five factors that an employer acted with deliberate intent to injure an employee. In lieu of this private cause of action, the bill permits in permanent total disability or dependent benefits claims, a recovery of enhanced workers' compensation benefits of up to an additional thirty percent of the benefits award which a claimant is otherwise entitled under this chapter by proving the same five factors before the Workers' Compensation Office of Judges.

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