

1 COMMITTEE SUBSTITUTE

2 FOR

3 H. B. 2011

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

6
7 (Originating in the Committee on the Judiciary.)

8 (January 30, 2015)

9
10 A BILL to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, generally
11 relating to a workplace employee injury caused by the deliberate intention of the employer
12 required for the employer to lose immunity from a lawsuit; defining actual knowledge;
13 providing that actual knowledge must be specifically proven by direct evidence and cannot
14 be established by inference, constructive knowledge or proof of what should have been
15 known; establishing that proof of actual knowledge of prior accidents, near misses, safety
16 complaints or citations must be proven by direct evidence and cannot be established by
17 inference or circumstantial evidence; providing that proof of failure to inspect for safety
18 violations must be specifically related to the cause of the worker's injury or death; defining
19 a commonly accepted and well-known safety standard within the industry or business of the
20 employer; requiring that if the unsafe working condition relates to a violation of a state or
21 federal safety provision that safety provision must address the specific work, working
22 conditions and hazards involved; defining serious compensable injury; and, providing for
23 consideration of bifurcation of discovery in certain circumstances.

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

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

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

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

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

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

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

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

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

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

21 (i) It is proved that the employer or person against whom liability is asserted acted with a
22 consciously, subjectively and deliberately formed intention to produce the specific result of injury

1 or death to an employee. This standard requires a showing of an actual, specific intent and may not
2 be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically
3 intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C)
4 willful, wanton or reckless misconduct; or

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

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

10 (B) That the employer, prior to the injury, had actual knowledge of the existence of the
11 specific unsafe working condition and of the high degree of risk and the strong probability of serious
12 injury or death presented by the specific unsafe working condition.

13 (1) Actual knowledge is a direct, conscious and clear awareness, perceived, recognized and
14 understood clearly and with certainty by the employee's immediate supervisor or any management
15 personnel who have authority to direct and control the workforce or safety in the area or areas where
16 a specific unsafe working condition is alleged to have existed.

17 (a) In every case actual knowledge must specifically be proven by the employee or other
18 person(s) seeking to recover under this section, by direct evidence, not inference or circumstantial
19 proof.

20 (b) Actual knowledge shall not be presumed under any circumstances.

21 (c) Actual knowledge is not established by constructive knowledge or by proof of what an
22 employee's immediate supervisor or management personnel should have known had they exercised

1 reasonable care or been more diligent.

2 (d) Any proof of the immediate supervisor or management personnel's knowledge of prior
3 accidents, near misses, safety complaints, or citations from regulatory agencies must be proven by
4 direct evidence and may not be inferred or proven circumstantially.

5 (e) Proof of a failure to inspect for a safety violation must be specific to the safety violations
6 which caused the worker's injury or death and must be shown to be the proximate cause of that
7 injury death and but for that failure to inspect that injury or death would not have occurred.

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

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

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

22 (2) If the specific unsafe working condition relates to a violation of a state or federal safety

1 statute, rule or regulation that statute, rule, or regulation:

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

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

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

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

13 (1) A permanent physical injury, rated at a total whole person impairment level of at least
14 ten percent (10%) as determined by the final award in the employee's workers compensation claim;
15 and

16 (a) The injury results in dismemberment, significant disfigurement, a fracture, permanent
17 loss of use of a body organ, member, function or system; or

18 (b) The injury is medically determined as an injury or impairment of a non-permanent nature
19 which prevents the injured person from performing substantially all of the material acts which
20 constitute that person's usual and customary daily activities for not less than ninety consecutive days
21 during the one hundred and eighty days immediately following the occurrence of the injury or
22 impairment.

1 (iii) In cases alleging liability under the provisions of paragraph (ii) of this subdivision:
2 (A) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;
3 (B) Notwithstanding any other provision of law or rule to the contrary, and consistent with
4 the legislative findings of intent to promote prompt judicial resolution of issues of immunity from
5 litigation under this chapter, ~~the court shall dismiss the action upon motion for summary judgment~~
6 if it finds the employer may request and the court shall give due consideration to the bifurcation of
7 discovery in any action brought under the provisions of subparagraphs (A) through (E), of paragraph
8 (ii) such that the discovery related to liability issues be completed before discovery related to damage
9 issues. The court shall dismiss the action upon motion for summary judgment if it finds pursuant
10 to rule 56 of the rules of civil procedure that one or more of the facts required to be proved by the
11 provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not
12 exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the
13 plaintiff if after considering all the evidence and every inference legitimately and reasonably raised
14 thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to
15 find each and every one of the facts required to be proven by the provisions of subparagraphs (A)
16 through (E), inclusive, paragraph (ii) of this subdivision; and
17 (C) The provisions of this paragraph and of each subparagraph thereof are severable from
18 the provisions of each other subparagraph, subsection, section, article or chapter of this code so that
19 if any provision of a subparagraph of this paragraph is held void, the remaining provisions of this
20 act and this code remain valid.
21 (e) The reenactment of this section in the regular session of the Legislature during the year
22 ~~1983~~ 2015 does not in any way affect the right of any person to bring an action with respect to or

1 upon any cause of action which arose or accrued prior to the effective date of the reenactment.

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

3 shall apply to all injuries occurring and all actions filed on or after July 1, ~~2005~~ 2015.