

E N R O L L E D

COMMITTEE SUBSTITUTE

FOR

H. B. 2011

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[Passed March 14, 2015;
in effect ninety days from passage.]

AN ACT to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating generally to a workplace employee injury caused by the deliberate intention of the employer required for the employer to lose immunity from a lawsuit; defining actual knowledge; eliminating obsolete language referring to the West Virginia Workers Compensation Fund and board of managers; establishing standards related to blood tests administered after accident; providing that intoxication shown by a positive blood test for alcohol or drugs that meet certain thresholds is the proximate cause of any injury; clarifying provisions outlining who may assert claims on behalf of an employee under this section; requiring that

a claim for worker's compensation benefits be filed prior to bringing a cause of action under this section unless good cause is shown; providing that actual knowledge must be specifically proven by the employee or other person seeking to recover under this section and shall not be deemed or presumed; providing an employee may prove actual knowledge by evidence of an employer's intentional or deliberate failure to conduct a legally required inspection, audit or assessment; establishing actual knowledge is not established by what an employee's immediate supervisor or management personnel should have known had they exercised reasonable care or been more diligent; establishing that proof of actual knowledge of prior accidents, near misses, safety complaints or citations must be proven by documentary or other credible evidence; defining a commonly accepted and well-known safety standard within the industry or business of the employer; exempting certain codes or standards from applying to volunteer fire departments, municipal fire departments and emergency medical response personnel if those entities have followed rules promulgated by the Fire Commission; requiring that if the unsafe working condition relates to a violation of a state or federal safety provision that safety provision must address the specific work, working conditions and hazards involved; establishing that the applicability of state or federal safety provisions is a matter for judicial determination; defining generally serious compensable injury; establishing four categories of serious compensable injury including an injury rated at a whole person impairment of at least thirteen percent (13%) and other threshold requirements, an injury or condition likely to result in death within eighteen (18) months from the date of the filing of the complaint, an injury not capable of whole person impairment if it causes permanent serious disfigurement, causes permanent loss or significant impairment of function of any bodily organ or system, or results in objectively verifiable bilateral or multi-level dermatomal radiculopathy and is not a physical injury that has no objective medical evidence to support a diagnosis, or if an employee suffers from complicated

pneumoconiosis or pulmonary massive fibrosis and that condition has resulted in an impairment rating of at least fifteen percent (15%); establishing certification requirements for the categories of serious compensable injury; requiring that a verified statement submitted from a person with knowledge and expertise of the workplace safety, statutes, rules, regulations and consensus industry standards specifically applicable to the industry and workplace involved in an injury be served with any complaint asserting certain causes of action brought under this section; providing for the minimum contents of the required verified statement; limiting the use of the required verified statement during litigation; providing for consideration of bifurcation of discovery in certain circumstances; establishing the venue in which claims under this section may be brought; providing that actions accruing prior to the effective date are not affected; and establishing the effective date of July 1, 2015, for the amendments to this section.

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.

- 1 (a) Notwithstanding anything contained in this chapter, no
- 2 employee or dependent of any employee is entitled to receive
- 3 any sum under the provisions of this chapter on account of any
- 4 personal injury to or death to any employee caused by a self-
- 5 inflicted injury or the intoxication of the employee. Upon the
- 6 occurrence of an injury which the employee asserts, or which
- 7 reasonably appears to have, occurred in the course of and

8 resulting from the employee's employment, the employer may
9 require the employee to undergo a blood test for the purpose of
10 determining the existence or nonexistence of evidence of
11 intoxication: *Provided*, That the employer must have a
12 reasonable and good faith objective suspicion of the employee's
13 intoxication and may only test for the purpose of determining
14 whether the person is intoxicated. If any blood test for
15 intoxication is given following an accident, at the request of the
16 employer or otherwise, and if any of the following are true, the
17 employee is deemed intoxicated and the intoxication is the
18 proximate cause of the injury:

19 (1) If a blood test is administered within two hours of the
20 accident and evidence that there was, at that time, more than five
21 hundredths of one percent, by weight, of alcohol in the
22 employee's blood; or

23 (2) If there was, at the time of the blood test, evidence of
24 either on or off the job use of a nonprescribed controlled
25 substance as defined in the West Virginia Uniform Controlled
26 Substances Act, West Virginia Code §60A-2-201, *et seq.*,
27 Schedules I, II, III, IV and V.

28 (b) For the purpose of this chapter, the commission may
29 cooperate with the Office of Miners' Health, Safety and Training
30 and the State Division of Labor in promoting general safety
31 programs and in formulating rules to govern hazardous
32 employments.

33 (c) If injury results to any employee from the deliberate
34 intention of his or her employer to produce the injury or death,
35 the employee, or, if the employee has been found to be
36 incompetent, his or her conservator or guardian, may recover
37 under this chapter and bring a cause of action against the
38 employer, as if this chapter had not been enacted, for any excess
39 of damages over the amount received or receivable in a claim for

40 benefits under this chapter. If death results to any employee from
 41 the deliberate intention of his or her employer to produce the
 42 injury or death, the representative of the estate may recover
 43 under this chapter and bring a cause of action, pursuant to
 44 section six, article seven of chapter fifty-five of this code,
 45 against the employer, as if this chapter had not been enacted, for
 46 any excess of damages over the amount received or receivable
 47 in a claim for benefits under this chapter. To recover under this
 48 section, the employee, the employee's representative or
 49 dependent, as defined under this chapter, must, unless good
 50 cause is shown, have filed a claim for benefits under this chapter.

51 (d)(1) It is declared that enactment of this chapter and the
 52 establishment of the workers' compensation system in this
 53 chapter was and is intended to remove from the common law tort
 54 system all disputes between or among employers and employees
 55 regarding the compensation to be received for injury or death to
 56 an employee except as expressly provided in this chapter and to
 57 establish a system which compensates even though the injury or
 58 death of an employee may be caused by his or her own fault or
 59 the fault of a co-employee; that the immunity established in
 60 sections six and six-a, article two of this chapter is an essential
 61 aspect of this workers' compensation system; that the intent of
 62 the Legislature in providing immunity from common lawsuit
 63 was and is to protect those immunized from litigation outside the
 64 workers' compensation system except as expressly provided in
 65 this chapter; that, in enacting the immunity provisions of this
 66 chapter, the Legislature intended to create a legislative standard
 67 for loss of that immunity of more narrow application and
 68 containing more specific mandatory elements than the common
 69 law tort system concept and standard of willful, wanton and
 70 reckless misconduct; and that it was and is the legislative intent
 71 to promote prompt judicial resolution of the question of whether
 72 a suit prosecuted under the asserted authority of this section is or
 73 is not prohibited by the immunity granted under this chapter.

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

79 (A) It is proved that the employer or person against whom
80 liability is asserted acted with a consciously, subjectively and
81 deliberately formed intention to produce the specific result of
82 injury or death to an employee. This standard requires a showing
83 of an actual, specific intent and may not be satisfied by
84 allegation or proof of: (i) Conduct which produces a result that
85 was not specifically intended; (ii) conduct which constitutes
86 negligence, no matter how gross or aggravated; or (iii) willful,
87 wanton or reckless misconduct; or

88 (B) The trier of fact determines, either through specific
89 findings of fact made by the court in a trial without a jury, or
90 through special interrogatories to the jury in a jury trial, that all
91 of the following facts are proven:

92 (i) That a specific unsafe working condition existed in the
93 workplace which presented a high degree of risk and a strong
94 probability of serious injury or death;

95 (ii) That the employer, prior to the injury, had actual
96 knowledge of the existence of the specific unsafe working
97 condition and of the high degree of risk and the strong
98 probability of serious injury or death presented by the specific
99 unsafe working condition.

100 (I) In every case actual knowledge must specifically be
101 proven by the employee or other person(s) seeking to recover
102 under this section, and shall not be deemed or presumed:
103 *Provided*, That actual knowledge may be shown by evidence of
104 intentional and deliberate failure to conduct an inspection, audit
105 or assessment required by state or federal statute or regulation

106 and such inspection, audit or assessment is specifically intended
107 to identify each alleged specific unsafe working condition.

108 (II) Actual knowledge is not established by proof of what an
109 employee's immediate supervisor or management personnel
110 should have known had they exercised reasonable care or been
111 more diligent.

112 (III) Any proof of the immediate supervisor or management
113 personnel's knowledge of prior accidents, near misses, safety
114 complaints or citations from regulatory agencies must be proven
115 by documentary or other credible evidence.

116 (iii) That the specific unsafe working condition was a
117 violation of a state or federal safety statute, rule or regulation,
118 whether cited or not, or of a commonly accepted and well-known
119 safety standard within the industry or business of the employer.

120 (I) If the specific unsafe working condition relates to a
121 violation of a commonly accepted and well-known safety
122 standard within the industry or business of the employer, that
123 safety standard must be a consensus written rule or standard
124 promulgated by the industry or business of the employer, such
125 as an organization comprised of industry members: *Provided*,
126 That the National Fire Protection Association Codes and
127 Standards or any other industry standards for Volunteer Fire
128 Departments shall not be cited as an industry standard for
129 Volunteer Fire Departments, Municipal Fire Departments and
130 Emergency Medical Response Personnel as an unsafe working
131 condition as long as the Volunteer Fire Departments, Municipal
132 Fire Departments and the Emergency Medical Response
133 Personnel have followed the Rules that have been promulgated
134 by the Fire Commission.

135 (II) If the specific unsafe working condition relates to a
136 violation of a state or federal safety statute, rule or regulation
137 that statute, rule or regulation:

138 (a) Must be specifically applicable to the work and working
139 condition involved as contrasted with a statute, rule, regulation
140 or standard generally requiring safe workplaces, equipment or
141 working conditions;

142 (b) Must be intended to address the specific hazard(s)
143 presented by the alleged specific unsafe working condition; and,

144 (c) The applicability of any such state or federal safety
145 statute, rule or regulation is a matter of law for judicial
146 determination.

147 (iv) That notwithstanding the existence of the facts set forth
148 in subparagraphs (i) through (iii), inclusive, of this paragraph,
149 the person or persons alleged to have actual knowledge under
150 subparagraph (ii) nevertheless intentionally thereafter exposed
151 an employee to the specific unsafe working condition; and

152 (v) That the employee exposed suffered serious compensable
153 injury or compensable death as defined in section one, article
154 four, chapter twenty-three as a direct and proximate result of the
155 specific unsafe working condition. For the purposes of this
156 section, serious compensable injury may only be established by
157 one of the following four methods:

158 (I) It is shown that the injury, independent of any preexisting
159 impairment:

160 (a) Results in a permanent physical or combination of
161 physical and psychological injury rated at a total whole person
162 impairment level of at least thirteen percent (13%) as a final
163 award in the employees workers' compensation claim; and

164 (b) Is a personal injury which causes permanent serious
165 disfigurement, causes permanent loss or significant impairment
166 of function of any bodily organ or system, or results in
167 objectively verifiable bilateral or multi-level dermatomal

168 radiculopathy; and is not a physical injury that has no objective
169 medical evidence to support a diagnosis; or

170 (II) Written certification by a licensed physician that the
171 employee is suffering from an injury or condition that is caused
172 by the alleged unsafe working condition and is likely to result in
173 death within eighteen (18) months or less from the date of the
174 filing of the complaint. The certifying physician must be
175 engaged or qualified in a medical field in which the employee
176 has been treated, or have training and/or experience in
177 diagnosing or treating injuries or conditions similar to those of
178 the employee and must disclose all evidence upon which the
179 written certification is based, including, but not limited to, all
180 radiographic, pathologic or other diagnostic test results that were
181 reviewed.

182 (III) If the employee suffers from an injury for which no
183 impairment rating may be determined pursuant to the rule or
184 regulation then in effect which governs impairment evaluations
185 pursuant to this chapter, serious compensable injury may be
186 established if the injury meets the definition in subclause (I)(b).

187 (IV) If the employee suffers from an occupational
188 pneumoconiosis, the employee must submit written certification
189 by a board certified pulmonologist that the employee is suffering
190 from complicated pneumoconiosis or pulmonary massive
191 fibrosis and that the occupational pneumoconiosis has resulted
192 in pulmonary impairment as measured by the standards or
193 methods utilized by the West Virginia Occupational
194 Pneumoconiosis Board of at least fifteen percent (15%) as
195 confirmed by valid and reproducible ventilatory testing. The
196 certifying pulmonologist must disclose all evidence upon which
197 the written certification is based, including, but not limited to, all
198 radiographic, pathologic or other diagnostic test results that were
199 reviewed: *Provided*, That any cause of action based upon this
200 clause must be filed within one year of the date the employee
201 meets the requirements of the same.

202 (C) In cases alleging liability under the provisions of
203 paragraph (B) of this subdivision:

204 (i) The employee, the employee's guardian or conservator,
205 or the representative of the employee's estate shall serve with the
206 complaint a verified statement from a person with knowledge
207 and expertise of the workplace safety statutes, rules, regulations
208 and consensus industry safety standards specifically applicable
209 to the industry and workplace involved in the employee's injury,
210 setting forth opinions and information on:

211 (I) The person's knowledge and expertise of the applicable
212 workplace safety statutes, rules, regulations and/or written
213 consensus industry safety standards;

214 (II) The specific unsafe working condition(s) that were the
215 cause of the injury that is the basis of the complaint; and

216 (III) The specific statutes, rules, regulations or written
217 consensus industry safety standards violated by the employer
218 that are directly related to the specific unsafe working
219 conditions: *Provided, however,* That this verified statement shall
220 not be admissible at the trial of the action and the Court,
221 pursuant to the Rules of Evidence, common law and subclause
222 two-c, subparagraph (iii), paragraph (B), subdivision (2),
223 subsection (d), section two, article four, chapter twenty-three of
224 this code, retains responsibility to determine and interpret the
225 applicable law and admissibility of expert opinions.

226 (ii) No punitive or exemplary damages shall be awarded to
227 the employee or other plaintiff;

228 (iii) Notwithstanding any other provision of law or rule to
229 the contrary, and consistent with the legislative findings of intent
230 to promote prompt judicial resolution of issues of immunity
231 from litigation under this chapter, the employer may request and

232 the court shall give due consideration to the bifurcation of
 233 discovery in any action brought under the provisions of
 234 subparagraphs (i) through (v), of paragraph (B) such that the
 235 discovery related to liability issues be completed before
 236 discovery related to damage issues. The court shall dismiss the
 237 action upon motion for summary judgment if it finds pursuant to
 238 rule 56 of the rules of civil procedure that one or more of the
 239 facts required to be proved by the provisions of subparagraphs
 240 (i) through (v), inclusive, paragraph (B) of this subdivision do
 241 not exist, and the court shall dismiss the action upon a timely
 242 motion for a directed verdict against the plaintiff if after
 243 considering all the evidence and every inference legitimately and
 244 reasonably raised thereby most favorably to the plaintiff, the
 245 court determines that there is not sufficient evidence to find each
 246 and every one of the facts required to be proven by the
 247 provisions of subparagraphs (i) through (v), inclusive, paragraph
 248 (B) of this subdivision; and

249 (iv) The provisions of this paragraph and of each
 250 subparagraph thereof are severable from the provisions of each
 251 other subparagraph, subsection, section, article or chapter of this
 252 code so that if any provision of a subparagraph of this paragraph
 253 is held void, the remaining provisions of this act and this code
 254 remain valid.

255 (e) Any cause of action brought pursuant to this section shall
 256 be brought either in the circuit court of the county in which the
 257 alleged injury occurred or the circuit court of the county of the
 258 employer's principal place of business. With respect to causes of
 259 action arising under this chapter, the venue provisions of this
 260 section shall be exclusive of and shall supersede the venue
 261 provisions of any other West Virginia statute or rule.

262 (f) The reenactment of this section in the regular session of
 263 the Legislature during the year 2015 does not in any way affect
 264 the right of any person to bring an action with respect to or upon

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265 any cause of action which arose or accrued prior to the effective
266 date of the reenactment.

267 (g) The amendments to this section enacted during the 2015
268 session of the Legislature shall apply to all injuries occurring on
269 or after July 1, 2015.

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That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, House Committee

Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within _____ this the _____
day of _____, 2015.

Governor

