ENROLLED

Com. Sub. for
HOUSE BILL No. 1201

(By Mr. Speaker, Mr. Lee, and Mr. Albright)

Passed February 7, 1983
In Effect Ninety Days From Passage
ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 1201

(By Mr. Speaker, Mr. See, and Mr. Albright)

[Passed February 7, 1983; in effect ninety days from passage.]

AN ACT to amend and reenact section two, article four, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said chapter by adding thereto a new article, designated article four-c, all relating to workmen's compensation; providing for the rejection of workmen's compensation claims resulting from a self-inflicted injury or intoxication; eliminating from workmen's compensation claims the defenses of willful misconduct, willful disobedience, willful self-exposure and failure to use protective or safety appliances; authorizing a civil suit in addition to workmen's compensation benefits when the injury or death results from a deliberate intention to produce such injury or death; setting forth certain legislative findings as to the purposes of the West Virginia workmen's compensation system and the immunity from suit provisions provided as a part of such system; specifying circumstances under which the immunity from suit shall be abrogated; requiring a court hearing in action brought under this chapter to dismiss the action unless there is substantial evidence of the existence of the facts required by this section; disallowing punitive or exemplary damages in suits other than those based upon an injury caused by an employer who acted with a consciously, subjectively and deliberately formed
intention to produce the specific result of injury or death to an employee; providing that the provisions of this section are severable; establishing an employers' excess liability fund, which is separate from the workmen's compensation fund and participation in which is optional for employers; providing for payment of damages from the fund; the manner of settlement of claims against the fund in certain cases; providing for the funding of the fund; and providing for the administration of the fund and clarifying the rule-making and other powers of the workmen's compensation commissioner with respect to said fund.

Be it enacted by the Legislature of West Virginia:

That section two, article four, chapter twenty-three of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that said chapter be further amended by adding thereto a new article, designated article four-c, all 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 hereinbefore or hereinafter contained, no employee or dependent of any employee shall be entitled to receive any sum from the workmen's compensation fund, or to direct compensation from any employer making the election and receiving the permission mentioned in section nine, article two of this chapter, 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 such employee. For the purpose of this chapter, the commissioner may cooperate with the state department of mines and the state department of labor in promoting general safety programs and in formulating rules and regulations to govern hazardous employments.

(b) If injury or death result to any employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this
chapter, and shall also have cause of action against the em-
ployer, as if this chapter had not been enacted, for any excess
of damages over the amount received or receivable under this
chapter.

(c) (1) It is declared that enactment of this chapter and the
establishment of the workmen's compensation system in this
chapter was and is intended to remove from the common law
tort system all disputes between or among employers and em-
ployees regarding the compensation to be received for injury
or death to an employee except as herein expressly provided,
and to establish a system which compensates even though the
injury or death of an employee may be caused by his own fault
or the fault of a co-employee; that the immunity established
in sections six and six-a, article two of this chapter, is an
essential aspect of this workmen's compensation system; that
the intent of the Legislature in providing immunity from com-
mon law suit was and is to protect those so immunized from
litigation outside the workmen's compensation system except
as herein expressly provided; that, in enacting the immunity
provisions of this chapter, the Legislature intended to create
a legislative standard for loss of that immunity of more nar-
row application and containing more specific mandatory ele-
ments than the common law tort system concept and standard
of willful, wanton and reckless misconduct; and that it was
and is the legislative intent to promote prompt judicial reso-
lution of the question of whether a suit prosecuted under the
asserted authority of this section is or is not prohibited by the
immunity granted under this chapter.

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

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

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

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

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

(iii) In cases alleging liability under the provisions of the preceding paragraph (ii);

(A) No punitive or exemplary damages shall be awarded to the employee or other plaintiff;
(B) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it shall find, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) do not exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court shall determine that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraph (A) through (E) of the preceding paragraph (ii); and

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

(d) The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in any way affect the right of any person to bring an action with respect to or upon any cause of action which arose or accrued prior to the effective date of such reenactment.

ARTICLE 4C. EMPLOYERS' EXCESS LIABILITY FUND.

§23-4C-1. Purpose.

The purpose of this article is to establish a fund to provide insurance coverage for employers subject to this chapter who may be subjected to liability under section two, article four of this chapter, for any excess of damages over the amount received or receivable under this chapter.

§23-4C-2. Employers' excess liability fund established.

To provide insurance coverage for employers subject to this
chapter who may be subjected to liability for any excess of damages over the amount received or receivable under this chapter, there is hereby established a fund to be known as the employers' excess liability fund, which fund shall be separate from the workmen's compensation fund. The employers' excess liability fund shall consist of premiums paid thereto by employers who may voluntarily elect to subscribe to the fund for coverage of potential liability to any person who may be entitled to any excess of damages over the amount received or receivable under this chapter.

§23-4C-3. Payment of excess damages from fund.

Upon receipt of a final order of a court determining the liability under section two, article four of this chapter, of a subscribing employer and the amount of the excess of damages over the amount received or receivable under this chapter, the commissioner shall make disbursements from the employers' excess liability fund in such amounts and to such persons as such final order may direct. In the event of a proposed settlement of a disputed claim against a subscribing employer, the commissioner, upon approving the settlement upon petition by the subscribing employer, shall make disbursements from the employers' excess liability fund in such amounts and to such persons as the approved settlement may specify. In the event of the settlement of any disputed claim wherein one or more of the persons entitled to the proceeds to be paid pursuant to such settlement is under a legal disability by reason of age, mental incapacity or other reason, such settlement, if required by other provisions of law to be approved by a circuit court shall be approved by the circuit court of the county wherein such person under disability is a resident or wherein a civil action could be brought and maintained upon such claim, in addition to being approved by the commissioner as required by this section. The commissioner shall by legislative rule establish criteria and procedures for the settlement of all disputed claims. In order to expeditiously establish such criteria and procedures, the commissioner is hereby given authority to promulgate such emergency rule or rules as may be necessary in accordance with the provisions of section fifteen, article three, chapter twenty-nine-a of this code. The provisions
of said section fifteen, article three, chapter twenty-nine-a
notwithstanding, such emergency rule, whether procedural,
interpretive or legislative, shall be effective upon the filing
thereof in the state register and shall have an effective period
of not to exceed eighteen months, unless any such rule or rules
be altered or amended or such period of time shortened or
lengthened by subsequent act of the Legislature. No action shall
lie for de novo or other review of such rule to contest or
question the existence of circumstances justifying the promul-
gation of an emergency rule nor to challenge the validity of
such rule because of its classification as an emergency rule.

§23-4C-4. Employers' excess liability fund; how funded.

For the purpose of creating the employers' excess liability
fund, each employer who shall elect to subscribe to the fund
shall pay premiums based upon and being such a percentage
of the payroll of the employer as the commissioner may deter-
mine. It shall be the duty of the commissioner to fix and
maintain the lowest possible rates or premiums consistent with
the maintenance of a solvent fund. The premium rates shall
be adjusted annually, or more often as may in the opinion of
the commissioner be necessary.

The commissioner shall initially classify subscribers into
groups or classes according to the nature of the unusual hazards
incident to the business thereof as contemplated by section four,
article two of this chapter, and assign premium rates thereto.
The fixing, maintaining and adjusting of premium rates and the
initial classification of subscribers into groups or classes pur-
suant to this section shall be deemed to be findings or deter-
minations of fact and not a legislative rule. In addition, the
commissioner shall by legislative rule prescribe procedures for
subscription, payroll reporting, premium payment, termination
of subscription, reinstatement, reclassification of groups, classes
or subscribers, the increase or decrease of premiums based
upon incidence of liability and amounts awarded, and other
matters pertinent to the subscribers' continuing participation in
the employers' excess liability fund.

§23-4C-5. Administration.

The employers' excess liability fund shall be administered
by the state workmen's compensation commissioner, who shall employ such employees as may be necessary to discharge his duties and responsibilities under this article. All payments of salaries and expenses of the employees and all expenses peculiar to the administration of this article shall be made by the state treasurer from the employers' excess liability fund upon requisitions signed by the commissioner.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

James L. David  
Chairman Senate Committee

Donald H. Smith  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Jesse C. Miller  
Clerk of the Senate

Donald R. Hapgood  
Clerk of the House of Delegates

Nancy R. McLaw  
President of the Senate

Mary M. Deeds  
Speaker House of Delegates

The within approved this the 21 day of __________, 1983.

John J. Dady  
Governor