

No: 1701

REGULAR SESSION, 1983

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ENROLLED

Com. Sub. for
HOUSE BILL No. 1201

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

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Passed February 7, 1983

In Effect Twenty Days From Passage



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SECY. OF STATE
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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.

1 (a) Notwithstanding anything hereinbefore or hereinafter
2 contained, no employee or dependent of any employee shall be
3 entitled to receive any sum from the workmen's compensation
4 fund, or to direct compensation from any employer making the
5 election and receiving the permission mentioned in section
6 nine, article two of this chapter, or otherwise under the pro-
7 visions of this chapter, on account of any personal injury to
8 or death to any employee caused by a self-inflicted injury or
9 the intoxication of such employee. For the purpose of this
10 chapter, the commissioner may cooperate with the state de-
11 partment of mines and the state department of labor in pro-
12 moting general safety programs and in formulating rules and
13 regulations to govern hazardous employments.

14 (b) If injury or death result to any employee from the
15 deliberate intention of his employer to produce such injury
16 or death, the employee, the widow, widower, child or dependent
17 of the employee shall have the privilege to take under this

18 chapter, and shall also have cause of action against the em-
19 ployer, as if this chapter had not been enacted, for any excess
20 of damages over the amount received or receivable under this
21 chapter.

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

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

51 (i) It is proved that such employer or person against whom
52 liability is asserted acted with a consciously, subjectively and
53 deliberately formed intention to produce the specific result of
54 injury or death to an employee. This standard requires a show-
55 ing of an actual, specific intent and may not be satisfied by
56 allegation or proof of (A) conduct which produces a result

57 that was not specifically intended; (B) conduct which con-
58 stitutes negligence, no matter how gross or aggravated; or
59 (C) willful, wanton or reckless misconduct; or

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

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

67 (B) That the employer had a subjective realization and an
68 appreciation of the existence of such specific unsafe working
69 condition and of the high degree of risk and the strong prob-
70 ability of serious injury or death presented by such specific
71 unsafe working condition;

72 (C) That such specific unsafe working condition was a vio-
73 lation of a state or federal safety statute, rule or regulation,
74 whether cited or not, or of a commonly accepted and well-
75 known safety standard within the industry or business of such
76 employer, which statute, rule, regulation or standard was
77 specifically applicable to the particular work and working con-
78 dition involved, as contrasted with a statute, rule, regulation
79 or standard generally requiring safe workplaces, equipment or
80 working conditions;

81 (D) That notwithstanding the existence of the facts set forth
82 in subparagraphs (A) through (C) hereof, such employer never-
83 theless thereafter exposed an employee to such specific unsafe
84 working condition intentionally; and

85 (E) That such employee so exposed suffered serious injury
86 or death as a direct and proximate result of such specific un-
87 safe working condition.

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

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

92 (B) Notwithstanding any other provision of law or rule to
 93 the contrary, and consistent with the legislative findings of
 94 intent to promote prompt judicial resolution of issues of im-
 95 munity from litigation under this chapter, the court shall dis-
 96 miss the action upon motion for summary judgment if it shall
 97 find, pursuant to Rule 56 of the Rules of Civil Procedure that
 98 one or more of the facts required to be proved by the provi-
 99 sions of subparagraphs (A) through (E) of the preceding para-
 100 graph (ii) do not exist, and the court shall dismiss the action
 101 upon a timely motion for a directed verdict against the plain-
 102 tiff if after considering all the evidence and every inference
 103 legitimately and reasonably raised thereby most favorably to
 104 the plaintiff, the court shall determine that there is not suf-
 105 ficient evidence to find each and every one of the facts re-
 106 quired to be proven by the provisions of subparagraph (A)
 107 through (E) of the preceding paragraph (ii); and

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

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

ARTICLE 4C. EMPLOYERS' EXCESS LIABILITY FUND.

§23-4C-1. Purpose.

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

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

1 To provide insurance coverage for employers subject to this

2 chapter who may be subjected to liability for any excess of
3 damages over the amount received or receivable under this
4 chapter, there is hereby established a fund to be known as
5 the employers' excess liability fund, which fund shall be sep-
6 arate from the workmen's compensation fund. The employers'
7 excess liability fund shall consist of premiums paid thereto by
8 employers who may voluntarily elect to subscribe to the fund
9 for coverage of potential liability to any person who may be
10 entitled to any excess of damages over the amount received
11 or receivable under this chapter.

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

1 Upon receipt of a final order of a court determining the
2 liability under section two, article four of this chapter, of
3 a subscribing employer and the amount of the excess of dam-
4 ages over the amount received or receivable under this chap-
5 ter, the commissioner shall make disbursements from the em-
6 ployers' excess liability fund in such amounts and to such
7 persons as such final order may direct. In the event of a pro-
8 posed settlement of a disputed claim against a subscribing em-
9 ployer, the commissioner, upon approving the settlement upon
10 petition by the subscribing employer, shall make disbursements
11 from the employers' excess liability fund in such amounts and
12 to such persons as the approved settlement may specify. In
13 the event of the settlement of any disputed claim wherein one
14 or more of the persons entitled to the proceeds to be paid
15 pursuant to such settlement is under a legal disability by reason
16 of age, mental incapacity or other reason, such settlement, if
17 required by other provisions of law to be approved by a cir-
18 cuit court shall be approved by the circuit court of the county
19 wherein such person under disability is a resident or wherein
20 a civil action could be brought and maintained upon such
21 claim, in addition to being approved by the commissioner as
22 required by this section. The commissioner shall by legislative
23 rule establish criteria and procedures for the settlement of all
24 disputed claims. In order to expeditiously establish such cri-
25 teria and procedures, the commissioner is hereby given author-
26 ity to promulgate such emergency rule or rules as may be
27 necessary in accordance with the provisions of section fifteen,
28 article three, chapter twenty-nine-a of this code. The provisions

29 of said section fifteen, article three, chapter twenty-nine-a
30 notwithstanding, such emergency rule, whether procedural,
31 interpretive or legislative, shall be effective upon the filing
32 thereof in the state register and shall have an effective period
33 of not to exceed eighteen months, unless any such rule or rules
34 be altered or amended or such period of time shortened or
35 lengthened by subsequent act of the Legislature. No action shall
36 lie for de novo or other review of such rule to contest or
37 question the existence of circumstances justifying the promul-
38 gation of an emergency rule nor to challenge the validity of
39 such rule because of its classification as an emergency rule.

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

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

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

§23-4C-5. Administration.

1 The employers' excess liability fund shall be administered

2 by the state workmen's compensation commissioner, who shall
3 employ such employees as may be necessary to discharge his
4 duties and responsibilities under this article. All payments of
5 salaries and expenses of the employees and all expenses
6 peculiar to the administration of this article shall be made by
7 the state treasurer from the employers' excess liability fund
8 upon requisitions signed by the commissioner.

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

James L. Davis
Chairman Senate Committee

Armed Enroll
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Jedd C. Phillips
Clerk of the Senate

Donald L. Hopp
Clerk of the House of Delegates

Marion K. McHale
President of the Senate

W. H. M. Sees Jr.
Speaker House of Delegates

The within *is approved* this the *21*
day of *Feb.*, 1983.

John D. Ralston
Governor



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