ENROLLED

SENATE BILL NO. 744

(By Senator Kessler, et al)

PASSED April 7, 2005

In Effect July 1, 2005
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Senate Bill No. 744

(BY SENATORS KESSLER, DEMPESEY, FANNING, FOSTER, HUNTER, JENKINS, MINARD, OLIVERIO, WHITE, BARNES, CARUTH, HARRISON, LANHAM, MCKENZIE AND WEEKS)

[Passed April 7, 2005; to take effect July 1, 2005.]

AN ACT to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating to clarifying the criteria for an employee to sustain a lawsuit for intentional injury.

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

(b) For the purpose of this chapter, the commission may
cooperate with the Office of Miners' Health, Safety and
Training and the state division of labor in promoting
general safety programs and in formulating rules to govern
hazardous employment.

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

(d) (1) It is declared that enactment of this chapter and
the establishment of the workers' compensation system in
this chapter was and is intended to remove from the
common law tort system all disputes between or among
employers and employees regarding the compensation to
be received for injury or death to an employee except as
expressly provided in this chapter and to establish a
system which compensates even though the injury or death
of an employee may be caused by his or her own fault or
the fault of a coemployee; that the immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the intent of the Legislature in providing immunity from common lawsuit was and is to protect those immunized from litigation outside the workers' compensation system except as expressly provided in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements 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 resolution 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 sections six and 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 the 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 showing 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, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

(C) That the 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 the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, 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), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and

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

(iii) In cases alleging liability under the provisions of paragraph (ii) of this subdivision:

(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 finds, 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), inclusive, paragraph (ii) of this subdivision 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 determines that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision; and

(C) The provisions of this paragraph and of each subparagraph thereof are 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 is held void, the remaining provisions of this act and this code remain valid.

(e) The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three does 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 the reenactment.

(f) The amendments to this section enacted during the two thousand five session of the Legislature shall apply to all injuries occurring and all actions filed on or after the first day of July, two thousand five.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

To take effect July 1, 2005.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within........................................... this the...........................................

Day of........................................... 2005.

Governor