WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2015

ENROLLED
COMMITTEE SUBSTITUTE FOR
House Bill No. 2011

(By Delegate(s) Hanshaw, Shott, E. Nelson, Rohrbach, Sobonya, Weld, Espinosa, Statler and Miller)

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.

(a) Notwithstanding anything contained in this chapter, no employee or dependent of any employee is entitled to receive any sum 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: 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. If any blood test for intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the injury:

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

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

(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 employments.

(c) If injury results to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, or, if the employee has been found to be incompetent, his or her conservator or guardian, may recover under this chapter and bring 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. If death results to any employee from
the deliberate intention of his or her employer to produce the
injury or death, the representative of the estate may recover
under this chapter and bring a cause of action, pursuant to
section six, article seven of chapter fifty-five of this code,
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. To recover under this
section, the employee, the employee’s representative or
dependent, as defined under this chapter, must, unless good
cause is shown, have filed a claim for benefits under this chapter.

(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 co-employee; 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.
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:

(A) 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: (i) Conduct which produces a result that was not specifically intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii) willful, wanton or reckless misconduct; or

(B) 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:

(i) 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;

(ii) 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.

(I) In every case actual knowledge must specifically be proven by the employee or other person(s) seeking to recover under this section, and shall not be deemed or presumed: Provided, That actual knowledge may be shown by evidence of intentional and deliberate failure to conduct an inspection, audit or assessment required by state or federal statute or regulation.
and such inspection, audit or assessment is specifically intended
to identify each alleged specific unsafe working condition.

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

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

(iii) 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.

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

(II) If the specific unsafe working condition relates to a
violation of a state or federal safety statute, rule or regulation
that statute, rule or regulation:
(a) Must be specifically applicable to the work and working condition involved as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

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

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

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

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

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

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

(b) Is a personal injury which 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

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

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

(IV) If the employee suffers from an occupational pneumoconiosis, the employee must submit written certification by a board certified pulmonologist that the employee is suffering from complicated pneumoconiosis or pulmonary massive fibrosis and that the occupational pneumoconiosis has resulted in pulmonary impairment as measured by the standards or methods utilized by the West Virginia Occupational Pneumoconiosis Board of at least fifteen percent (15%) as confirmed by valid and reproducible ventilatory testing. The certifying pulmonologist must disclose all evidence upon which the written certification is based, including, but not limited to, all radiographic, pathologic or other diagnostic test results that were reviewed: Provided, That any cause of action based upon this clause must be filed within one year of the date the employee meets the requirements of the same.
(C) In cases alleging liability under the provisions of paragraph (B) of this subdivision:

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

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

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

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

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

(iii) 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 employer may request and
the court shall give due consideration to the bifurcation of
discovery in any action brought under the provisions of
subparagraphs (i) through (v), of paragraph (B) such that the
discovery related to liability issues be completed before
discovery related to damage issues. 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
(i) through (v), inclusive, paragraph (B) 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 (i) through (v), inclusive, paragraph
(B) of this subdivision; and

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

(f) The reenactment of this section in the regular session of
the Legislature during the year 2015 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.

(g) The amendments to this section enacted during the 2015
session of the Legislature shall apply to all injuries occurring on
or after July 1, 2015.
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 is approved this the 31st day of March, 2015.

Governor
PRESENTED TO THE GOVERNOR

MAR 2 / 2015

Time 11:35 AM