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## West Virginia's Amended Deliberate Intent Statute

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For a number of years, W. Va. Code § 23-4-2 (commonly known as the deliberate intent statute) has provided employees with work-related injuries an avenue to circumvent the workers' compensation immunity afforded to West Virginia employers. In part, the statute provides that the traditional immunity from suit for an employee's work-related injury "may be lost only if the employer or person against whom liability is asserted acted with 'deliberate intention,'" which requires proof of certain specific facts.

Although W. Va. Code § 23-4-2 remains in effect, recent amendments to the statute have raised the bar an injured worker must clear in order to prove a deliberate intent claim. The amendments constitute a legislative response to court decisions affecting the scope of the statute.

### Two Types of Deliberate Intent Claims

The deliberate intent statute has provided, and continues to provide, injured workers with two ways of proving a deliberate intent claim against an employer or person: (1) by proving that the employer or person against whom liability is asserted acted with a consciously, subjectively, and deliberately formed intention to produce the specific injury or death to the employee (formerly W. Va. Code § 23-4-2(d)(2)(i), but now (as amended) W. Va. Code § 23-4-2(d)(2)(A)); or (2) by proving the existence of each of five factors (formerly W. Va. Code § 23-4-2(d)(2)(ii), but now (as amended) W. Va. Code § 23-4-2(d)(2)(B)). Claims brought pursuant to the five factors set forth in W. Va. Code § 23-4-2(d)(2)(B), sometimes referred to as the five-factor test, are the far more common of the two types of deliberate intent claims.

### The Five-Factor Test

The five factors necessary to establish a claim under Section 23-4-2(d)(2)(B), primarily (though not entirely) unchanged from those set forth in the pre-amendment version of the statute, require proof of the following:

- (1) the existence of a specific unsafe working condition that presented a high degree of risk and a strong probability of serious injury or death;

- (2) that the employer, pre-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;
- (3) 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;
- (4) that notwithstanding the existence of each of the above-referenced facts, the person or persons alleged to have actual knowledge intentionally thereafter exposed the employee to the specific unsafe working condition; and
- (5) that the employee suffered serious compensable injury or compensable death as a direct and proximate result of the specific unsafe working condition.

## Impact of the Amendments on the Five-Factor Test

The amendments to the statute provide much-needed clarification regarding certain elements of the five-factor test, including clarification about what constitutes “actual knowledge,” what constitutes an applicable state or federal safety statute, rule, regulation or commonly-accepted and well-known safety standard within the industry or business of the employer, and what constitutes a “serious compensable injury.”

### Actual knowledge

With regard to actual knowledge, the deliberate-intent statute now expressly provides:

- actual knowledge may not be presumed;
- 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, provided that such inspection, audit, or assessment is specifically intended to identify each alleged specific unsafe working condition;
- 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; and
- 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.

### Safety Laws or Industry/Business Safety Standards

Under the amended version of the statute, if a plaintiff takes the position that the specific unsafe working condition was a violation of a state or federal safety statute, rule, or regulation, whether cited or not, then the 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; [and] (b) Must be intended to address the specific hazard(s) presented by the alleged specific unsafe working condition[.]” The amended version of the deliberate intent statute also provides that “[t]he applicability of any such state or federal safety statute, rule or regulation is a matter of law for judicial determination[.]” removing the potential for submission of such a decision to a jury.

Under the amended statute, if a plaintiff takes the position that the specific unsafe working condition violated a commonly accepted and well-known safety standard within the industry or business of the employer, he or she must prove that the safety standard is “a consensus written rule or standard promulgated by the industry or business of the employer, such as an organization comprised of industry members”—with certain exceptions for volunteer fire departments, municipal fire departments, and emergency medical response personnel.

### Serious Compensable Injury

The amended deliberate intent statute establishes significant parameters regarding what constitutes a serious compensable injury. The statute now provides that:

[S]erious 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 employee[']s 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 ventilator 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.

### **Other Noteworthy Amendments to the Deliberate Intent Statute**

In addition to clarifying certain elements of the five-factor test, the recent amendments to the deliberate intent statute also establish the following:

- **Specific circumstances in which intoxication constitutes the proximate cause of the injury** (W. Va. Code § 23-4-2(a) (in part)): 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:

(I) 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

(II) 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, . . . Schedules I, II, III, IV and V.

- **Filing of a workers' compensation claim as a pre-requisite to recovery in connection with a deliberate intent claim** (W. Va. Code § 23-4-2(c) (in part)): "To recover under [the deliberate intent statute], the employee, the employee's representative or dependent, as defined under [the West Virginia Workers' Compensation Act], must, unless good cause is shown, have filed a claim for benefits under [the West Virginia Workers' Compensation Act]."
- **Submission of a verified statement by an expert in support of a plaintiff's claims under the five-factor test** (W. Va. Code § 23-4-2(d)(2)(C)(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 . . . retains responsibility to determine and interpret the applicable law and admissibility of expert opinions.
- **Potential bifurcation of discovery** (W. Va. Code § 23-4-2(d)(2)(C)(iii) (in part)): An "employer may request and the court shall give due consideration to the bifurcation of discovery in any action brought under the provisions of" the five-factor test under W. Va. Code § 23-4-2(d)(2)(B) "such that the discovery related to liability issues be completed before discovery related to damage issues."
- **Venue** (W. Va. Code § 23-4-2(e)): Any cause of action brought pursuant to [the deliberate intent statute] 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 [the statute], the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.

## Effective Date of the Amendments

The recent amendments to the deliberate intent statute apply to injuries occurring on or after July 1, 2015.