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II. "Gross Negligence" and Ky Worker's Comp Law

Per your request, I looked through Ky cases in which both the phrases "gross negligence" and (variations on) "workers' compensation" appear.

Unfortunately, the Kentucky Supreme Court and the Ky CoA have consistently shut down the argument that "gross negligence", "gross misconduct", "reckless disregard" or any other act or omission that is not actually *intended* to harm someone can work its way around the exclusive remedy provisions of KRS 342.

In Shamrock Coal Co. v. Maricle, 5 SW3 130, 135 (Ky.1999), the plaintiff workers "alleged that Shamrock was 'negligent, careless and reckless' in its mining operations and conducted those operations in 'gross disregard' of their health, safety, and welfare. They also alleged that Shamrock 'intentionally violated' safety procedures established by statutes and regulations, and that Shamrock engaged in outrageous conduct, thereby 'intentionally or recklessly' causing the plaintiffs to suffer extreme emotional distress." The Court ruled that "absent 'willful and unprovoked *physical aggression*' by an employee, officer, or director, there is no exception to the exclusive liability provision of the Workers' Compensation Act" (emphasis in original).

Notably, Shamrock also has a strong dissent, by three justices, regarding the Court's treatment of category one pneumoconiosis, where the workers had respiratory impairment of less than twenty percent, as not compensable.

In Moore v. Environmental Const. Corp., 147 S.W.3d , 18-19 (Ky.2004), the Court held that even where the employer maintained working conditions that violated several OSHA provisions, the employer's "violation of OSHA regulations and acknowledgement of the possible consequences does not amount to a deliberate intention to produce [the plaintiff's] death." The Moore court also approvingly cites to Tennessee cases holding that "mere knowledge and appreciation of the risk involved in an act is not the same as the intent to cause the injury. Mere carelessness or negligence, however gross, wanton or reckless, does not establish such intent." Id. at 17-18.

There are a lot of unpublished CoA opinions that address this topic, none of them pro-plaintiff. The unpublished CoA opinion of Hunton v. Detrex Corp., 2006 WL 1789147 (Ky.App.2006) notes that "[a]n allegation of inferred or constructive intent ... is simply insufficient to trigger the Act's intentional act exception clause."

Likewise, the unpublished opinion of Lee v. E.I. DuPont de Nemours and Co., Not Reported in S.W.3d, 2008 WL 162894, Ky.App.,2008 goes on to cite all of the above cases, as well as a treatise by a Professor Larson:

> [e]ven if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, wilfully [sic] failing to furnish a safe place to work, willfully violating a safety statute, failing to protect employees from crime, negligent hiring, refusing to respond to an employee's medical needs and restrictions, allowing excessive levels of employee horseplay or withholding information about worksite hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of accidental character.

The West Virginia case that you e-mailed to me (Bias v. Eastern Associated Coal Corp.), with the strong dissent, concerned "a mental injury without physical manifestation." While I certainly agree with the reasoning of the dissent, that case has no negative citations in Shepard's, and several positive ones.

About the only case I found that held any hope for this idea was McDonald's v. Ogborne, 309 S.W.3d 274, 292 (KyApp2009), which holds that the superseding criminal act of an employee does not relieve the employer of liability where the employer had reason to know that the criminal act might occur and neglected to train its employees to anticipate the crime. But those facts are a bit far-fetched for [your] case, where there is no criminal activity.

After sifting through a couple dozen of these cases, I can't say that the argument you want to advance here re: "gross negligence" and a workaround of WC exclusivity is likely to meet with any sort of success in Ky. There may be other states that allow it, but Ky isn't one as of this date.