

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 FOR

4 H. B. 2011

5 (By Delegates Hanshaw, Shott, E. Nelson, Rohrbach,  
6 Sobonya, Weld, Espinosa, Statler and Miller)

7  
8 [Passed March 14, 2015, in effect ninety days from passage.]

9  
10 AN ACT to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended, relating  
11 generally to a workplace employee injury caused by the deliberate intention of the employer  
12 required for the employer to lose immunity from a lawsuit; defining actual knowledge;  
13 eliminating obsolete language referring to the West Virginia Workers Compensation Fund  
14 and board of managers; establishing standards related to blood tests administered after  
15 accident; providing that intoxication shown by a positive blood test for alcohol or drugs that  
16 meet certain thresholds is the proximate cause of any injury; clarifying provisions outlining  
17 who may assert claims on behalf of an employee under this section; requiring that a claim  
18 for worker's compensation benefits be filed prior to bringing a cause of action under this  
19 section unless good cause is shown; providing that actual knowledge must be specifically  
20 proven by the employee or other person seeking to recover under this section and shall not  
21 be deemed or presumed; providing an employee may prove actual knowledge by evidence  
22 of an employer's intentional or deliberate failure to conduct a legally required inspection,  
23 audit or assessment; establishing actual knowledge is not established by what an employee's

1 immediate supervisor or management personnel should have known had they exercised  
2 reasonable care or been more diligent; establishing that proof of actual knowledge of prior  
3 accidents, near misses, safety complaints or citations must be proven by documentary or  
4 other credible evidence; defining a commonly accepted and well-known safety standard  
5 within the industry or business of the employer; exempting certain codes or standards from  
6 applying to volunteer fire departments, municipal fire departments and emergency medical  
7 response personnel if those entities have followed rules promulgated by the Fire  
8 Commission; requiring that if the unsafe working condition relates to a violation of a state  
9 or federal safety provision that safety provision must address the specific work, working  
10 conditions and hazards involved; establishing that the applicability of state or federal safety  
11 provisions is a matter for judicial determination; defining generally serious compensable  
12 injury; establishing four categories of serious compensable injury including an injury rated  
13 at a whole person impairment of at least thirteen percent (13%) and other threshold  
14 requirements, an injury or condition likely to result in death within eighteen (18) months  
15 from the date of the filing of the complaint, an injury not capable of whole person  
16 impairment if it causes permanent serious disfigurement, causes permanent loss or significant  
17 impairment of function of any bodily organ or system, or results in objectively verifiable  
18 bilateral or multi-level dermatomal radiculopathy and is not a physical injury that has no  
19 objective medical evidence to support a diagnosis, or if an employee suffers from  
20 complicated pneumoconiosis or pulmonary massive fibrosis and that condition has resulted  
21 in an impairment rating of at least fifteen percent (15%); establishing certification  
22 requirements for the categories of serious compensable injury; requiring that a verified

1 statement submitted from a person with knowledge and expertise of the workplace safety,  
2 statutes, rules, regulations and consensus industry standards specifically applicable to the  
3 industry and workplace involved in an injury be served with any complaint asserting certain  
4 causes of action brought under this section; providing for the minimum contents of the  
5 required verified statement; limiting the use of the required verified statement during  
6 litigation; providing for consideration of bifurcation of discovery in certain circumstances;  
7 establishing the venue in which claims under this section may be brought; providing that  
8 actions accruing prior to the effective date are not affected; and establishing the effective date  
9 of July 1, 2015, for the amendments to this section.

10 *Be it enacted by the Legislature of West Virginia:*

11 That §23-4-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted  
12 to read as follows:

13 **ARTICLE 4. DISABILITY AND DEATH BENEFITS.**

14 **§23-4-2. Disbursement where injury is self-inflicted or intentionally caused by employer;**  
15 **legislative declarations and findings; “deliberate intention” defined.**

16 (a) Notwithstanding anything contained in this chapter, no employee or dependent of any  
17 employee is entitled to receive any sum under the provisions of this chapter on account of any  
18 personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of  
19 the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably  
20 appears to have, occurred in the course of and resulting from the employee’s employment, the  
21 employer may require the employee to undergo a blood test for the purpose of determining the  
22 existence or nonexistence of evidence of intoxication: *Provided,* That the employer must have a

1 reasonable and good faith objective suspicion of the employee's intoxication and may only test for  
2 the purpose of determining whether the person is intoxicated. If any blood test for intoxication is  
3 given following an accident, at the request of the employer or otherwise, and if any of the following  
4 are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the  
5 injury:

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

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

12 (b) For the purpose of this chapter, the commission may cooperate with the Office of Miners'  
13 Health, Safety and Training and the State Division of Labor in promoting general safety programs  
14 and in formulating rules to govern hazardous employments.

15 (c) If injury results to any employee from the deliberate intention of his or her employer to  
16 produce the injury or death, the employee, or, if the employee has been found to be incompetent, his  
17 or her conservator or guardian, may recover under this chapter and bring a cause of action against  
18 the employer, as if this chapter had not been enacted, for any excess of damages over the amount  
19 received or receivable in a claim for benefits under this chapter. If death results to any employee  
20 from the deliberate intention of his or her employer to produce the injury or death, the representative  
21 of the estate may recover under this chapter and bring a cause of action, pursuant to section six,  
22 article seven of chapter fifty-five of this code, against the employer, as if this chapter had not been

1 enacted, for any excess of damages over the amount received or receivable in a claim for benefits  
2 under this chapter. To recover under this section, the employee, the employee's representative or  
3 dependent, as defined under this chapter, must, unless good cause is shown, have filed a claim for  
4 benefits under this chapter.

5 (d)(1) It is declared that enactment of this chapter and the establishment of the workers'  
6 compensation system in this chapter was and is intended to remove from the common law tort  
7 system all disputes between or among employers and employees regarding the compensation to be  
8 received for injury or death to an employee except as expressly provided in this chapter and to  
9 establish a system which compensates even though the injury or death of an employee may be caused  
10 by his or her own fault or the fault of a co-employee; that the immunity established in sections six  
11 and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that  
12 the intent of the Legislature in providing immunity from common lawsuit was and is to protect those  
13 immunized from litigation outside the workers' compensation system except as expressly provided  
14 in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to  
15 create a legislative standard for loss of that immunity of more narrow application and containing  
16 more specific mandatory elements than the common law tort system concept and standard of willful,  
17 wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt  
18 judicial resolution of the question of whether a suit prosecuted under the asserted authority of this  
19 section is or is not prohibited by the immunity granted under this chapter.

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

1 (A) It is proved that the employer or person against whom liability is asserted acted with a  
2 consciously, subjectively and deliberately formed intention to produce the specific result of injury  
3 or death to an employee. This standard requires a showing of an actual, specific intent and may not  
4 be satisfied by allegation or proof of: (i) Conduct which produces a result that was not specifically  
5 intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii)  
6 willful, wanton or reckless misconduct; or

7 (B) The trier of fact determines, either through specific findings of fact made by the court in  
8 a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the  
9 following facts are proven:

10 (i) That a specific unsafe working condition existed in the workplace which presented a high  
11 degree of risk and a strong probability of serious injury or death;

12 (ii) That the employer, prior to the injury, had actual knowledge of the existence of the  
13 specific unsafe working condition and of the high degree of risk and the strong probability of serious  
14 injury or death presented by the specific unsafe working condition.

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

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

1 more diligent.

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

5 (iii) That the specific unsafe working condition was a violation of a state or federal safety  
6 statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety  
7 standard within the industry or business of the employer.

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

17 (II) If the specific unsafe working condition relates to a violation of a state or federal safety  
18 statute, rule or regulation that statute, rule or regulation:

19 (a) Must be specifically applicable to the work and working condition involved as contrasted  
20 with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working  
21 conditions;

22 (b) Must be intended to address the specific hazard(s) presented by the alleged specific unsafe

1 working condition; and,

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

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

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

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

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

16 (b) Is a personal injury which causes permanent serious disfigurement, causes permanent loss  
17 or significant impairment of function of any bodily organ or system, or results in objectively  
18 verifiable bilateral or multi-level dermatomal radiculopathy; and is not a physical injury that has no  
19 objective medical evidence to support a diagnosis; or

20 (II) Written certification by a licensed physician that the employee is suffering from an injury  
21 or condition that is caused by the alleged unsafe working condition and is likely to result in death  
22 within eighteen (18) months or less from the date of the filing of the complaint. The certifying

1 physician must be engaged or qualified in a medical field in which the employee has been treated,  
2 or have training and/or experience in diagnosing or treating injuries or conditions similar to those  
3 of the employee and must disclose all evidence upon which the written certification is based,  
4 including, but not limited to, all radiographic, pathologic or other diagnostic test results that were  
5 reviewed.

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

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

20 (C) In cases alleging liability under the provisions of paragraph (B) of this subdivision:

21 (i) The employee, the employee's guardian or conservator, or the representative of the  
22 employee's estate shall serve with the complaint a verified statement from a person with knowledge

1 and expertise of the workplace safety statutes, rules, regulations and consensus industry safety  
2 standards specifically applicable to the industry and workplace involved in the employee's injury,  
3 setting forth opinions and information on:

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

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

8 (III) The specific statutes, rules, regulations or written consensus industry safety standards  
9 violated by the employer that are directly related to the specific unsafe working conditions:

10 *Provided, however,* That this verified statement shall not be admissible at the trial of the action and  
11 the Court, pursuant to the Rules of Evidence, common law and subclause two-c, subparagraph (iii),  
12 paragraph (B), subdivision (2), subsection (d), section two, article four, chapter twenty-three of this  
13 code, retains responsibility to determine and interpret the applicable law and admissibility of expert  
14 opinions.

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

16 (iii) Notwithstanding any other provision of law or rule to the contrary, and consistent with  
17 the legislative findings of intent to promote prompt judicial resolution of issues of immunity from  
18 litigation under this chapter, the employer may request and the court shall give due consideration to  
19 the bifurcation of discovery in any action brought under the provisions of subparagraphs (i) through  
20 (v), of paragraph (B) such that the discovery related to liability issues be completed before discovery  
21 related to damage issues. The court shall dismiss the action upon motion for summary judgment if  
22 it finds pursuant to rule 56 of the rules of civil procedure that one or more of the facts required to

1 be proved by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this  
2 subdivision do not exist, and the court shall dismiss the action upon a timely motion for a directed  
3 verdict against the plaintiff if after considering all the evidence and every inference legitimately and  
4 reasonably raised thereby most favorably to the plaintiff, the court determines that there is not  
5 sufficient evidence to find each and every one of the facts required to be proven by the provisions  
6 of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision; and

7 (iv) The provisions of this paragraph and of each subparagraph thereof are severable from  
8 the provisions of each other subparagraph, subsection, section, article or chapter of this code so that  
9 if any provision of a subparagraph of this paragraph is held void, the remaining provisions of this  
10 act and this code remain valid.

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

16 (f) The reenactment of this section in the regular session of the Legislature during the year  
17 2015 does not in any way affect the right of any person to bring an action with respect to or upon any  
18 cause of action which arose or accrued prior to the effective date of the reenactment.

19 (g) The amendments to this section enacted during the 2015 session of the Legislature shall  
20 apply to all injuries occurring on or after July 1, 2015.