

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Introduced**

**Senate Bill 648**

By Senator Tarr

[Introduced February 15, 2023; referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §23-4-2 of the Code of West Virginia, 1931, as amended; and to  
 2 amend said code by adding thereto three new sections, designated §23-4-2a, §23-4-2b,  
 3 and §23-4-2c, all relating to the deliberate intent exception to the immunities provided  
 4 under workers compensation; clarifying the definition of employee; removing occupational  
 5 pneumoconiosis as a covered injury; requiring bifurcation of discovery upon request of the  
 6 defendant, establishing a limit on noneconomic loss; accounting for collateral source  
 7 payments for the same injury; and setting a limit of fees and costs recoverable by attorney  
 8 for the claimant or dependent.

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

**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  
 2 employee is entitled to receive any sum under the provisions of this chapter on account of any  
 3 personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of  
 4 the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably  
 5 appears to have, occurred in the course of and resulting from the employee's employment, the  
 6 employer may require the employee to undergo a blood test for the purpose of determining the  
 7 existence or nonexistence of evidence of intoxication: *Provided*, That the employer must have a  
 8 reasonable and good faith objective suspicion of the employee's intoxication and may only test for  
 9 the purpose of determining whether the person is intoxicated. If any blood test for intoxication is  
 10 given following an accident, at the request of the employer or otherwise, and if any of the following  
 11 are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the  
 12 injury:

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

15 blood; or

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

19 (b) For the purpose of this chapter, supervisors and managers who are responsible for  
20 providing safe working conditions and whose job duties include eliminating or ameliorating that  
21 condition giving rise to liability are not employees.

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

25 ~~(e)~~(d) If injury results to any employee from the deliberate intention of his or her employer  
26 to produce the injury or death, the employee, or, if the employee has been found to be  
27 incompetent, his or her conservator or guardian, may recover under this chapter and bring a cause  
28 of action against the employer, as if this chapter had not been enacted, for any excess of damages  
29 over the amount received or receivable in a claim for benefits under this chapter. If death results to  
30 any employee from the deliberate intention of his or her employer to produce the injury or death,  
31 the representative of the estate may recover under this chapter and bring a cause of action,  
32 pursuant to §55-7-6 of this code, against the employer, as if this chapter had not been enacted, for  
33 any excess of damages over the amount received or receivable in a claim for benefits under this  
34 chapter. To recover under this section, the employee, the employee's representative or  
35 dependent, as defined under this chapter, must, unless good cause is shown, have filed a claim for  
36 benefits under this chapter.

37 ~~(d)~~(e)(1) It is declared that enactment of this chapter and the establishment of the workers'  
38 compensation system in this chapter was and is intended to remove from the common law tort  
39 system all disputes between or among employers and employees regarding the compensation to  
40 be received for injury or death to an employee except as expressly provided in this chapter and to

41 establish a system which compensates even though the injury or death of an employee may be  
42 caused by his or her own fault or the fault of a co-employee; that the immunity established in §23-  
43 2-6 ~~an~~ and §23-2-6a of this code is an essential aspect of this workers' compensation system; that  
44 the intent of the Legislature in providing immunity from common lawsuit was and is to protect those  
45 immunized from litigation outside the workers' compensation system except as expressly provided  
46 in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to  
47 create a legislative standard for loss of that immunity of more narrow application and containing  
48 more specific mandatory elements than the common law tort system concept and standard of  
49 willful, wanton and reckless misconduct; and that it was and is the legislative intent to promote  
50 prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority  
51 of this section is or is not prohibited by the immunity granted under this chapter.

52 (2) The immunity from suit provided under this section and under §23-2-6 ~~an~~ and §23-2-6a  
53 of this code may be lost only if the employer or person against whom liability is asserted acted with  
54 "deliberate intention". This requirement may be satisfied only if:

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

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

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

66 (ii) That the employer, prior to the injury, had actual knowledge of the existence of the

67 specific unsafe working condition and of the high degree of risk and the strong probability of  
68 serious injury or death presented by the specific unsafe working condition.

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

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

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

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

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

93 promulgated by the Fire Commission.

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

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

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

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

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

107 (v) That the employee exposed suffered serious compensable injury or compensable  
108 death as defined in §23-4-1 of this code as a direct and proximate result of the specific unsafe  
109 working condition. For the purposes of this section, serious compensable injury may only be  
110 established by one of the following four methods:

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

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

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

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

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

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

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

141 (i) The employee, the employee's guardian or conservator, or the representative of the  
142 employee's estate shall serve with the complaint a verified statement from a person with  
143 knowledge and expertise of the workplace safety statutes, rules, regulations and consensus  
144 industry safety standards specifically applicable to the industry and workplace involved in the

145 employee's injury, setting forth opinions and information on:

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

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

150 (III) The specific statutes, rules, regulations or written consensus industry safety standards  
151 violated by the employer that are directly related to the specific unsafe working conditions:  
152 *Provided, however,* That this verified statement shall not be admissible at the trial of the action and  
153 the Court, pursuant to the Rules of Evidence, common law and §23-4-2(d)(2)(B)(iii)two-c  
154 subclause two-c of this code, retains responsibility to determine and interpret the applicable law  
155 and admissibility of expert opinions.

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

157 (iii) Notwithstanding any other provision of law or rule to the contrary, and consistent with  
158 the legislative findings of intent to promote prompt judicial resolution of issues of immunity from  
159 litigation under this chapter, the employer may request and the court shall give due consideration  
160 to the bifurcation of discovery in any action brought under the provisions of subparagraphs (i)  
161 through (v), of paragraph (B) of this subdivision such that the discovery related to liability issues be  
162 completed before discovery related to damage issues. The court shall dismiss the action upon  
163 motion for summary judgment if it finds pursuant to rule 56 of the rules of civil procedure that one or  
164 more of the facts required to be proved by the provisions of subparagraphs (i) through (v),  
165 inclusive, paragraph (B) of this subdivision do not exist, and the court shall dismiss the action upon  
166 a timely motion for a directed verdict against the plaintiff if after considering all the evidence and  
167 every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court  
168 determines that there is not sufficient evidence to find each and every one of the facts required to  
169 be proven by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this  
170 subdivision; and



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

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

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

183 (g)(h) The amendments to this section enacted during the 2023 session of the Legislature  
184 shall apply to all injuries occurring on or after July 1, 2023.

**§23-4-2a. Limit on liability for noneconomic loss.**

1 (a) In any action brought pursuant to this article, the maximum amount recoverable as  
2 compensatory damages for noneconomic loss may not exceed \$250,000 for each occurrence,  
3 regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death,  
4 regardless of the number of distributees.

5 (b) On January 1, 2024, and in each year thereafter, the limitation for compensatory  
6 damages contained in subsection (a) of this section shall increase to account for inflation by an  
7 amount equal to the Consumer Price Index published by the United States Department of Labor,  
8 not to exceed 150 percent of the amounts specified in those subsections.

9 (c) This section shall become effective on July 1, 2023.

**§23-4-2b. Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury.**

1           (a) In any action arising after the effective date of this section, a defendant who has been  
2 found liable to the plaintiff for damages for medical care, rehabilitation services, lost earnings or  
3 other economic losses may present to the court, after the trier of fact has rendered a verdict, but  
4 before entry of judgment, evidence of payments the plaintiff has received for the same injury from  
5 collateral sources.

6           (b) In a hearing held pursuant to subsection (a) of this section, the defendant may present  
7 evidence of future payments from collateral sources if the court determines that:

8           (1) There is a preexisting contractual or statutory obligation on the collateral source to pay  
9 the benefits;

10           (2) The benefits, to a reasonable degree of certainty, will be paid to the plaintiff for  
11 expenses the trier of fact has determined the plaintiff will incur in the future; and

12           (3) The amount of the future expenses is readily reducible to a sum certain.

13           (c) In a hearing held pursuant to subsection (a) of this section, the plaintiff may present  
14 evidence of the value of payments or contributions he or she has made to secure the right to the  
15 benefits paid by the collateral source.

16           (d) After hearing the evidence presented by the parties, the court shall make the following  
17 findings of fact:

18           (1) The total amount of damages for economic loss found by the trier of fact;

19           (2) The total amount of damages for each category of economic loss found by the trier of  
20 fact;

21           (3) The total amount of allowable collateral source payments received or to be received by  
22 the plaintiff for the medical injury which was the subject of the verdict in each category of economic  
23 loss; and

24           (4) The total amount of any premiums or contributions paid by the plaintiff in exchange for  
25 the collateral source payments in each category of economic loss found by the trier of fact.

26           (e) The court shall subtract the total premiums the plaintiff was found to have paid in each

27 category of economic loss from the total collateral source benefits the plaintiff received with regard  
28 to that category of economic loss to arrive at the net amount of collateral source payments.

29 (f) The court shall then subtract the net amount of collateral source payments received or  
30 to be received by the plaintiff in each category of economic loss from the total amount of damages  
31 awarded the plaintiff by the trier of fact for that category of economic loss to arrive at the adjusted  
32 verdict.

33 (g) The court may not reduce the verdict rendered by the trier of fact in any category of  
34 economic loss to reflect:

35 (1) Amounts paid to or on behalf of the plaintiff which the collateral source has a right to  
36 recover from the plaintiff through subrogation, lien, or reimbursement;

37 (2) Amounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a  
38 collateral source in a category of economic loss;

39 (3) The proceeds of any individual disability or income replacement insurance paid for  
40 entirely by the plaintiff;

41 (4) The assets of the plaintiff or the members of the plaintiff's immediate family; or

42 (5) A settlement between the plaintiff and another tortfeasor.

43 (h) After determining the amount of the adjusted verdict, the court shall enter judgment in  
44 accordance with the provisions of §23-4-9 of this code.

45 (i) This section becomes effective on July 1, 2023.

**§23-4-2c. Fees of attorney for claimant; unlawful charging or receiving of attorney fees;**  
**effective until June 30, 2022.**

1 (a) An attorney's fee in excess of 20 percent of any award granted may not be charged or  
2 received by an attorney for a claimant or dependent.

3 (b) Where an attorney has been awarded attorney's fees and costs in a deliberate intention  
4 suit under §23-4-2 of this code, that attorney's fee shall be capped under the provisions of §23-4-  
5 2b(a) of this code, and the attorney's costs for travel, transportation, meals, and other incidental

6 charges, shall be capped at the maximum allowable rate set for Federal employees for such costs  
7 as established by the travel rules prescribed for such employees by the U.S. General Services  
8 Administration in the relevant year.

9 (c) This section becomes effective on July 1, 2023.

NOTE: The purpose of this bill is to amend the deliberate intent statute to limit noneconomic damages to \$250,000, remove occupational pneumoconiosis from compensable injuries under deliberate intent, require bifurcation to enhance speedy resolution of non-meritorious claims, and to cap attorney's fees to the same amount allowable under the other portions of Chapter 23.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.