

Senate Bill No. 403

(By Senators Hall, K. Facemyer, Nohe, Barnes, Boley and Sypolt)

[Introduced February 3, 2011; referred to the Committee on the
Judiciary; and then to the Committee on Finance.]

A BILL to amend and reenact §23-4-2 of the Code of West Virginia,
1931, as amended, relating to disbursement where injury is
self-inflicted or intentionally caused by the employer.

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 from the Workers' Compensation Fund, from a self-insured
employer or otherwise under the provisions of this chapter on
account of any personal injury to or death to ~~any~~ an employee
caused by a self-inflicted injury or the intoxication of the

1 employee. Upon the occurrence of an injury which the employee
2 asserts, or which reasonably appears to have, occurred in the
3 course of and resulting from the employee's employment, the
4 employer may require the employee to undergo a blood test for the
5 purpose of determining the existence or nonexistence of evidence of
6 intoxication pursuant to rules for the administration of the test
7 promulgated by the board of managers. ~~Provided, That~~ The employer
8 must have a reasonable and good faith objective suspicion of the
9 employee's intoxication and may only test for the purpose of
10 determining whether the person is intoxicated. If any test for
11 intoxication is given following an accident, at the request of the
12 employer or otherwise, and the results are as follows, there shall
13 be a rebuttable presumption which can only be overcome by clear and
14 convincing evidence that the employee was intoxicated and that the
15 intoxication was the proximate cause of the injury:

16 (1) If a test is administered within two hours of the event
17 that results in injury and the test results indicate that there
18 was, at that time, more than five hundredths of one percent, by
19 weight, of alcohol in the employee's blood; or

20 (2) If the test results indicate that there was either on or
21 off the job use of a nonprescribed controlled substance as defined
22 in the West Virginia Uniform Controlled Substance Act, West
23 Virginia Code §60A-2-201, et seq., Scheduled I, II, III, IV and V.

24 ~~(b) For the purpose of this chapter, the commission may~~
25 ~~cooperate with the Office of Miners' Health, Safety and Training~~
26 ~~and the state Division of Labor in promoting general safety~~

1 ~~programs and in formulating rules to govern hazardous employments.~~

2 The following definitions apply to this section:

3 (1) "Amounts receivable" means future benefits related to the
4 serious injury or death giving rise to the asserted cause of action
5 that the employee or the employee's dependent is eligible to
6 receive under this chapter, established with reasonable certainty.

7 (2) "Amounts received" means all amounts paid under this
8 chapter by the self-insured employer or the employers' workers'
9 compensation insurer related to the serious injury or death giving
10 rise to the asserted cause of action.

11 (3) "Commonly accepted and well-known safety standard within
12 the industry or business of the employer" means a consensus written
13 safety standard promulgated by an organization or group generally
14 recognized as representing the entire industry or business of the
15 employer, such as an organization that includes a majority of
16 industry members, and not by any state or federal body. Equipment
17 or machinery operator's manuals, maintenance manuals or similar
18 product materials, and safety standards or rules promulgated or
19 suggested by industries or businesses other than the industry or
20 business of the employer, are not competent evidence to prove
21 subsection (d)(2)(ii)(C) of this section unless specifically
22 adopted in writing as a consensus safety standard by the industry
23 or business of the employer.

24 (4) "Compensable injury" or "compensable death" means an
25 injury or death that is determined to be compensable under this
26 chapter. In the event a worker's compensation claim is denied or

1 where compensability is in dispute and has not been decided, a
2 cause of action under this section does not exist and does not
3 accrue until the time such claim is finally ruled compensable and
4 any lawsuit asserting a cause of action under this section must be
5 filed within one year of such determination or within two years of
6 the injury or death, whichever is longer.

7 (5) A "dependent" is a person who is determined to be a
8 dependent as defined in this chapter. Any administrative
9 determination of such dependent or dependents shall be binding in
10 a cause of action maintained under this section.

11 (6) "Employer" means a person, firm, association, corporation,
12 partnership, governmental agency or legal entity regularly
13 employing the employee for the purpose of carrying on any form of
14 industry, service or business in this state. No supervisory or
15 management personnel of the employer may be personally sued in an
16 action filed pursuant to this section.

17 (7) "Excess damages" recoverable over amounts received or
18 receivable under this chapter are:

19 (A) In case of serious injury, damages for pain and suffering;
20 mental anguish; loss of enjoyment of life; lost wages, to the
21 extent they exceed the permanent total, temporary total, temporary
22 total rehabilitation, temporary partial rehabilitation and
23 permanent partial disability benefits paid under this chapter; lost
24 future earnings reduced to present value, to the extent this
25 calculation exceeds future permanent total, temporary total,
26 temporary total rehabilitation, temporary partial rehabilitation

1 and permanent partial disability benefits receivable plus predicted
2 future earnings, all reduced to present value.

3 (B) In case of death, those elements of subparagraph (A) that
4 apply; funeral expenses, to the extent they exceed the amount paid
5 under this chapter; lost wages, to the extent they exceed the
6 permanent, temporary total, permanent partial disability and death
7 benefits paid under this chapter; lost future earnings reduced to
8 present value, to the extent this calculation exceeds the maximum
9 death benefits receivable by any dependent, reduced to present
10 value; amount to replace lost future household services, reduced to
11 present value; and, sorrow, mental anguish and solace which may
12 include society, companionship, comfort, guidance, kindly offices
13 and advice of decedent.

14 In no event may the recovery under (A) or (B) for noneconomic
15 losses exceed \$250,000 or an amount that is equal to three times
16 the amount of economic loss, whichever is less.

17 (8) "Serious injury" means an injury that in and of itself and
18 not in combination with any other compensable injury or conditions
19 results in a permanent total disability award under this chapter.

20 ~~(c) If injury or death result to any employee from the~~
21 ~~deliberate intention of his or her employer to produce the injury~~
22 ~~or death, the employee, the widow, widower, child or dependent of~~
23 ~~the employee has the privilege to take under this chapter and has~~
24 ~~a cause of action against the employer, as if this chapter had not~~
25 ~~been enacted, for any excess of damages over the amount received or~~
26 ~~receivable in a claim for benefits under this chapter, whether~~

1 ~~filed or not.~~ If an employee suffers serious injury or death as a
2 result of the "deliberate intention" of his or her employer to
3 produce such serious injury or death:

4 (1) In the case of serious injury, the employee has a cause of
5 action against the employer for excess damages over and above
6 amounts received or receivable in a claim for benefits under this
7 chapter; or

8 (2) In the case of death, the employee's dependents as defined
9 in this chapter, have a cause of action against the employer for
10 excess damages over and above amounts received or receivable in a
11 claim for benefits under this chapter. This cause of action must
12 be maintained by the personal representative of the deceased
13 employee for the benefit of the employee's dependents. In the
14 event no such dependents exist, no cause of action may be
15 maintained under this section for the employee's death.

16 (d) (1) It is declared that enactment of this chapter and the
17 establishment of the workers' compensation system in this chapter
18 was and is intended to remove from the common law tort system all
19 disputes between or among employers and employees regarding the
20 compensation to be received for injury or death to an employee
21 except as expressly provided in this chapter and to establish a
22 system which compensates even though the injury or death of an
23 employee may be caused by his or her own fault or the fault of a
24 coemployee; that the immunity established in sections six and six-
25 a, article two of this chapter is an essential aspect of this
26 workers' compensation system; that the intent of the Legislature in

1 providing immunity from common lawsuit was and is to protect those
2 immunized from litigation outside the workers' compensation system
3 except as expressly provided in this chapter; that, in enacting the
4 immunity provisions of this chapter, the Legislature intended to
5 create a legislative standard for loss of that immunity of more
6 narrow application and containing more specific mandatory elements
7 than the common law tort system concept and standard of willful,
8 wanton and reckless misconduct; and that it was and is the
9 legislative intent to promote prompt judicial resolution of the
10 question of whether a suit prosecuted under the asserted authority
11 of this section is or is not prohibited by the immunity granted
12 under this chapter.

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

18 (i) It is proved that the employer ~~or person against whom~~
19 ~~liability is asserted~~ acted with a consciously, subjectively and
20 deliberately formed intention to produce the specific result of
21 injury or death to an employee. A cause of action under this
22 subparagraph (i) may also be asserted against the employee's
23 individual supervisor who committed the act or acts causing injury
24 or death; however, the consciously, subjectively and deliberately
25 formed intention of such supervisor to produce the specific result
26 of injury or death to the employee, if proved, may not be imputed

1 to the employer and the employer may not be held vicariously liable
2 under this subparagraph for such act or acts. This standard
3 requires a showing of an actual, specific intent and may not be
4 satisfied by allegation or proof of:

5 (A) Conduct which produces a result that was not specifically
6 intended;

7 (B) Conduct which constitutes negligence, no matter how gross
8 or aggravated; or

9 (C) Willful, wanton or reckless misconduct; or

10 (ii) The trier of fact determines, either through specific
11 findings of fact made by the court in a trial without a jury, or
12 through special interrogatories to the jury in a jury trial, that
13 all of the following facts are proven:

14 (A) That a specific unsafe working condition existed in the
15 workplace which presented a high degree of risk and a strong
16 probability of serious injury or death;

17 (B) That the employer, prior to the injury, had actual
18 knowledge of the existence of the specific unsafe working condition
19 and of the high degree of risk and the strong probability of
20 serious injury or death presented by the specific unsafe working
21 condition;

22 (C) That the specific unsafe working condition was a violation
23 of a state or federal safety statute, rule or regulation, whether
24 cited or not, or of a commonly accepted and well-known safety
25 standard within the industry or business of the employer, ~~as~~
26 ~~demonstrated by competent evidence of written standards or~~

1 ~~guidelines which reflect a consensus safety standard in the~~
2 ~~industry or business,~~ which statute, rule, regulation or standard
3 was specifically applicable to the particular work and working
4 condition involved and was intended to address the specific hazard
5 or hazards presented by the alleged specific unsafe working
6 condition, as contrasted with a statute, rule, regulation or
7 standard generally requiring safe workplaces, equipment or working
8 conditions;

9 (D) That notwithstanding the existence of the facts set forth
10 in subparagraphs (A) through (C), inclusive, of this paragraph, the
11 employer nevertheless intentionally ~~thereafter~~ exposed an employee
12 to the specific unsafe working condition; and

13 (E) That the employee exposed suffered serious compensable
14 injury or compensable death ~~as defined in section one, article~~
15 ~~four, chapter twenty-three whether a claim for benefits under this~~
16 ~~chapter is filed or not as a direct and~~ as a proximate result of
17 the specific unsafe working condition.

18 (iii) In cases alleging liability under the provisions of
19 paragraph (ii) of this subdivision:

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

22 (B) ~~Notwithstanding any other provision of law or rule to the~~
23 ~~contrary, and consistent with the legislative findings of intent to~~
24 ~~promote prompt judicial resolution of issues of immunity from~~
25 ~~litigation under this chapter, the court shall dismiss the action~~
26 ~~upon motion for summary judgment if it finds, pursuant to rule 56~~

~~1 of the rules of civil procedure that one or more of the facts
2 required to be proved by the provisions of subparagraphs (A)
3 through (E), inclusive, paragraph (ii) of this subdivision do not
4 exist, and the court shall dismiss the action upon a timely motion
5 for a directed verdict against the plaintiff if after considering
6 all the evidence and every inference legitimately and reasonably
7 raised thereby most favorably to the plaintiff, the court
8 determines that there is not sufficient evidence to find each and
9 every one of the facts required to be proven by the provisions of
10 subparagraphs (A) through (E), inclusive, paragraph (ii) of this
11 subdivision; and The cause of action is the exclusive right of an
12 injured employee or other person entitled to recover under this
13 section. No part of this section may be read or interpreted so as
14 to allow any party who is not an injured employee or other person
15 entitled to recover to assert a cause of action directly against an
16 employer for deliberate intention. A third party claim for
17 contribution may only be made against an employer where the injured
18 employee or other person entitled to recover under this section
19 asserts a deliberate intention cause of action against the employer
20 in addition to other causes of action against other defendants. In
21 that situation, the trier of fact must apportion, either through
22 specific findings of fact made by the court in a trial without a
23 jury, or through a special interrogatory to the jury, fault among
24 all defendants against whom liability is found, including a
25 percentage of fault for the "deliberate intention" of the employer
26 if it so finds. Only in this particular instance may a nonemployer~~

1 defendant recover for contribution from the employer. A finding by
2 the trier of fact that the employer acted with deliberate intention
3 does not equate to a finding that the employer acted with the
4 intention of inflicting injury or death pursuant to West Virginia
5 Code §55-7-24(b)(1). Contribution and implied indemnity claims
6 against the employer by third parties are not permitted and a third
7 party who is sued by an injured employee or other person entitled
8 to recover under this section may not implead the employer into the
9 action seeking implied indemnity or contribution upon a deliberate
10 intention theroy. Express indemnity claims may be asserted.

11 In the event the employee or other person entitled to recover
12 under this section asserts claims against parties other than the
13 employer for a compensable injury or compensable death claimed to
14 be caused by "deliberate intention" and such employee or other
15 person entitled to recover under this section prevails against the
16 employer and the nonemployer party or parties or settles with the
17 employer, then such nonemployer party or parties shall be entitled
18 to the same offset for amounts received or amounts receivable under
19 this chapter for the injury or death as the employer. A settlement
20 by the employee or other person entitled to recover under this
21 section with the employer shall not affect the nonemployer
22 defendants' entitlement to this offset and the nonemployer
23 defendant shall, in addition, be entitled to an offset for any
24 settlement amount paid by the employer. Any subrogation amount
25 recoverable by the self-insured employer or workers' compensation
26 insurer from the employee pursuant to West Virginia Code §23-2A-1

1 shall be deducted from the nonemployer defendants' total offset.

2 ~~(C) The provisions of this paragraph and of each subparagraph~~
3 ~~thereof are severable from the provisions of each other~~
4 ~~subparagraph, subsection, section, article or chapter of this code~~
5 ~~so that if any provision of a subparagraph of this paragraph is~~
6 ~~held void, the remaining provisions of this act and this code~~
7 ~~remain valid. Where the injured or deceased employee is a~~
8 ~~supervisor or member of management of the employer, no recovery may~~
9 ~~be had by the employee or other person entitled to recover under~~
10 ~~this section unless the employee or other person entitled to~~
11 ~~recover under this section satisfies the subparagraphs~~
12 ~~(d) (2) (ii) (B) and (D) as to supervisors of injured or deceased~~
13 ~~employees or members of management superior to the injured or~~
14 ~~deceased employee.~~

15 ~~(e) The reenactment of this section in the regular session of~~
16 ~~the Legislature during the year 1983 does not in any way affect the~~
17 ~~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~~
19 ~~of the reenactment.~~

20 ~~(f) The amendments to this section enacted during the 2005~~
21 ~~session of the Legislature shall apply to all injuries occurring~~
22 ~~and all actions filed on or after July 1, 2005.~~

NOTE: The purpose of this bill is to clearly express circumstances giving rise to employer and third-party liability under the deliberate intention exception to West Virginia's Workers Compensation scheme and to expressly state recoverable damages.

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