

1 **Senate Bill No. 500**

2 (By Senators McCabe, Palumbo, K. Facemyer, Stollings,
3 Williams, Unger, Jenkins, Helmick, Hall, Browning, Plymale, and
4 Nohe)

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6 [Introduced February 11, 2011; referred to the Committee on
7 Labor; and then to the Committee on the Judiciary.]

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11 A BILL to amend and reenact §23-4-2 of the Code of West Virginia,
12 1931, as amended, relating to workers' compensation;
13 disability and death benefits; injuries self-inflicted or
14 intentionally caused by employer; clarifying those dependents
15 who have a cause of action under this section; and modifying
16 the deliberate intention exception to an employer's immunity
17 from liability regarding its employees' compensable, work-
18 related injuries by requiring a court to dismiss, on a proper
19 motion, a deliberate intention cause of action if the
20 plaintiff has not received a determination of compensability
21 of an injury or death.

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

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

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

1 **§23-4-2. Disbursement where injury is self-inflicted or**
2 **intentionally caused by employer; legislative**
3 **declarations and findings; "deliberate intention"**
4 **defined.**

5 (a) Notwithstanding anything contained in this chapter, no
6 employee or dependent of any employee is entitled to receive any
7 sum from the Workers' Compensation Fund, from a self-insured
8 employer or otherwise under the provisions of this chapter on
9 account of any personal injury to or death to any employee caused
10 by a self-inflicted injury or the intoxication of the employee.
11 Upon the occurrence of an injury which the employee asserts, or
12 which reasonably appears to have, occurred in the course of and
13 resulting from the employee's employment, the employer may require
14 the employee to undergo a blood test for the purpose of determining
15 the existence or nonexistence of evidence of intoxication pursuant
16 to rules for the administration of the test promulgated by the
17 board of managers: *Provided*, That the employer must have a
18 reasonable and good faith objective suspicion of the employee's
19 intoxication and may only test for the purpose of determining
20 whether the person is intoxicated.

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

1 (c) If injury or death result to any employee from the
2 deliberate intention of his or her employer to produce the injury
3 or death, the employee, ~~the widow, widower, child or dependent of~~
4 ~~the employee~~ or his or her dependants as defined in subsection d,
5 section ten of this article has the privilege to take under this
6 chapter and has a cause of action against the employer ~~as if this~~
7 ~~chapter had not been enacted,~~ for any excess of damages over the
8 amount received or receivable in a claim for benefits under this
9 chapter. ~~whether filed or not.~~

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

1 narrow application and containing more specific mandatory elements
2 than the common law tort system concept and standard of willful,
3 wanton and reckless misconduct; and that it was and is the
4 legislative intent to promote prompt judicial resolution of the
5 question of whether a suit prosecuted under the asserted authority
6 of this section is or is not prohibited by the immunity granted
7 under this chapter.

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

13 (i) An employee, as described in section one-a, article two of
14 this chapter or his or her dependent, as described in subsection
15 (d), section ten of this article, has filed a claim for workers'
16 compensation benefits under this chapter and a final determination
17 has been made that the employee's injury or death was compensable
18 under this chapter: *Provided*, That the statute of limitations for
19 a cause of action under this section does not begin to run until
20 the date the injury or death was finally determined to be
21 compensable; and either;

22 ~~(i)~~ (ii) It is proved that the employer or person against whom
23 liability is asserted acted with a consciously, subjectively and
24 deliberately formed intention to produce the specific result of
25 injury or death to an employee. This standard requires a showing

1 of an actual, specific intent and may not be satisfied by
2 allegation or proof of: (A) Conduct which produces a result that
3 was not specifically intended; (B) conduct which constitutes
4 negligence, no matter how gross or aggravated; or (C) willful,
5 wanton or reckless misconduct; or

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

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

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

18 (C) That the specific unsafe working condition was a violation
19 of a state or federal safety statute, rule or regulation, whether
20 cited or not, or of a commonly accepted and well-known safety
21 standard within the industry or business of the employer, as
22 demonstrated by competent evidence of written standards or
23 guidelines which reflect a consensus safety standard in the
24 industry or business, which statute, rule, regulation or standard
25 was specifically applicable to the particular work and working

1 condition involved, as contrasted with a statute, rule, regulation
2 or standard generally requiring safe workplaces, equipment or
3 working conditions;

4 (D) That notwithstanding the existence of the facts set forth
5 in subparagraphs (A) through (C), inclusive, of this paragraph, the
6 employer nevertheless intentionally thereafter exposed an employee
7 to the specific unsafe working condition; and

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

13 ~~(iii)~~ (iv) In cases alleging liability under the provisions of
14 paragraph ~~(ii)~~ iii of this subdivision:

15 (A) No punitive or exemplary damages ~~shall~~ may be awarded to
16 the employee or other plaintiff;

17 (B) Notwithstanding any other provision of law or rule to the
18 contrary, and consistent with the legislative findings of intent to
19 promote prompt judicial resolution of issues of immunity from
20 litigation under this chapter, the court shall dismiss the action
21 upon motion for summary judgment if it finds, pursuant to rule 56
22 of the rules of civil procedure that one or more of the facts
23 required to be proved by the provisions of paragraph (i) of this
24 suddivision or subparagraphs (A) through (E), inclusive, paragraph
25 ~~(ii)~~ (iii) of this subdivision do not exist, and the court shall

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

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

15 (e) The reenactment of this section in the regular session of
16 the Legislature during the year ~~1983~~ 2011 does not in any way
17 affect the right of any person to bring an action with respect to
18 or upon any cause of action which arose or accrued prior to the
19 effective date 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.

23 (g) The amendments to this section enacted during the 2011
24 session of the Legislature apply to all injuries occurring and all
25 actions filed on or after July 1, 2011.

NOTE: The purpose of this bill is to modify the deliberate intention exception to employers' immunity from lawsuits based on work-related injuries granted by Workers' Compensation. This bill requires that a deliberate intention plaintiff have a compensable worker's compensation claim as a prerequisite to filing a deliberate intention claim and directs the court to dismiss, on a timely motion, a deliberate intention cause of action if a plaintiff's worker's compensation claim has not been ruled compensable. The bill also provides that the statute of limitations does not begin to run on a deliberate intention claim until a final ruling that the claim is compensable.

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