

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

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

24 (2) If the test results indicate that there was either on or

1 off the job use of a nonprescribed controlled substance as defined
2 in the West Virginia Uniform Controlled Substance Act, West
3 Virginia Code §60A-2-201, et seq., Scheduled I, II, III, IV and V.

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

8 The following definitions apply to this section:

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

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

17 (3) "Commonly accepted and well-known safety standard within
18 the industry or business of the employer" means a consensus written
19 safety standard promulgated by an organization or group generally
20 recognized as representing the entire industry or business of the
21 employer, such as an organization that includes a majority of
22 industry members, and not by any state or federal body. Equipment
23 or machinery operator's manuals, maintenance manuals or similar
24 product materials, and safety standards or rules promulgated or

1 suggested by industries or businesses other than the industry or
2 business of the employer, are not competent evidence to prove
3 subsection (d)(2)(ii)(C) of this section unless specifically
4 adopted in writing as a consensus safety standard by the industry
5 or business of the employer.

6 (4) "Compensable injury" or "compensable death" means an
7 injury or death that is determined to be compensable under this
8 chapter. In the event a workers' compensation claim is denied or
9 where compensability is in dispute and has not been decided, a
10 cause of action under this section does not exist and does not
11 accrue until the time such claim is finally ruled compensable and
12 any lawsuit asserting a cause of action under this section must be
13 filed within one year of such determination or within two years of
14 the injury or death, whichever is longer.

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

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

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

3 (A) In case of serious injury, damages for pain and suffering;
4 mental anguish; loss of enjoyment of life; lost wages, to the
5 extent they exceed the permanent total, temporary total, temporary
6 total rehabilitation, temporary partial rehabilitation and
7 permanent partial disability benefits paid under this chapter; lost
8 future earnings reduced to present value, to the extent this
9 calculation exceeds future permanent total, temporary total,
10 temporary total rehabilitation, temporary partial rehabilitation
11 and permanent partial disability benefits receivable plus predicted
12 future earnings, all reduced to present value.

13 (B) In case of death, those elements of subparagraph (A) that
14 apply; funeral expenses, to the extent they exceed the amount paid
15 under this chapter; lost wages, to the extent they exceed the
16 permanent, temporary total, permanent partial disability and death
17 benefits paid under this chapter; lost future earnings reduced to
18 present value, to the extent this calculation exceeds the maximum
19 death benefits receivable by any dependent, reduced to present
20 value; amount to replace lost future household services, reduced to
21 present value; and, sorrow, mental anguish and solace which may
22 include society, companionship, comfort, guidance, kindly offers
23 and advice of decedent.

24 In no event may the recovery under (A) or (B) for noneconomic

1 losses exceed \$250,000 or an amount that is equal to three times
2 the amount of economic loss, whichever is less.

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

6 ~~(c) If injury or death result to any employee from the~~
7 ~~deliberate intention of his or her employer to produce the injury~~
8 ~~or death, the employee, the widow, widower, child or dependent of~~
9 ~~the employee has the privilege to take under this chapter and has~~
10 ~~a cause of action against the employer, as if this chapter had not~~
11 ~~been enacted, for any excess of damages over the amount received or~~
12 ~~receivable in a claim for benefits under this chapter, whether~~
13 ~~filed or not. If an employee suffers serious injury or death as a~~
14 ~~result of the "deliberate intention" of his or her employer to~~
15 ~~produce such serious injury or death:~~

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

20 (2) In the case of death, the employee's dependents as defined
21 in this chapter, have a cause of action against the employer for
22 excess damages over and above amounts received or receivable in a
23 claim for benefits under this chapter. This cause of action must
24 be maintained by the personal representative of the deceased

1 employee for the benefit of the employee's dependents. In the
2 event no such dependents exist, no cause of action may be
3 maintained under this section for the employee's death.

4 (d) (1) It is declared that enactment of this chapter and the
5 establishment of the workers' compensation system in this chapter
6 was and is intended to remove from the common law tort system all
7 disputes between or among employers and employees regarding the
8 compensation to be received for injury or death to an employee
9 except as expressly provided in this chapter and to establish a
10 system which compensates even though the injury or death of an
11 employee may be caused by his or her own fault or the fault of a
12 coemployee; that the immunity established in sections six and
13 six-a, article two of this chapter is an essential aspect of this
14 workers' compensation system; that the intent of the Legislature in
15 providing immunity from common lawsuit was and is to protect those
16 immunized from litigation outside the workers' compensation system
17 except as expressly provided in this chapter; that, in enacting the
18 immunity provisions of this chapter, the Legislature intended to
19 create a legislative standard for loss of that immunity of more
20 narrow application and containing more specific mandatory elements
21 than the common law tort system concept and standard of willful,
22 wanton and reckless misconduct; and that it was and is the
23 legislative intent to promote prompt judicial resolution of the
24 question of whether a suit prosecuted under the asserted authority

1 of this section is or is not prohibited by the immunity granted
2 under this chapter.

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

8 (i) It is proved that the employer ~~or person against whom~~
9 ~~liability is asserted~~ acted with a consciously, subjectively and
10 deliberately formed intention to produce the specific result of
11 injury or death to an employee. A cause of action under this
12 subparagraph (i) may also be asserted against the employee's
13 individual supervisor who committed the act or acts causing injury
14 or death; however, the consciously, subjectively and deliberately
15 formed intention of such supervisor to produce the specific result
16 of injury or death to the employee, if proved, may not be imputed
17 to the employer and the employer may not be held vicariously liable
18 under this subparagraph for such act or acts. This standard
19 requires a showing of an actual, specific intent and may not be
20 satisfied by allegation or proof of:

21 (A) Conduct which produces a result that was not specifically
22 intended;

23 (B) Conduct which constitutes negligence, no matter how gross
24 or aggravated; or

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

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

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

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

14 (C) That the specific unsafe working condition was a violation
15 of a state or federal safety statute, rule or regulation, whether
16 cited or not, or of a commonly accepted and well-known safety
17 standard within the industry or business of the employer, ~~as~~
18 ~~demonstrated by competent evidence of written standards or~~
19 ~~guidelines which reflect a consensus safety standard in the~~
20 ~~industry or business,~~ which statute, rule, regulation or standard
21 was specifically applicable to the particular work and working
22 condition involved and was intended to address the specific hazard
23 or hazards presented by the alleged specific unsafe working
24 condition, as contrasted with a statute, rule, regulation or

1 standard generally requiring safe workplaces, equipment or working
2 conditions;

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

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

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

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

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

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

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

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