

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

21 (1) If a test is administered within two hours of the event
22 that results in injury and the test results indicate that there
23 was, at that time, more than five hundredths of one percent, by

1 weight, of alcohol in the employee's blood; or

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

6 ~~(b) For the purpose of this chapter, the commission may~~
7 ~~cooperate with the Office of Miners' Health, Safety and Training~~
8 ~~and the state Division of Labor in promoting general safety~~
9 ~~programs and in formulating rules to govern hazardous employments.~~
10 The following definitions apply to this section:

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

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

19 (3) "Commonly accepted and well-known safety standard within
20 the industry or business of the employer" means a consensus written
21 safety standard promulgated by an organization or group generally
22 recognized as representing the entire industry or business of the
23 employer, such as an organization that includes a majority of

1 industry members, and not by any state or federal body. Equipment
2 or machinery operator's manuals, maintenance manuals or similar
3 product materials, and safety standards or rules promulgated or
4 suggested by industries or businesses other than the industry or
5 business of the employer, are not competent evidence to prove
6 subsection (d)(2)(ii)(C) of this section unless specifically
7 adopted in writing as a consensus safety standard by the industry
8 or business of the employer.

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

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

22 (6) "Employer" means a person, firm, association, corporation,
23 partnership, governmental agency or legal entity regularly

1 employing the employee for the purpose of carrying on any form of
2 industry, service or business in this state. No supervisory or
3 management personnel of the employer may be personally sued in an
4 action filed pursuant to this section.

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

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

17 (B) In case of death, those elements of subparagraph (A) that
18 apply; funeral expenses, to the extent they exceed the amount paid
19 under this chapter; lost wages, to the extent they exceed the
20 permanent, temporary total, permanent partial disability and death
21 benefits paid under this chapter; lost future earnings reduced to
22 present value, to the extent this calculation exceeds the maximum
23 death benefits receivable by any dependent, reduced to present

1 value; amount to replace lost future household services, reduced to
2 present value; and, sorrow, mental anguish and solace which may
3 include society, companionship, comfort, guidance, kindly offers
4 and advice of decedent.

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

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

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

21 (1) In the case of serious injury, the employee has a cause of
22 action against the employer for excess damages over and above
23 amounts received or receivable in a claim for benefits under this

1 chapter; or

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

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
19 six-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

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

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

15 ~~(i) (A) It is proved that the employer or person against whom~~
16 ~~liability is asserted acted with a consciously, subjectively and~~
17 ~~deliberately formed intention~~ conscious, subjective and deliberate
18 formed intent to produce the specific result of injury or death to
19 an employee. A cause of action under this paragraph may also be
20 asserted against the employee's individual supervisor who committed
21 the act or acts causing injury or death. The conscious, subjective
22 and deliberate formed intent of the supervisor to produce the
23 specific result of injury or death to the employee, if proved, may

1 not be imputed to the employer and the employer may not be held
2 vicariously liable under this subparagraph for such act or acts.

3 This standard requires a showing of an actual, specific intent and
4 may not be satisfied by allegation or proof of:

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

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

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

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

17 ~~(B)~~ (ii) 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)~~ (iii) That the specific unsafe working condition was a
23 violation of a state or federal safety statute, rule or regulation,

1 whether cited or not, or of a commonly accepted and well-known
2 safety standard within the industry or business of the employer, ~~as~~
3 ~~demonstrated by competent evidence of written standards or~~
4 ~~guidelines which reflect a consensus safety standard in the~~
5 ~~industry or business,~~ which statute, rule, regulation or standard
6 was specifically applicable to the particular work and working
7 condition involved and was intended to address the specific hazard
8 or hazards presented by the alleged specific unsafe working
9 condition, as contrasted with a statute, rule, regulation or
10 standard generally requiring safe workplaces, equipment or working
11 conditions;

12 ~~(D)~~ (iv) That notwithstanding the existence of the facts set
13 forth in subparagraphs ~~(A)~~ (i) through ~~(c)~~ (iii), inclusive, of
14 this paragraph, the employer nevertheless intentionally ~~thereafter~~
15 exposed an employee to the specific unsafe working condition; and

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

21 ~~(iii)~~ (C) In cases alleging liability under the provisions of
22 paragraph ~~(ii)~~ (B) of this subdivision:

23 ~~(A)~~ (i) No punitive or exemplary damages shall be awarded to

1 the employee or other plaintiff;

2 ~~(B) (ii) Notwithstanding any other provision of law or rule to~~
3 ~~the contrary, and consistent with the legislative findings of~~
4 ~~intent to promote prompt judicial resolution of issues of immunity~~
5 ~~from litigation under this chapter, the court shall dismiss the~~
6 ~~action upon motion for summary judgment if it finds, pursuant to~~
7 ~~rule 56 of the rules of civil procedure that one or more of the~~
8 ~~facts required to be proved by the provisions of subparagraphs (A)~~
9 ~~through (E), inclusive, paragraph (ii) of this subdivision do not~~
10 ~~exist, and the court shall dismiss the action upon a timely motion~~
11 ~~for a directed verdict against the plaintiff if after considering~~
12 ~~all the evidence and every inference legitimately and reasonably~~
13 ~~raised thereby most favorably to the plaintiff, the court~~
14 ~~determines that there is not sufficient evidence to find each and~~
15 ~~every one of the facts required to be proven by the provisions of~~
16 ~~subparagraphs (A) through (E), inclusive, paragraph (ii) of this~~
17 ~~subdivision; and~~ The cause of action is the exclusive right of an
18 injured employee or other person entitled to recover under this
19 section. No part of this section allows any party who is not an
20 injured employee or other person entitled to recover to assert a
21 cause of action directly against an employer for deliberate
22 intention. A third party claim for contribution may only be made
23 against an employer where the injured employee or other person

1 entitled to recover under this section asserts a deliberate
2 intention cause of action against the employer in addition to other
3 causes of action against other defendants. In that situation, the
4 trier of fact must apportion, either through specific findings of
5 fact made by the court in a trial without a jury, or through a
6 special interrogatory to the jury, fault among all defendants
7 against whom liability is found, including a percentage of fault
8 for the "deliberate intention" of the employer if it so finds.
9 Only in this particular instance may a nonemployer defendant
10 recover for contribution from the employer. A finding by the trier
11 of fact that the employer acted with deliberate intention does not
12 equate to a finding that the employer acted with the intention of
13 inflicting injury or death pursuant to West Virginia Code
14 §55-7-24(b) (1). Contribution and implied indemnity claims against
15 the employer by third parties are not permitted and a third party
16 who is sued by an injured employee or other person entitled to
17 recover under this section may not implead the employer into the
18 action seeking implied indemnity or contribution upon a deliberate
19 intention theory. Express indemnity claims may be asserted.

20 In the event the employee or other person entitled to recover
21 under this section asserts claims against parties other than the
22 employer for a compensable injury or compensable death claimed to
23 be caused by "deliberate intention" and such employee or other

1 person entitled to recover under this section prevails against the
2 employer and the nonemployer party or parties or settles with the
3 employer, then such nonemployer party or parties is entitled to the
4 same offset for amounts received or amounts receivable under this
5 chapter for the injury or death as the employer. A settlement by
6 the employee or other person entitled to recover under this section
7 with the employer does not affect the nonemployer defendants'
8 entitlement to this offset and the nonemployer defendant is, in
9 addition, entitled to an offset for any settlement amount paid by
10 the employer. A subrogation amount recoverable by the self-insured
11 employer or workers' compensation insurer from the employee
12 pursuant to West Virginia Code §23-2A-1 shall be deducted from the
13 nonemployer defendants' total offset.

14 ~~(C) (iii) The provisions of this paragraph and of each~~
15 ~~subparagraph thereof are severable from the provisions of each~~
16 ~~other subparagraph, subsection, section, article or chapter of this~~
17 ~~code so that if any provision of a subparagraph of this paragraph~~
18 ~~is held void, the remaining provisions of this act and this code~~
19 ~~remain valid. Where the injured or deceased employee is a~~
20 supervisor or member of management of the employer, no recovery may
21 be had by the employee or other person entitled to recover under
22 this section unless the employee or other person entitled to
23 recover under this section satisfies ~~the~~ subparagraphs

1 ~~(d) (2) (ii) (B) and (D) subparagraphs (ii) and (iv), paragraph (B),~~
2 ~~subdivision (2), of this subsection as to supervisors of injured or~~
3 ~~deceased employees or members of management superior to the injured~~
4 ~~or deceased employee.~~

5 ~~(e) The reenactment of this section in the regular session of~~
6 ~~the Legislature during the year 1983 does not in any way affect the~~
7 ~~right of any person to bring an action with respect to or upon any~~
8 ~~cause of action which arose or accrued prior to the effective date~~
9 ~~of the reenactment.~~

10 ~~(f) The amendments to this section enacted during the 2005~~
11 ~~session of the Legislature shall apply to all injuries occurring~~
12 ~~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.