

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 3270

BY DELEGATES HOTT, WESTFALL, HOUSEHOLDER, CRISS,

ESPINOSA, HARDY, COOPER, HECKERT, HOWELL,

HILLENBRAND AND JENNINGS

[Passed March 10, 2023; in effect ninety days from passage.]

1 AN ACT 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 a new section, designated §23-4-2a, all relating to the
3 deliberate intent exception to the immunities provided under Workers Compensation;
4 clarifying certain definitions of employee; clarifying the proof required for certain claims;
5 clarifying the recoverable amount payable for compensatory damages for noneconomic
6 losses; and requiring a yearly increase in certain limitations for compensatory damages
7 to account for inflation.

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
9 for the purpose of determining whether the person is intoxicated. If any blood test for intoxication
10 is given following an accident, at the request of the employer or otherwise, and if any of the
11 following are true, the employee is deemed intoxicated and the intoxication is the proximate cause
12 of the 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
15 employee's 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, the commission may cooperate with the Office of
20 Miners' Health, Safety and Training and the State Division of Labor in promoting general safety
21 programs and in formulating rules to govern hazardous employments.

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

34 (d)(1) It is declared that enactment of this chapter and the establishment of the workers'
35 compensation system in this chapter was and is intended to remove from the common law tort
36 system all disputes between or among employers and employees regarding the compensation to
37 be received for injury or death to an employee except as expressly provided in this chapter and
38 to establish a system which compensates even though the injury or death of an employee may
39 be caused by his or her own fault or the fault of a co-employee; that the immunity established in
40 sections six and six-a, article two of this chapter is an essential aspect of this workers'
41 compensation system; that the intent of the Legislature in providing immunity from common

42 lawsuit was and is to protect those immunized from litigation outside the workers' compensation
43 system except as expressly provided in this chapter; that, in enacting the immunity provisions of
44 this chapter, the Legislature intended to create a legislative standard for loss of that immunity of
45 more narrow application and containing more specific mandatory elements than the common law
46 tort system concept and standard of willful, wanton and reckless misconduct; and that it was and
47 is the legislative intent to promote prompt judicial resolution of the question of whether a suit
48 prosecuted under the asserted authority of this section is or is not prohibited by the immunity
49 granted under this chapter.

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

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

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

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

64 (ii) That the employer, prior to the injury, had actual knowledge of the existence of the
65 specific unsafe working condition and of the high degree of risk and the strong probability of
66 serious injury or death presented by the specific unsafe working condition.

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

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

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

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

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

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

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

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

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

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

105 (v) That the employee exposed suffered serious compensable injury or compensable
106 death as defined in section one, article four, chapter twenty-three as a direct and proximate result
107 of the specific unsafe working condition. For the purposes of this section, serious compensable
108 injury may only be established by one of the following four methods:

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

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

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

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

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

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

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

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

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

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

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

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

159 (iii) Notwithstanding any other provision of law or rule to the contrary, and consistent with
160 the legislative findings of intent to promote prompt judicial resolution of issues of immunity from
161 litigation under this chapter, the employer may request and the court shall give due consideration
162 to the bifurcation of discovery in any action brought under the provisions of subparagraphs (i)
163 through (v), of paragraph (B) such that the discovery related to liability issues be completed before
164 discovery related to damage issues. The court shall dismiss the action upon motion for summary
165 judgment if it finds pursuant to rule 56 of the rules of civil procedure that one or more of the facts
166 required to be proved by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B)
167 of this subdivision do not exist, and the court shall dismiss the action upon a timely motion for a

168 directed verdict against the plaintiff if after considering all the evidence and every inference
169 legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines
170 that there is not sufficient evidence to find each and every one of the facts required to be proven
171 by the provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision;
172 and

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

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

182 (f) The reenactment of this section in the regular session of the Legislature during the year
183 2015 does not in any way affect the right of any person to bring an action with respect to or upon
184 any cause of action which arose or accrued prior to the effective date of the reenactment.

185 (g) The amendments to this section enacted during the 2023 session of the Legislature
186 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 the higher of two times the
3 economic damages before offset or \$500,000 for each person, regardless of the number of
4 plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number
5 of distributees.

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

10 (c) This section shall become effective for causes of action accruing on or after July 1,
11 2023.

The Clerk of the House of Delegates and the Clerk of the Senate hereby certify that the foregoing bill is correctly enrolled.

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Clerk of the House of Delegates

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Clerk of the Senate

Originated in the House of Delegates.

In effect ninety days from passage.

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Speaker of the House of Delegates

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President of the Senate

The within is this the.....
Day of, 2023.

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Governor