

H. B. 2069

(By Delegate Craig)

[Introduced January 12, 2011; referred to the
Committee on Energy, Industry and Labor, Economic
Development and Small Business then the Judiciary.]

A BILL to amend and reenact §22A-1-1 and §22A-1-31 of the Code of
West Virginia, 1931, as amended; to amend said code by adding
thereto a new article, designated §22A-12-1, §22A-12-2, §22A-
12-3, §22A-12-4, §22A-12-5, §22A-12-6, §22A-12-7, §22A-12-8,
§22A-12-9, §22A-12-10, §22A-12-11, §22A-12-12, §22A-12-13 and
§22A-12-14; and to amend and reenact §23-4-2 of said code, all
relating generally to the creation and implementation of drug-
free workplaces in coal mines; requiring Office of Miners'
Health Safety and Training to ensure drug-free workplaces in
the mining industry; adopting procedures for the suspension or
revocation of miners' certification upon proof of confirmed
positive drug tests; requiring breach of duty hearings to be
held within twenty days; establishing process and conditions
for reissuance of miners' certification; authorizing Director
of Office of Miners' Health Safety and Training to require all

1 operators to adopt drug-free workplaces programs at coal
2 mines; assessment of fee for costs; requiring employers to pay
3 for cost of drug tests for employees; providing for
4 definitions; requiring all companies providing safety-
5 sensitive services to mine operators to have drug-free
6 workplace program for certain employees; providing immunity
7 from wrongful discharge lawsuits for employers who implement
8 program; implementing process for drug testing and appellate
9 procedure; permitting the Office of Miners' Health Safety and
10 Training to require drug and alcohol test in serious mine
11 accidents of certain persons; requiring alcohol and drug tests
12 on all mine fatalities; requiring applicants for additional
13 certifications to be certified drug free; ensuring substance
14 abuse training; requiring minimum level of alcohol and
15 substance abuse training and proof of being drug and alcohol
16 free for certification; requiring proof of drug and alcohol
17 free for applicants as apprenticeship miner or miner
18 certification; requiring Office of Miners' Health Safety and
19 Training to provide drug testing program for apprentices;
20 providing for cost reimbursement or acceptance of results of
21 certain other drug tests; providing for confidentiality of
22 drug test results and exemption from the West Virginia Freedom
23 of Information Act; allowing for release by consent or
24 compulsion by court order; establishing relevancy to legal

1 claim asserted by applicant; prohibiting use of results in
 2 criminal proceedings against applicant; requiring substance
 3 abuse awareness training for emergency medical services
 4 personnel in mines; providing for severability; and modifying
 5 rights of certain employees to receive indemnity benefits and
 6 common law right to sue where accident proximately caused by
 7 employee's intoxication.

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

9 That §22A-1-1 and §22A-1-31 of the Code of West Virginia,
 10 1931, as amended, be amended and reenacted; that said code be
 11 amended by adding thereto a new article, designated §22A-12-1,
 12 §22A-12-2, §22A-12-3, §22A-12-4, §22A-12-5, §22A-12-6, §22A-12-7,
 13 §22A-12-8, §22A-12-9, §22A-12-10, §22A-12-11, §22A-12-12, §22A-12-
 14 13 and §22A-12-14; and that §23-4-2 of said code be amended and
 15 reenacted, all to read as follows:

16 **CHAPTER 22A. MINERS' HEALTH, SAFETY AND TRAINING.**

17 **ARTICLE 1. OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING;**
 18 **ADMINISTRATION; ENFORCEMENT.**

19 **§22A-1-1. Continuation of the Office of Miners' Health, Safety and**
 20 **Training; purpose.**

21 (a) The Office of Miners' Health, Safety and Training is
 22 continued and is a separate office within the Department of
 23 Commerce, Labor and Environmental Resources. The office shall be
 24 administered, in accordance with the provisions of this article,

1 under the supervision and direction of the Director of the Office
2 of Miners' Health, Safety and Training.

3 (b) The Division of Health, Safety and Training shall have as
4 its purpose the supervision of the execution and enforcement of the
5 provisions of this chapter and, in carrying out the aforesaid
6 purposes, it shall give prime consideration to the protection of
7 the safety and health of persons employed within or at the mines of
8 this state. To further preserve the safety and health of those
9 persons, the Division of Health, Safety and Training shall ensure
10 drug-free workplaces in the mining industry. In addition, the
11 division shall, consistent with the aforesaid prime consideration,
12 protect and preserve mining property and property used in
13 connection therewith.

14 **§22A-1-31. Withdrawal of certification.**

15 (a) *Charge of breach of duty.* -- A mine inspector or the
16 director may charge a mine foreman, assistant mine foreman,
17 fireboss or any other certified person with neglect or failure to
18 perform any duty mandated pursuant to this article or article two
19 of this chapter. The charge shall state the name of the person
20 charged, the duty or duties he or she is alleged to have violated,
21 the approximate date and place so far as is known of the violation
22 of duty, the capacity of the person making the charge, and shall be
23 verified on the basis of information and belief or personal
24 knowledge. The charge is initiated by filing it with the director

1 or with the board of appeals. A copy of any charge filed with the
2 board of appeals or any member thereof, shall be transmitted
3 promptly to the director. The director shall maintain a file of
4 each charge and of all related documents which shall be open to the
5 public.

6 (b) *Evaluation of charge by board of appeals.* -- Within twenty
7 days after receipt of the charge the board shall evaluate the
8 charge and determine whether or not a violation of duty has been
9 stated. In making such a determination the board shall evaluate
10 all documents submitted to it by all persons to determine as nearly
11 as possible the substance of the charge and if the board of appeals
12 is unable to determine the substance of the charge it may request
13 the director to investigate the charge. Upon request, the director
14 shall cause the charge to be investigated and report the results of
15 the investigation to the board of appeals within ten days of the
16 director's receipt of the charge. If the board determines that
17 probable cause exists to support the allegation that the person
18 charged has violated his or her duty, the board by the end of the
19 twenty-day period shall set a date for hearing which date shall be
20 within eighty days of the filing of the charge: Provided, That if
21 a certificate is being suspended or revoked because of a confirmed
22 positive drug test, pursuant to the provisions of article twelve of
23 this chapter, the charged party is entitled to a hearing within
24 twenty days of the filing of the breach of duty charge. Notice of

1 the hearing or notice of denial of the hearing for failure to state
2 a charge and a copy of the charge shall be mailed by certified
3 mail, return receipt requested, to the charging party, the charged
4 party, the director, the representative of the miner or miners
5 affected and to any interested person of record. Thereafter the
6 board shall maintain the file of the charge which shall contain all
7 documents, testimony and other matters filed which shall be open
8 for public inspection.

9 (c) *Hearing.* -- The Board of Appeals shall hold a hearing, may
10 appoint a hearing examiner to take evidence and report to the Board
11 of Appeals within the time allotted, may direct or authorize taking
12 of oral depositions under oath by any participant, or adopt any
13 other method for the gathering of sworn evidence which affords the
14 charging party, the charged party, the director and any interested
15 party of record due process of law and a fair opportunity to
16 present and make a record of evidence. Any member of the board
17 shall have the power to administer oaths. The board may subpoena
18 witnesses and require production of any books, papers, records or
19 other documents relevant or material to the inquiry. The board
20 shall consider all evidence offered in support of the charge and on
21 behalf of the persons so charged at the time and place designated
22 in the notice. Each witness shall be sworn and a transcript shall
23 be made of all evidence presented in any such hearing. No
24 continuance shall be granted except for good cause shown.

1 At the conclusion of the hearing the board shall proceed to
2 determine the case upon consideration of all the evidence offered
3 and shall render a decision containing its findings of fact and
4 conclusions of law. If the board finds by a preponderance of the
5 evidence that the certificate or certificates of the charged person
6 should be suspended or revoked, as hereinafter provided, it shall
7 enter an order to that effect. A confirmed positive drug or
8 alcohol test result in violation of this chapter is good cause to
9 suspend or revoke a certification. No renewal of the certificate
10 shall be granted except as herein provided.

11 (d) *Failure to cooperate.* -- Any person charged who without
12 just cause refuses or fails to appear before the board or cooperate
13 in the investigation or gathering of evidence shall forfeit his or
14 her certificate or certificates for a period to be determined by
15 the board, not to exceed five years, and such certificate or
16 certificates may not be renewed except upon a successful completion
17 of the examination prescribed by the law for mine foremen,
18 assistant mine foremen, firebosses or other certified persons.

19 (e) *Penalties.* -- The board may suspend or revoke the
20 certificate or certificates of a charged party for a minimum of
21 thirty days or more including an indefinite period or may revoke
22 permanently the certificate or certificates of the charged party,
23 as it sees fit, subject to the prescribed penalties and monetary
24 fines imposed elsewhere in this chapter: Provided, That if a

1 certificate is suspended or revoked pursuant to article twelve of
2 this chapter, the charged party may not reapply for certification
3 until at least three months have passed since the suspension or
4 revocation: Provided, however, That the charged party must provide
5 documentation of having successfully completed a substance abuse
6 program and the charged party has tested drug and alcohol free,
7 which test must be performed within thirty days of reapplication
8 for certification.

9 (f) *Integrity of penalties imposed.* -- No person whose
10 certification is suspended or revoked under this provision can
11 perform any duties under any other certification issued under this
12 chapter, during the period of the suspension imposed herein.

13 (g) Any party adversely affected by a final order or decision
14 issued by the board hereunder is entitled to judicial review
15 thereof pursuant to section four, article five, chapter twenty-
16 nine-a of this code.

17 **ARTICLE 12. DRUG-FREE WORKPLACES IN WEST VIRGINIA MINES.**

18 **§22A-12-1. Legislative findings, purposes and intent.**

19 The Legislature hereby finds and declares:

20 (a) That the Supreme Court of Appeals of West Virginia
21 recognized that the drug testing of employees will not violate
22 public policy grounded in the potential intrusion of a person's
23 right to privacy where it is conducted by an employer based upon a
24 reasonable good faith objective suspicion of an employee's drug

1 usage, where an employee's job responsibility involves public
2 safety or the safety of others; and in preemployment/post-offer
3 testing of new hires;

4 (b) That according to the 2002 National Survey on Drug Use and
5 Health (NSDUH) conducted by the Federal Department of Health and
6 Human Services - Substance Abuse and Mental Health Services
7 Administration (HHS-SAMSHA), the following findings were made
8 regarding drug and alcohol abuse in the workplace: Eight point
9 nine percent of the population aged twelve or older were current
10 illicit drug users; that one third of the persons who reported
11 using marijuana reported that they had used it on twenty or more
12 days in the past month; that almost three percent of the population
13 were nonmedical users of cocaine, hallucinogens and
14 psychotherapeutic drugs; that of the illicit drug users aged
15 eighteen or older in 2002, seventy-four point six percent were
16 employed; that nineteen percent of the national workforce who died
17 on the job, who were drug or alcohol tested, tested positive for
18 drugs or alcohol at the time of their death; that the highest
19 percentage of workers reporting alcohol and drug abuse were in the
20 mining and construction industries, with fifteen point seven
21 percent of that sector reporting heavy alcohol use in the past
22 month at the time of the survey and twelve point three percent
23 reporting that they had used illicit drugs in the month preceding
24 the survey;

1 (c) That employees in the mining industry have job
2 responsibilities involving their own safety and the safety of their
3 fellow miners and that all of West Virginia's miners deserve a
4 drug-free workplace;

5 (d) That many mine operators recognize that the use of illegal
6 drugs and being under the influence of alcohol while working in the
7 mining industry represents a serious threat to the health and
8 safety of all miners;

9 (e) That many mine operators in West Virginia have taken steps
10 to improve mine safety at their particular mines by establishing
11 drug testing programs to ensure that miners are able to perform
12 their jobs free from the influence of illegal drugs or being under
13 the influence of alcohol while working and that persons who have
14 tested positive for illegal drugs and have been discharged are able
15 to simply begin working for another employer, thereby endangering
16 the safety of persons at their new place of employment; and

17 (f) That instituting drug-free workplace programs in
18 coordination with the Office of Miners' Health, Safety and Training
19 and its licensing and certification powers, will help ensure a
20 safer workplace for all miners in West Virginia.

21 **§22A-12-2. Additional powers of the Office of Miners' Health,**
22 **Safety and Training.**

23 (a) In addition to the other powers provided in this chapter,
24 the Director of the Office of Miners' Health, Safety and Training

1 is hereby authorized to:

2 (1) Require the implementation of drug-free workplace programs
3 as provided in this article; and

4 (2) Assess a reasonable fee of all persons seeking
5 certification pursuant to the provisions of this chapter which fee
6 shall be used solely to pay for the costs of administering the
7 drug-free workplace provisions provided herein. The director shall
8 annually set the amount of such fee.

9 **§22A-12-3. Definitions.**

10 The following definitions apply to the provisions of this
11 article:

12 (a) "Alcohol" means ethyl alcohol, ethanol, hydrated oxide of
13 ethyl or spirits of wine, from whatever source or by whatever
14 process produced.

15 (b) "Drug and Alcohol Free" means testing negative on any
16 certified drug and alcohol test, which shall be in accordance with
17 subsection (d) of this section.

18 (c) "Discharge for positive drug or alcohol test" means the
19 good faith discharge or termination from employment of an employee
20 who tests positive on a confirmed substance abuse test, refuses to
21 take a test or adulterates a specimen for testing under a drug-free
22 workplace program.

23 (d) "Drug and alcohol testing" means any screen for drugs
24 which includes, at a minimum: Alcohol, amphetamines, cannabinoids

1 (THC), cocaine, opiates and phencyclidine. Employers may use
2 additional drug screens. All specimens must be certified by a
3 Substance Abuse and Mental Health Services Administration (SAMHSA)
4 or Federal Department of Transportation (DOT)certified lab and
5 threshold detection levels of drugs and alcohol shall be in
6 accordance with SAMHSA or College of American Pathologists-Forensic
7 Urine Drug Testing (CAP-FUDT) guidelines.

8 (e) "Drug-free Workplace Program" is a private employer
9 program which includes written policies prohibiting safety
10 sensitive employees working in, on or around coal mines to be under
11 the influence of illegal drugs or alcohol at work and which
12 requires substance abuse testing and employee confidentiality
13 provisions. Testing of employees under this program shall be at
14 the expense of the employer.

15 (f) "Illegal drugs" means amphetamines, barbituric acid,
16 lysergic acid, diethylamide, cannabinoids, cocaine, phencyclidine
17 (PCP), methadone, methaqualone, opiates, barbituates,
18 benzodiazepines propoxyphene or a metabolite of any of these
19 substances or any other substance which is unlawful under the
20 Controlled Substances Act and has not been prescribed by the
21 employee's treating physician or is present in excess of
22 therapeutic level.

23 (g) "Medical Review Officer" means a licensed physician
24 trained in the field of alcohol and drug testing who provides

1 medical assessment of positive test results, requests reanalysis if
2 necessary and makes a determination whether or not alcohol or
3 illegal drugs use has occurred based on the test specimen and
4 applying the Substance Abuse and Mental Health Services
5 Administration's (SAMSHA) Medical Review Officer Manual and the
6 Mandatory Guidelines for Federal Workplace Drug Testing Programs
7 (69 F.R. 19653 et seq.), DOT or CAP-FUDD guidelines.

8 (h) "Safety Sensitive" means: (1) Any position in a mining
9 operation where that person's impaired performance may, directly or
10 indirectly, result in an incident affecting the health and safety
11 of the employees, coworkers, customers, customer employees, the
12 public or damage to property or the environment, including, but not
13 limited to, those positions, the duties of which require the
14 employee, regularly or from time to time, to be in an area of a
15 mine or other facility containing operating or mechanical equipment
16 where the employee's actions or failure to act could result in such
17 incident; or (2) those positions which include responsibility for
18 the engineering, inspection, construction, operation or maintenance
19 of equipment/machinery or employee safety where the employee's
20 actions or failure to act could result in such incident; or (3)
21 executive, managerial or supervisory positions with direct or
22 indirect supervision of employees who would be considered safety-
23 sensitive under this policy.

24 (i) "Substance abuse" is the use of illegal drugs or being

1 under the influence of alcohol while at work with a blood alcohol
2 concentration of four tenths of one percent or greater.

3 (j) "Testing positive" means a drug or alcohol test result
4 from a SAMHSA or DOT certified lab at threshold detection levels or
5 greater as set forth in the SAMHSA, DOT or CAP-FUDT guidelines,
6 referred to in this article.

7 **§22A-12-4. Drug-free workplace programs.**

8 (a) All mine operators shall create drug-free workplace
9 programs covering all employees in safety-sensitive positions;

10 (b) All companies providing safety-sensitive services to mine
11 operators shall create drug-free workplace programs covering all of
12 their employees who perform safety-sensitive work for a mine
13 operation;

14 (c) Any mine operator whose worksite has specific safety
15 hazards necessarily encountered by employees traveling on mine
16 property, may, at its option and as a business necessity, create
17 drug-free workplace programs covering all employees, consistent
18 with drug and alcohol testing allowed under the Americans With
19 Disabilities Act.

20 (d) Employers who implement drug-free workplace programs under
21 this article cannot be sued for the good faith discharge of an
22 employee whose confirmed drug test is positive for drugs or alcohol
23 while working in, on or around coal mines in West Virginia, or who
24 discharge for an employee's refusal to take a test or where there

1 is evidence of an adulterated specimen. Notwithstanding any other
2 provision in this code to the contrary, the Board of Appeals does
3 not have the authority to reinstate a discharged employee to a
4 previously held private sector job, where that discharge was the
5 result of a confirmed positive drug or alcohol test.

6 **§22A-12-5. Positive drug tests as breach of duty.**

7 (a) Breach of duty -- If a mine foreman, assistant mine
8 foreman, fireboss or any other person certified under this chapter
9 undergoes a drug test administered by his or her employer, where
10 there is a confirmed positive illegal drug test result as defined
11 in subsections (d) and (f), section three of this article or for a
12 blood alcohol concentration of four tenths of a percent or greater
13 while working or an employee refuses a test or there is evidence of
14 an adulterated specimen, it is hereby deemed a breach of duty:
15 Provided, That for the purposes of this section, any drug test
16 administered by an operator shall be administered in accordance
17 with the provisions of subsection (d), section three of this
18 article and be performed pursuant to a drug free workplace program
19 as defined in subsection (e) of section three of this article.

20 (b) Charge of breach of duty -- Upon receipt of a confirmed
21 positive drug test result, a refusal to take a test or evidence of
22 an adulterated specimen the operator or employer shall report such
23 information to the director within seven days, who shall promptly
24 file a charge of breach of duty with the board of appeals. The

1 director shall maintain a file of each charge and of all related
2 documents which shall be open to medical review officers. The
3 Board of Appeals shall evaluate a charge filed under this section
4 and conduct a hearing in accordance with the requirements and
5 guarantees of section thirty-one, article eight of this chapter.
6 A confirmed positive test for illegal drugs or an alcohol test
7 showing a blood alcohol concentration of four tenths of a percent
8 or greater while working, the refusal to take a drug test or the
9 adulteration of a specimen are all good cause to suspend or revoke
10 a certification.

11 **§22A-12-6. Drug testing in connection with mine accidents.**

12 (a) The Office of Miners' Health, Safety and Training may
13 require drug and alcohol testing of persons who are or have been on
14 mine property to determine whether the presence of alcohol or
15 illegal drugs are a potential contributing factor in any mine
16 accident in which serious physical injury or loss of life occurs.
17 Any accident reportable under section sixty-six, article two of
18 this chapter shall be a mine accident for which the Office of
19 Miners' Health, Safety and Training may require such drug and
20 alcohol testing.

21 (b) The director or his or her designee may order testing of
22 all persons who: (1) Were working in the immediate area of the
23 accident; or (2) in the judgment of the director or his or her
24 designee, may reasonably have contributed to or witnessed the

1 accident or fatality.

2 (c) The post-accident testing permitted by this section shall:

3 (1) Meet all guidelines set forth in subsections (d) and (f),

4 section three of this article; (2) be paid for by either the

5 employer or the Office of Miners' Health, Safety and Training; and

6 (3) be performed on samples obtained within eight hours of the

7 accident.

8 (d) Any confirmed positive test results required by this

9 section shall be provided to the employer of the person tested

10 under this section.

11 (e) Alcohol and an eleven-panel drug testing shall be

12 performed on victims when death occurs on mine property. The

13 testing pursuant to this subsection may be performed on specimens

14 of either blood, saliva, or other appropriate bodily fluids and in

15 accordance with the provisions of subsections (d) and (f), section

16 three of this article. Confirmed positive test results shall be

17 provided to the employer of any victim tested pursuant to this

18 section.

19 **§22A-12-7. Additional requirements for certification.**

20 (a) In addition to the requirements contained in article eight

21 of this chapter, the Board of Miner Training, Education and

22 Certification shall require all miners in training and current

23 miners, whether surface or underground, and all safety-sensitive

24 persons regularly working in or around coal mines, to be certified

1 free from the use of alcohol or illegal drugs while working.

2 (b) The board shall ensure that substance abuse training and
3 education, including an explanation of an employer's drug-free
4 workplace program, be required as part of the certified miner's
5 annual retraining conducted in a class room after August 1, 2011:
6 Provided, That this requirement shall not apply to certified
7 persons who received the one hour initial substance abuse training
8 and education as part of their eighty-hour new miner training. In
9 addition to the training required of all certified miners,
10 supervisory personnel shall be required to receive additional
11 alcohol and substance abuse awareness training annually to include
12 information regarding the signs of being under the influence of
13 drugs or alcohol and their employer's drug-free workplace program.

14 **§22A-12-8. Drug-free status required for certification.**

15 In addition to any other requirements for certification
16 imposed by the provisions of article eight of this chapter, any
17 applicant for a permit of apprenticeship-underground miner, a
18 permit of apprenticeship-surface miner or a certificate of
19 competency and qualification pursuant to sections three, four and
20 six of this article, shall submit proof of his or her drug-free
21 status and undergo at least one hour of classroom training
22 dedicated to alcohol and substance abuse training.

23 **§22A-12-9. Office of Miners' Health, Safety and Training Drug**

24 **Testing Program.**

1 (a) The office shall provide a drug testing program for all
2 applicants for a permit of apprenticeship-underground miner, a
3 permit of apprenticeship-surface miner, a certificate of competency
4 and qualification, and certification as a mine foreman or fireboss.

5 (b) The minimum testing protocol for any test administered
6 under the drug testing program shall be an 11 panel urine test that
7 shall test for the following substances: Amphetamines,
8 cannabanoids/THC, cocaine, opiates, phencyclidine (PCP),
9 benzodiazepines, propoxyphene, methaqualone, methadone,
10 barbiturates, and synthetic narcotics and for blood alcohol
11 concentration at four tenths of a percent or greater.

12 (c) All drug tests shall be administered in accordance with
13 the standards, procedures and protocols for collection and testing
14 as referred to in subsection (d) of this section.

15 (d) The results of any drug test shall be evaluated by a
16 medical review officer in accordance with the requirement and
17 procedures set forth in the Substance Abuse and Mental Health
18 Services Administration's Medical Review Officer Manual and the
19 Mandatory Guidelines for Federal Workplace Drug Testing Programs.
20 (69 F.R. 19653 et seq.)

21 (e) The office may contract with private entities to
22 administer the required drug tests: *Provided*, That any testing
23 administered by such a company must meet the minimum requirements
24 of subsection (d), section three of this article.

1 (f) The costs of any drug test administered by the office
2 shall be paid for by the applicant: *Provided*, That any fees
3 charged by the office shall not exceed the office's actual cost of
4 collection, analysis and evaluation: *Provided, however*, That if an
5 applicant is granted certification and subsequently obtains
6 employment by an operator or if that certified miner applies and
7 receives an additional certification, the applicant's employer
8 shall reimburse the applicant for the cost of one drug test per
9 certification obtained herein.

10 **§22A-12-10. Other drug testing programs.**

11 The director may accept the results of a drug test from
12 entities other than those retained by the office under the
13 following conditions:

14 (a) The applicant shall submit a written request to the
15 director for the acceptance of the results of a drug test that has
16 been administered within the thirty days immediately preceding the
17 request;

18 (b) The test shall be administered by a laboratory certified
19 in accordance with this provision referred to subsection three (d)
20 of this article; and

21 (c) The test shall meet the minimum requirements set forth in
22 subsections (b), (c) and (d), section nine of this article.

23 **§22A-12-11. Results; retesting; appeal.**

24 (a) The results of a drug test administered by the Office of

1 Miners' Safety and Training shall be provided to the applicant at
2 the time that the office notifies the applicant of the granting or
3 refusal of the application.

4 (b) Any application for a permit of apprenticeship-underground
5 miner; a permit of apprenticeship-surface miner, a certificate of
6 competency and qualification, or certification as a mine foreman or
7 fireboss shall be refused if any one of the following conditions
8 occur:

9 (1) The applicant's positive drug tests, as defined in
10 subsections (d) and (f), section three of this article are deemed
11 to fail by a medical review officer;

12 (2) The applicant's drug test results demonstrate the
13 submission of an adulterated specimen; or

14 (3) The applicant refuses to submit to a drug test as required
15 by section nine of this article.

16 (c) Any applicant who is refused a permit of apprenticeship or
17 certification due to the results of his or her drug test may
18 request a second test, to be administered at the applicant's
19 expense, by submitting a written request to the director within ten
20 days of receiving the results of the initial drug test: *Provided,*
21 That any applicant that is refused a permit of apprenticeship or
22 certification due to the results of a second drug test may not
23 reapply for a permit of apprenticeship or certification until at
24 least three months have passed since the initial refusal, the

1 applicant has successfully completed a substance abuse program and
2 has submitted proof of his or her drug-free status in accordance
3 with the provisions of this article.

4 (d) Any applicant aggrieved by an action of the director in
5 failing or refusing to issue a certificate of qualification and
6 competency may, within ten-days' notice of the action complained
7 of, appeal to the director pursuant to the provisions of section
8 seven of this article.

9 **§22A-12-12. Confidentiality of results.**

10 (a) Records of drug or alcohol test results, written or
11 otherwise, received by the Office of Miners' Health, Safety and
12 Training, its contractors, subcontractors, or other employees are
13 confidential communications and exempt from disclosure under
14 article one of chapter twenty-nine-b of this code except as
15 follows:

16 (1) Where release of the information is authorized solely
17 pursuant to a written consent form signed voluntarily by the person
18 tested, the consent form shall contain the following: (A) The name
19 of the person who is authorized to obtain the information; (B) the
20 purpose of the disclosure; (C) the precise information to be
21 disclosed; (D) the duration of the consent; and (E) the signature
22 of the person authorizing the release of the information; or

23 (2) Where the release of the information is compelled by a
24 hearing officer or court of competent jurisdiction pursuant to an

1 appeal taken under section nine, article one, chapter twenty-two-b
2 of this code;

3 (3) Where release of the information is relevant to a legal
4 claim asserted by the applicant;

5 (4) Where the information is used by the entity conducting
6 drug or alcohol testing when consulting with legal counsel in
7 connection with matters brought under or related to section one,
8 article two-b, chapter twenty-two-a, et seq. of this code; or in
9 its defense of civil or administrative actions related to the
10 testing or results; or

11 (5) Where release of the information is deemed appropriate by
12 the Office of Miners' Health, Safety and Training or a court of
13 competent jurisdiction in disciplinary proceeding brought under the
14 terms of section five of this article.

15 (b) Information on positive illegal drug and alcohol test
16 results for tests administered pursuant to this article shall not
17 be released or used in any criminal proceeding against the
18 applicant.

19 **§22A-12-13. Additional training of emergency personnel in coal**
20 **mines.**

21 Notwithstanding any provision to the contrary, the training of
22 the emergency medical services personnel employed at certain mines
23 pursuant to the provisions of article ten of this chapter must also
24 include substance abuse training as well as alcohol and substance

1 abuse awareness training to assist such personnel in the ready
 2 identification of the symptoms of intoxication.

3 **§22A-12-14. Severability.**

4 If any provision of this article or application thereof to any
 5 person or circumstance is held invalid, the invalidity does not
 6 effect other provisions or applications of the article which can be
 7 given effect without the invalid provision or application, and to
 8 this end the provisions of this article are severable.

9 **CHAPTER 23. WORKERS' COMPENSATION.**

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

11 **§23-4-2. Disbursement where injury is self-inflicted or**
 12 **intentionally caused by employer; legislative**
 13 **declarations and findings; "deliberate intention"**
 14 **defined.**

15 (a) Notwithstanding anything contained in this chapter, no
 16 employee or dependent of any employee is entitled to receive any
 17 sum from the Workers' Compensation Fund, from a self-insured
 18 employer or otherwise under the provisions of this chapter on
 19 account of any personal injury to or death to any employee caused
 20 by a self-inflicted injury or the intoxication of the employee.
 21 Employees who work for an employer and who are covered by a drug-
 22 free workplace program implemented under the state's mine safety
 23 laws under chapter twenty-two-a and who test positive for drugs or
 24 alcohol following a work related accident shall be presumed to be

1 intoxicated. These employees testing positive for drugs and
2 alcohol and who are therefore intoxicated at the time of the work
3 related accident shall lose their right to receive indemnity
4 benefits from the Workers' Compensation Program and any common law
5 rights to sue the employer for damages where the accident was
6 proximately caused by the employee's intoxication: *Provided, That*
7 such injured employees shall remain eligible for payment of medical
8 benefits for the treatment of any injuries incurred on the job,
9 regardless of testing positive for drugs or alcohol.

10 Upon the occurrence of an injury which the employee asserts,
11 or which reasonably appears to have, occurred in the course of and
12 resulting from the employee's employment, the employer may require
13 the employee to undergo a blood test for the purpose of determining
14 the existence or nonexistence of evidence of intoxication pursuant
15 to rules for the administration of the test promulgated by the
16 board of managers: *Provided, That* the employer must have a
17 reasonable and good faith objective suspicion of the employee's
18 intoxication and may only test for the purpose of determining
19 whether the person is intoxicated.

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

24 (c) If injury or death result to any employee from the

1 deliberate intention of his or her employer to produce the injury
2 or death, the employee, the widow, widower, child or dependent of
3 the employee has the privilege to take under this chapter and has
4 a cause of action against the employer, as if this chapter had not
5 been enacted, for any excess of damages over the amount received or
6 receivable in a claim for benefits under this chapter, whether
7 filed or not.

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

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

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

12 (i) It is proved that the employer or person against whom
13 liability is asserted acted with a consciously, subjectively and
14 deliberately formed intention to produce the specific result of
15 injury or death to an employee. This standard requires a showing
16 of an actual, specific intent and may not be satisfied by
17 allegation or proof of: (A) Conduct which produces a result that
18 was not specifically intended; (B) conduct which constitutes
19 negligence, no matter how gross or aggravated; or (C) willful,
20 wanton or reckless misconduct; or

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

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

4 (B) That the employer, prior to the injury, had actual
5 knowledge of the existence of the specific unsafe working condition
6 and of the high degree of risk and the strong probability of
7 serious injury or death presented by the specific unsafe working
8 condition;

9 (C) That the specific unsafe working condition was a violation
10 of a state or federal safety statute, rule or regulation, whether
11 cited or not, or of a commonly accepted and well-known safety
12 standard within the industry or business of the employer, as
13 demonstrated by competent evidence of written standards or
14 guidelines which reflect a consensus safety standard in the
15 industry or business, which statute, rule, regulation or standard
16 was specifically applicable to the particular work and working
17 condition involved, as contrasted with a statute, rule, regulation
18 or standard generally requiring safe workplaces, equipment or
19 working conditions;

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

24 (E) That the employee exposed suffered serious compensable

1 injury or compensable death as defined in section one, article
2 four, chapter twenty-three, whether a claim for benefits under this
3 chapter is filed or not as a direct and proximate result of the
4 specific unsafe working condition.

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

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

9 (B) Notwithstanding any other provision of law or rule to the
10 contrary, and consistent with the legislative findings of intent to
11 promote prompt judicial resolution of issues of immunity from
12 litigation under this chapter, the court shall dismiss the action
13 upon motion for summary judgment if it finds, pursuant to rule 56
14 of the rules of civil procedure that one or more of the facts
15 required to be proved by the provisions of subparagraphs (A)
16 through (E), inclusive, paragraph (ii) of this subdivision do not
17 exist, and the court shall dismiss the action upon a timely motion
18 for a directed verdict against the plaintiff if after considering
19 all the evidence and every inference legitimately and reasonably
20 raised thereby most favorably to the plaintiff, the court
21 determines that there is not sufficient evidence to find each and
22 every one of the facts required to be proven by the provisions of
23 subparagraphs (A) through (E), inclusive, paragraph (ii) of this
24 subdivision; and

1 (C) The provisions of this paragraph and of each subparagraph
2 thereof are severable from the provisions of each other
3 subparagraph, subsection, section, article or chapter of this code
4 so that if any provision of a subparagraph of this paragraph is
5 held void, the remaining provisions of this act and this code
6 remain valid.

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

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

NOTE: The purpose of this bill is to expand the number of mine employees who may be tested for drug or alcohol abuse by requiring all mine operators to create drug-free workplace programs applicable to safety-sensitive employees on mine property. Safety sensitive employees are defined to include engineering and certain operational staff. It would also require vendors providing such employees to implement the same program. The bill also allows employers who discharge employees who test positive to be immune from wrongful discharge lawsuits. The bill requires the suspension of mining certifications for positive confirmed drug tests and provides a mechanism for the reinstatement of certificates upon meeting minimum requirements of being drug free. In addition, the bill proposes minimum drug and alcohol awareness educational requirements for miners and emergency services personnel in mines. The bill also provides that employees who test positive lose the right to receive indemnity benefits and common law right to sue.

§22A-12 is new; therefore, it has been completely underscored.

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