

1 **H. B. 4479**

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3 (By Delegates Craig, Michael, Andes and Hartman)

4 [Introduced February 9, 2012; referred to the

5 Committee on Energy, Industry and Labor, Economic Development and  
6 Small Business then the Judiciary.]

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10 A BILL to amend and reenact §23-4-2 of the Code of West Virginia,  
11 1931, as amended, relating to disbursement where injury is  
12 self-inflicted or intentionally caused by the employer.

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

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

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

17 **§23-4-2. Disbursement where injury is self-inflicted or**  
18 **intentionally caused by employer; legislative**  
19 **declarations and findings; "deliberate intention"**  
20 **defined.**

21 (a) Notwithstanding anything contained in this chapter, no  
22 employee or dependent of any employee is entitled to receive any  
23 sum from the Workers' Compensation Fund, from a self-insured

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

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

23 (2) If the test results indicate that there was either on or  
24 off the job use of a nonprescribed controlled substance as defined

1 in the West Virginia Uniform Controlled Substance Act, West  
2 Virginia Code §60A-2-201, et seq., Scheduled I, II, III, IV and V.

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

7 (b) The following definitions apply to this section:

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

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

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

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

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

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

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

24 (7) "Excess damages" recoverable over amounts received or

1 receivable under this chapter are:

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

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

23       In no event may the recovery under (A) or (B) for noneconomic  
24 losses exceed \$250,000 or an amount that is equal to three times

1 the amount of economic loss, whichever is less.

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

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

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

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

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

3 (d) (1) It is declared that enactment of this chapter and the  
4 establishment of the workers' compensation system in this chapter  
5 was and is intended to remove from the common law tort system all  
6 disputes between or among employers and employees regarding the  
7 compensation to be received for injury or death to an employee  
8 except as expressly provided in this chapter and to establish a  
9 system which compensates even though the injury or death of an  
10 employee may be caused by his or her own fault or the fault of a  
11 coemployee; that the immunity established in sections six and six-  
12 a, article two of this chapter is an essential aspect of this  
13 workers' compensation system; that the intent of the Legislature in  
14 providing immunity from common lawsuit was and is to protect those  
15 immunized from litigation outside the workers' compensation system  
16 except as expressly provided in this chapter; that, in enacting the  
17 immunity provisions of this chapter, the Legislature intended to  
18 create a legislative standard for loss of that immunity of more  
19 narrow application and containing more specific mandatory elements  
20 than the common law tort system concept and standard of willful,  
21 wanton and reckless misconduct; and that it was and is the  
22 legislative intent to promote prompt judicial resolution of the  
23 question of whether a suit prosecuted under the asserted authority  
24 of this section is or is not prohibited by the immunity granted

1 under this chapter.

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

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

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

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

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



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

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

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

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

1 conditions;

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

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

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

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

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

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

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

8 In the event the employee or other person entitled to recover  
9 under this section asserts claims against parties other than the  
10 employer for a compensable injury or compensable death claimed to  
11 be caused by "deliberate intention" and such employee or other  
12 person entitled to recover under this section prevails against the  
13 employer and the nonemployer party or parties or settles with the  
14 employer, then such nonemployer party or parties shall be entitled  
15 to the same offset for amounts received or amounts receivable under  
16 this chapter for the injury or death as the employer. A settlement  
17 by the employee or other person entitled to recover under this  
18 section with the employer shall not affect the nonemployer  
19 defendants' entitlement to this offset and the nonemployer  
20 defendant shall, in addition, be entitled to an offset for any  
21 settlement amount paid by the employer. Any subrogation amount  
22 recoverable by the self-insured employer or workers' compensation  
23 insurer from the employee pursuant to West Virginia Code §23-2A-1  
24 shall be deducted from the nonemployer defendants' total offset.

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.~~     Where the injured or deceased employee is a  
7 supervisor or member of management of the employer, no recovery may  
8 be had by the employee or other person entitled to recover under  
9 this section unless the employee or other person entitled to  
10 recover under this section satisfies the subparagraphs  
11 (d) (2) (ii) (B) and (D) as to supervisors of injured or deceased  
12 employees or members of management superior to the injured or  
13 deceased employee.

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

19       ~~(f) The amendments to this section enacted during the 2005~~  
20 ~~session of the Legislature shall apply to all injuries occurring~~  
21 ~~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.