

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 685

By Senator Smith

[Introduced February 20, 2023; referred
to the Committee on the Judiciary]

1 A BILL 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 three new sections, designated §23-4-2a, §23-4-2b,
 3 and §23-4-2c, all relating to the deliberate intent exception to the immunities provided
 4 under Workers Compensation by clarifying the definition of employee; removing
 5 occupational pneumoconiosis as a covered injury pursuant to this section; requiring
 6 bifurcation of discovery upon request of the defendant; establishing a limit on
 7 noneconomic loss; accounting for collateral source payments for the same injury; and
 8 setting a limit on fees and costs recoverable by attorney for the claimant or dependent.

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 for
 9 the purpose of determining whether the person is intoxicated. If any blood test for intoxication is
 10 given following an accident, at the request of the employer or otherwise, and if any of the following
 11 are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the
 12 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 employee's

15 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, supervisors and managers who are responsible for
20 providing safe working conditions and whose job duties include eliminating or ameliorating that
21 condition giving rise to liability are not employees.

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

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

37 ~~(d)~~(e)(1) It is declared that enactment of this chapter and the establishment of the workers'
38 compensation system in this chapter was and is intended to remove from the common law tort
39 system all disputes between or among employers and employees regarding the compensation to
40 be received for injury or death to an employee except as expressly provided in this chapter and to

41 establish a system which compensates even though the injury or death of an employee may be
42 caused by his or her own fault or the fault of a co-employee; that the immunity established in
43 sections six and six-a, article two of this chapter is an essential aspect of this workers'
44 compensation system; that the intent of the Legislature in providing immunity from common
45 lawsuit was and is to protect those immunized from litigation outside the workers' compensation
46 system except as expressly provided in this chapter; that, in enacting the immunity provisions of
47 this chapter, the Legislature intended to create a legislative standard for loss of that immunity of
48 more narrow application and containing more specific mandatory elements than the common law
49 tort system concept and standard of willful, wanton and reckless misconduct; and that it was and is
50 the legislative intent to promote prompt judicial resolution of the question of whether a suit
51 prosecuted under the asserted authority of this section is or is not prohibited by the immunity
52 granted under this chapter.

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

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

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

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

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

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

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

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

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

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

93 and the Emergency Medical Response Personnel have followed the Rules that have been
94 promulgated by the Fire Commission.

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

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

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

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

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

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

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

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

116 (b) Is a personal injury which causes permanent serious disfigurement, causes permanent
117 loss or significant impairment of function of any bodily organ or system, or results in objectively
118 verifiable bilateral or multi-level dermatomal radiculopathy; and is not a physical injury that has no

119 objective medical evidence to support a diagnosis; or

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

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

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

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

143 (i) The employee, the employee's guardian or conservator, or the representative of the
144 employee's estate shall serve with the complaint a verified statement from a person with

145 knowledge and expertise of the workplace safety statutes, rules, regulations and consensus
146 industry safety standards specifically applicable to the industry and workplace involved in the
147 employee's injury, setting forth opinions and information on:

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

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

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

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

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

171 there is not sufficient evidence to find each and every one of the facts required to be proven by the
172 provisions of subparagraphs (i) through (v), inclusive, paragraph (B) of this subdivision; 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)~~(f) Any cause of action brought pursuant to this section shall be brought either in the
178 circuit court of the county in which the alleged injury occurred or the circuit court of the county of
179 the employer's principal place of business. With respect to causes of action arising under this
180 chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue
181 provisions of any other West Virginia statute or rule.

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

185 ~~(g)~~(h) 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 \$250,000 for each occurrence,
3 regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death,
4 regardless of the number of distributees.

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

9 (c) This section shall become effective on July 1, 2023.

§23-4-2b. Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury.

1 (a) In any action arising after the effective date of this section, a defendant who has been
2 found liable to the plaintiff for damages for medical care, rehabilitation services, lost earnings or
3 other economic losses may present to the court, after the trier of fact has rendered a verdict, but
4 before entry of judgment, evidence of payments the plaintiff has received for the same injury from
5 collateral sources.

6 (b) In a hearing held pursuant to subsection (a) of this section, the defendant may present
7 evidence of future payments from collateral sources if the court determines that:

8 (1) There is a preexisting contractual or statutory obligation on the collateral source to pay
9 the benefits;

10 (2) The benefits, to a reasonable degree of certainty, will be paid to the plaintiff for
11 expenses the trier of fact has determined the plaintiff will incur in the future; and

12 (3) The amount of the future expenses is readily reducible to a sum certain.

13 (c) In a hearing held pursuant to subsection (a) of this section, the plaintiff may present
14 evidence of the value of payments or contributions he or she has made to secure the right to the
15 benefits paid by the collateral source.

16 (d) After hearing the evidence presented by the parties, the court shall make the following
17 findings of fact:

18 (1) The total amount of damages for economic loss found by the trier of fact;

19 (2) The total amount of damages for each category of economic loss found by the trier of
20 fact;

21 (3) The total amount of allowable collateral source payments received or to be received by
22 the plaintiff for the medical injury which was the subject of the verdict in each category of economic
23 loss; and

24 (4) The total amount of any premiums or contributions paid by the plaintiff in exchange for

25 the collateral source payments in each category of economic loss found by the trier of fact.

26 (e) The court shall subtract the total premiums the plaintiff was found to have paid in each
27 category of economic loss from the total collateral source benefits the plaintiff received with regard
28 to that category of economic loss to arrive at the net amount of collateral source payments.

29 (f) The court shall then subtract the net amount of collateral source payments received or
30 to be received by the plaintiff in each category of economic loss from the total amount of damages
31 awarded the plaintiff by the trier of fact for that category of economic loss to arrive at the adjusted
32 verdict.

33 (g) The court may not reduce the verdict rendered by the trier of fact in any category of
34 economic loss to reflect:

35 (1) Amounts paid to or on behalf of the plaintiff which the collateral source has a right to
36 recover from the plaintiff through subrogation, lien or reimbursement;

37 (2) Amounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a
38 collateral source in a category of economic loss;

39 (3) The proceeds of any individual disability or income replacement insurance paid for
40 entirely by the plaintiff;

41 (4) The assets of the plaintiff or the members of the plaintiff's immediate family; or

42 (5) A settlement between the plaintiff and another tortfeasor.

43 (h) After determining the amount of the adjusted verdict, the court shall enter judgment in
44 accordance with the provisions of section nine of this article.

45 (i) This section becomes effective on July 1, 2023.

§23-4-2c. Fees of attorney for claimant; unlawful charging or receiving of attorney fees;
effective until June 30, 2022.

1 (a) An attorney's fee in excess of 20 percent of any award granted may not be charged or
2 received by an attorney for a claimant or dependent.

3 (b) Where an attorney has been awarded attorney's fees and costs in a deliberate intention

4 suit under §23-4-2 of this code, that attorney’s fee shall be capped under the provisions of §23-4-
5 2b(a) of this code, and the attorney’s costs for travel, transportation, meals, and other incidental
6 charges, shall be capped at the maximum allowable rate set for Federal employees for such costs
7 as established by the travel rules prescribed for such employees by the U.S. General Services
8 Administration in the relevant year.

9 (c) This section becomes effective on July 1, 2023.

NOTE: The purpose of this bill is to amend the deliberate intent statute to limit noneconomic damages to \$250,000, remove occupational pneumoconiosis from compensable injuries under deliberate intent, require bifurcation to enhance speedy resolution of non-meritorious claims, and to cap attorneys fees to the same amount allowable under the other portions of Chapter 23.

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