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March 6, 2023

Via Email: chamilton@wvcoal.com

Chris Hamilton
P.O. Box 3923
Charleston, WV 25339

Re: Analysis of Proposed Changes to Deliberate Intent

Dear Chris:

The following is an analysis of the most recent proposed changes to the deliberate intent statute as they relate to the coal industry. The proposed changes which will most affect the coal industry are the proposed addition of Section 23-4-2a, imposing a cap on non-economic loss, and the modification to Section 23-4-2(d)(2)(B)(v)(IV) relating to occupational pneumoconiosis.

A. Economic Loss

As proposed, the legislation caps the non-economic loss at \$500,000 or twice the special damages, whichever is greater. While this is clearly not a definitive cap and not as strong as the original proposal, it does provide some protection in cases where the special damages are low. Examples of these cases include injuries involving relatively low wage earners and cases involving fatal injuries to older workers. While the cap will be relatively high in cases involving significant or fatal injuries to younger, high wage-earning individuals, it will still provide an upper limit on a potential verdict. This will provide at least a measure of predictability and provide a ceiling from which any pre-trial resolution can be negotiated.

The most significant benefit to this section will be in cases involving significant pain and suffering prior to death. Examples of these cases include significant burns, entrapment prior to death, and other significant injuries where the victim experiences pain and suffering prior to death and/or is aware his impending death. These cases have historically exposed the employer to substantial general damages verdicts and have resulted in large pre-suit settlements. The damages in these cases will be significantly limited by this provision.

B. Occupational Pneumoconiosis

While there may not be many deliberate intent cases pending against the industry as a result of a diagnoses of occupational pneumoconiosis, the proposed modification provides an important protection against future litigation. It is not uncommon for miners with substantial lung impairment to file suit against respirator manufacturers or manufacturers of scrubbers installed on continuous miners. There is a potential for coal operators to be named in future cases. This provision requires that, in order to prevail against an employer, a miner must prove that the employer fraudulently concealed or manipulated dust samples. An example of such fraudulent concealment or manipulation would involve hanging the dust pump in intake air instead of wearing



it at a designated location on the working section. The law already requires heightened pleading when fraud is alleged and this language will provide significant protection for the industry.

C. Remaining Changes

The other changes from the original include removal of the cap on attorneys' fees and expenses and removal of the language relating to the collateral source. While the original proposed cap on the attorneys' fee could arguably dissuade some lawyers from taking the cases, it is unlikely to prevent the litigation altogether as some lawyer would inevitably take an otherwise strong case. Additionally, given that this cap would apply in cases where the fault is at issue (as opposed to the no-fault workers' compensation scheme), it may be subject to constitutional challenge. Removal of the language eliminates that possibility.

The removal of the language relating to the collateral source payments will have little effect, as deliberate intent damages are only available for damages in excess of the benefits provided by the workers' compensation scheme. Employers have always been entitled to an offset for damages paid or payable in connection with a workers' compensation claim. The removal of this language should not prejudice the industry in any way.

Please let me know if have any questions or need additional information.

Sincerely,

A handwritten signature in blue ink that reads 'Christopher D. Pence'.

Christopher D. Pence

CDP/adl