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## HOUSE BILL NO. 398

## FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Senator Norment  
on March 7, 2000)

(Patron Prior to Substitute—Delegate Woodrum)

*A BILL to amend and reenact §§ 8.01-273.1 and 38.2-5001 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; referral to Workers' Compensation Commission.*

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 8.01-273.1 and 38.2-5001 of the Code of Virginia are amended and reenacted as follows:**

§ 8.01-273.1. Motion for judgment; motion to refer; Virginia Birth-Related Neurological Injury Compensation Act.

A. In any civil action, where a party, *who is a participating hospital or physician as defined in § 38.2-5001*, moves to refer a cause of action to the Workers' Compensation Commission for the purposes of determining whether the cause of action satisfies the requirements of the Virginia Birth-Related Neurological Injury Compensation Act (§ 38.2-5000 et seq.), the court shall forward the motion to refer together with a copy of the motion for judgment to the Commission and stay all proceedings on the cause of action pending an award and notification by the Commission of its disposition; *provided, however, that the motion to refer the cause of action to the Workers' Compensation Commission shall be filed no later than 120 days after the date of filing a grounds of defense by the party seeking the referral.*

B. *Upon entry of the order of referral by the court, the clerk of the circuit court shall file with the Workers' Compensation Commission within thirty days a copy of the motion for judgment and the responsive pleadings of all the parties to the action. The clerk shall copy all counsel of record in the civil action on the transmittal letter accompanying the materials being filed with the Workers' Compensation Commission. All parties to the civil action shall be entitled to participate before the Commission upon filing a notice of appearance with the Clerk of the Commission within twenty-one days after receipt of the transmittal letter to the clerk of the circuit court. Notwithstanding the provisions of § 32.1-127.1:03, the moving party shall provide the Commission with an original and five copies of the following: appropriate assessments, evaluations, and prognoses and such other records obtained during discovery and are reasonably necessary for the determination of whether the infant has suffered a birth-related neurological injury. The medical records and the pleadings referenced in this subsection shall constitute a petition as referenced in § 38.2-5004. The moving party shall be reimbursed for all copying costs upon entry of an award of benefits as referenced in § 38.2-5009.*

§ 38.2-5001. Definitions.

As used in this chapter:

"Birth-related neurological injury" means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological injury" within the meaning of this chapter, such disability shall cause the infant to be permanently in need of assistance in all activities of daily living. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality, degenerative neurological disease, or maternal substance abuse. The definition provided here shall apply retroactively to any child born on and after January 1, 1988, who suffers from an injury to the brain or spinal cord caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

"Claimant" means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

"Commission" means the Virginia Workers' Compensation Commission.

"Participating hospital" means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to

60 review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the  
61 participating hospital assessment pursuant to § 38.2-5020 for the period of time in which the  
62 birth-related neurological injury occurred. The term also includes employees of such hospitals, excluding  
63 physicians or nurse-midwives who are eligible to qualify as participating physicians, acting in the course  
64 of and in the scope of their employment.

65 "Participating physician" means a physician licensed in Virginia to practice medicine, who practices  
66 obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of  
67 operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the  
68 scope of such licensure and who at the time of the injury (i) had in force an agreement with the  
69 Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the  
70 physician agreed to participate in the development of a program to provide obstetrical care to patients  
71 eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such  
72 program by the Commissioner of Health, to participate in its implementation, (ii) had in force an  
73 agreement with the Board of Medicine whereby the physician agreed to submit to review by the Board  
74 of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician  
75 assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury  
76 occurred. *The term "participating physician" includes a partnership, corporation, professional*  
77 *corporation, professional limited liability company or other entity through which the participating*  
78 *physician practices.*

79 "Program" means the Virginia Birth-Related Neurological Injury Compensation Program established  
80 by this chapter.

81 **2. That the provisions of this act amending § 38.2-5001 are declaratory of existing law.**

82 **3. That an emergency exists and this act is in force from its passage.**