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HOUSE BILL NO. 1505

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on Commerce and Labor
on February 21, 2005)

(Patron Prior to Substitute—Delegate Tata)

A BILL to amend and reenact §§ 38.2-5004, 38.2-5006, and 38.2-5008 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Program.

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-5004, 38.2-5006, and 38.2-5008 of the Code of Virginia are amended and reenacted as follows:

§ 38.2-5004. Filing of claims; review by Board of Medicine; review by Department of Health; filing of responses; medical records.

A. 1. In all claims filed under this chapter, the claimant shall file with the Commission a petition, setting forth the following information:

a. The name and address of the legal representative and the basis for his representation of the injured infant;

b. The name and address of the injured infant;

c. The name and address of any physician providing obstetrical services who was present at the birth and the name and address of the hospital at which the birth occurred;

d. A description of the disability for which claim is made;

e. The time and place where the birth-related neurological injury occurred;

f. A brief statement of the facts and circumstances surrounding the birth-related neurological injury and giving rise to the claim;

g. All available relevant medical records relating to the person who allegedly suffered a birth-related neurological injury and an identification of any unavailable records known to the claimant and the reasons for their unavailability;

h. Appropriate assessments, evaluations, and prognoses and such other records and documents as are reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the injured infant on account of a birth-related neurological injury;

i. Documentation of expenses and services incurred to date, which indicates whether such expenses and services have been paid for, and if so, by whom; and

j. Documentation of any applicable private or governmental source of services or reimbursement relative to the alleged impairments.

2. The claimant shall furnish the Commission with as many copies of the petition as required for service upon the Program, any physician and hospital named in the petition, the Board of Medicine and the Department of Health, along with a \$15 filing fee. Upon receipt of the petition the Commission shall immediately serve the Program by service upon the agent designated to accept service on behalf of the Program in the plan of operation by registered or certified mail, and shall mail copies of the petition to any physician and hospital named in the petition, the Board of Medicine and the Department of Health.

B. Upon receipt of the petition or the filing of a claim relating to the conduct of a participating physician, the Department of Health Professions shall investigate the petition or claim, utilizing the same process as it does in investigating complaints filed under any provision contained in Title 54.1. Conduct of health care providers giving rise to disciplinary action shall be referred to the Board of Medicine for action consistent with the authority granted to the Board in §§ 54.1-2911 through 54.1-2928. If a notice or order is issued by the Board of Medicine, a copy shall be mailed to the petitioner or claimant.

C. Upon receipt of the petition or the filing of a claim relating to the conduct of a participating hospital, the Department of Health shall investigate the petition or claim, utilizing the same process as it does in investigating complaints filed under any provision of Title 32.1. If it determines that there is reason to believe that the alleged injury resulted from, or was aggravated by, substandard care on the part of the hospital at which the birth occurred, it shall take any appropriate action consistent with the authority granted to the Department of Health in Title 32.1.

D. The Program shall have 30 days from the date of service in which to file a response to the petition, and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury, within the meaning of this chapter *within 10 days after the date the panel report prepared pursuant to subsection C of § 38.2-5008 is filed with the Commission.*

E. Any hospital at which a birth occurred, upon receipt of written notice from the legal representative of an injured infant that he intends to file a petition under this chapter, shall promptly deliver to such person all available medical records relating to the infant who allegedly suffered a birth-related neurological injury.

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60 F. As used in this chapter, fetal monitoring strips, whether printed or in electronic format, shall be
61 deemed to constitute part of the medical records relating to an infant who allegedly suffered a
62 birth-related neurological injury.

63 § 38.2-5006. Hearing; parties.

64 A. Immediately after a ~~petition has been received~~ *the Program's response is filed pursuant to*
65 *subsection D of § 38.2-5004*, the Commission shall set the date for a hearing, which shall be held no
66 sooner than ~~45~~ 15 days and no later than ~~120~~ 90 days after the filing of the ~~petition~~ *Program's*
67 *response*, and shall notify the parties to the hearing of the time and place of such hearing. The hearing
68 shall be held in the city or county where the birth-related neurological injury occurred, or in a
69 contiguous city or county, unless otherwise agreed to by the parties and authorized by the Commission.

70 B. The parties to the hearing required under this section shall include the claimant and the Program.
71 § 38.2-5008. Determination of claims; presumption; finding of Virginia Workers' Compensation
72 Commission binding on participants; medical advisory panel.

73 A. The Commission shall determine, on the basis of the evidence presented to it, the following
74 issues:

75 1. Whether the injury claimed is a birth-related neurological injury as defined in § 38.2-5001.

76 a. A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury
77 where it has been demonstrated, to the satisfaction of the Virginia Workers' Compensation Commission,
78 that the infant has sustained a brain or spinal cord injury caused by ~~oxygen~~ *the deprivation of oxygen* or
79 mechanical injury, and that the infant was thereby rendered permanently motorically disabled and (i)
80 developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated,
81 cognitively disabled.

82 If either party disagrees with such presumption, that party shall have the burden of proving that the
83 injuries alleged are not birth-related neurological injuries within the meaning of the chapter.

84 b. A rebuttable presumption of fetal distress, an element of a birth-related injury, shall arise if the
85 hospital fails to provide the fetal heart monitor tape to the claimant, as required by subsection E of
86 § 38.2-5004.

87 2. Whether obstetrical services were delivered by a participating physician at the birth.

88 3. Whether the birth occurred in a participating hospital.

89 4. How much compensation, if any, is awardable pursuant to § 38.2-5009.

90 5. If the Commission determines (i) that the injury alleged is not a birth-related neurological injury
91 as defined in § 38.2-5001, or (ii) that obstetrical services were not delivered by a participating physician
92 at the birth and that the birth did not occur in a participating hospital, it shall dismiss the petition and
93 cause a copy of its order of dismissal to be sent immediately to the parties by registered or certified
94 mail.

95 6. All parties are bound for all purposes including any suit at law against a participating physician or
96 participating hospital, by the finding of the Virginia Workers' Compensation Commission (or any appeal
97 therefrom) with respect to whether such injury is a birth-related neurological injury.

98 B. The deans of the Eastern Virginia Medical School, University of Virginia School of Medicine,
99 and Medical College of Virginia of Virginia Commonwealth University shall develop a plan whereby
100 each claim filed with the Commission is reviewed by a panel of three qualified and impartial physicians.
101 Such plan shall provide that each of the three aforementioned medical schools shall maintain a review
102 panel of physicians to review claims, with responsibility for reviewing claims rotating among each
103 medical school's panel on a case-by-case basis.

104 C. The panel created pursuant to subsection B shall prepare a report that provides a detailed
105 statement of the opinion of the panel's members regarding whether the infant's injury does or does not
106 satisfy each of the criteria of a birth-related neurological injury enumerated in such term's definition in
107 § 38.2-5001. The report shall include the panel's basis for its determination of whether each such criteria
108 was or was not satisfied. In addition, the report shall include such supporting documentation as the
109 board of directors of the program may reasonably request. The panel shall file its report with the
110 Commission 60 days from the date the petition was filed with the Commission. At the same time that
111 the panel files its report with the Commission, the panel shall send copies thereof to the Program and all
112 parties in the proceeding. At the request of the Commission, at least one member of the panel shall be
113 available to testify at the hearing. The Commission shall consider, but shall not be bound by, the
114 recommendation of the panel.