

2005 SESSION

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HOUSE BILL NO. 2182

Offered January 12, 2005

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A BILL for the relief of Andrew Patrick Kidder.

Patron—Tata (By Request)

Referred to Committee on Appropriations

Whereas, on February 28, 1990, Andrew Patrick Kidder (Andrew) was delivered by emergency cesarean section at Virginia Beach General Hospital (VBGH) when Andrew's mother's uterus ruptured during labor; and

Whereas, although a fetal heart monitor was used to monitor Andrew's condition during his mother's labor, it was disconnected to permit the cesarean section; and

Whereas, 20 minutes after the fetal heart monitor was disconnected, Andrew was delivered; and

Whereas, after receiving medical care to treat the condition resulting from the traumatic birth, Andrew was placed in the nursery where ongoing medical care was delivered; and

Whereas, Andrew was released from the hospital on March 4, 1990; and

Whereas, immediately after his discharge, Andrew's parents remained concerned about his condition; and

Whereas, within a few days of his discharge, Andrew was taken to the office of his pediatrician on two occasions; and

Whereas, on March 10, 1990, Andrew was readmitted to VBGH; and

Whereas, on March 11, 1990, Andrew suffered a stroke caused by thrombus, which manifested itself following the traumatic events of his birth, and was transferred to the Children's Hospital of the King's Daughters in Norfolk, Virginia, and placed under the care of Dr. L. Matthew Frank, a pediatric neurologist; and

Whereas, as a result of the stroke Andrew is motorically, cognitively, and developmentally disabled; and

Whereas, at no time immediately after Andrew's birth or for more than nine years subsequent were the parents made aware of the existence of the Virginia Birth-Related Neurological Injury Compensation Program (Program) and the possibility of Andrew's eligibility for participation in the Program; and

Whereas, it was not until December 1999 that Sturgis Kidder became aware of the Program's existence when he read a local newspaper article; and

Whereas, on January 7, 2000, Sturgis Kidder filed a petition for benefits under the Program with the Workers' Compensation Commission (Commission) and on January 10, 2000, the Commission issued a Notice of Claim to the Program; and

Whereas, pursuant to subsection A of § 38.2-5008 of the Code of Virginia, a rebuttable presumption shall arise that an injury alleged is a birth-related neurological injury where it has been demonstrated that the claimant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that the claimant has thereby been rendered permanently motorically and developmentally disabled; and

Whereas, over the course of the review of the claim, Dr. Edward H. Karotkin reviewed the medical records on Andrew's behalf; and

Whereas, over the course of the review of the claim, the records were reviewed by Drs. Kathryn Kerkerling and Lawrence D. Morton on the Program's behalf; and

Whereas, the medical records were also reviewed by a medical panel consisting of Drs. William N.P. Herbert, James E. Ferguson, and Elizabeth Mandell pursuant to subsection B of § 38.2-5008; and

Whereas, Dr. Karotkin opined that the thrombus occurred at birth when Andrew's mother's uterus ruptured, causing asphyxia, but that the effects of the thrombus were silent during the immediate newborn period; and

Whereas, Drs. Kerkerling and Morton and the panel opined that Andrew suffered no injury at birth and that the thrombus resulted from dehydration, which occurred after Andrew's release from the hospital; and

Whereas, Dr. Karotkin, Andrew's medical expert, was the only medical opinion to opine to a reasonable degree of medical certainty; and

Whereas, following a hearing, the presiding deputy commissioner of the Commission issued an opinion denying Andrew's entry into the Program stating that he was not entitled to the presumption provided by subsection B of § 38.2-5009 and on January 10, 2000, the Commission denied Andrew's

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59 entry into the Program; and

60 Whereas, Andrew subsequently appealed the denial; and

61 Whereas, on November 27, 2000, a hearing was held on the appeal before a deputy commissioner of
62 the Commission in Virginia Beach; and

63 Whereas, the opinion of Dr. Katherine Kerkerling, a member of the medical panel that reviewed the
64 claim, stated in her written opinion that medical evidence may exist to support Andrew's claim and if so
65 that such evidence should be included in the Commission's review; and

66 Whereas, despite the existence of such evidence and the statement of Dr. Kerkerling, the Commission
67 refused to include it in the review of Andrew's claim; and

68 Whereas, on February 13, 2001, the deputy commissioner issued a decision denying Andrew's claim;
69 and

70 Whereas, on March 5, 2001, Andrew appealed the decision to the full Commission; and

71 Whereas, on March 21, 2001, a hearing was held before the full Commission and on July 26, 2001,
72 the Commission voted 2-1 to deny the claim; and

73 Whereas, in the intervening time between the date of the hearing and the date that the Commission's
74 decision was rendered, the New England Journal of Medicine published the study results that absolutely
75 supported the medical opinion of Dr. Edward H. Karotkin, Andrew's medical expert; and

76 Whereas, Andrew unsuccessfully attempted to have the new medical evidence added to the record
77 but the Commission refused; and

78 Whereas, on October 5, 2001, Andrew appealed the decision of the Commission to the Virginia
79 Court of Appeals; and

80 Whereas, on March 16, 2002, a hearing was held before the Court of Appeals and during oral
81 arguments Andrew attempted to add the article containing the new medical evidence to the record but
82 the Court would not allow the article to be added indicating that the Commission should have included
83 the article in its review of the claim; and

84 Whereas, on March 26, 2002, the Court of Appeals affirmed the decision of the Commission; and

85 Whereas, in doing so the Court of Appeals did not follow precedent established by the Virginia
86 Court of Appeals in the case of *Coffey v. the Virginia Birth-Related Neurological Injury Compensation*
87 *Program*, decided on January 29, 2002, which provided that the testimony of medical experts on the
88 condition of claimants for entry on the Program must be established to a reasonable degree of medical
89 certainty to overcome the rebuttable presumption; and

90 Whereas, in September 2003 financial reports filed with the State Corporation Commission the
91 Program states that he January 29, 2003 judicial decision in *Coffey v. the Virginia Birth-Related*
92 *Neurological Injury Compensation Program* shifted the burden of proof of eligibility from the claimant
93 to the Program, and this decision could increase the number of claimants entering the Program; and

94 Whereas, on April 24, 2002, Andrew appealed to the Virginia Supreme Court and on October 21,
95 2002, the Court did not grant certiorari; and

96 Whereas, despite the existence of clear medical evidence that absolutely supports the opinion of
97 Andrew's medical expert, which was also the only medical opinion that has been offered throughout the
98 Commission's review of the claim that was opined to a reasonable degree of medical certainty as
99 required by *Coffey*, Andrew has been prevented from using it in his favor; and

100 Whereas, no cord blood pH testing was performed on Andrew, which would have shifted the
101 rebuttable presumption to the Program; and

102 Whereas, the "missing evidence inference" was upheld in the Commission decision of *Taylor Hope*
103 *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*; and

104 Whereas, Andrew proceeded to file another claim with the Commission on November 12, 2002, and
105 on December 10, 2002, the Program filed a Motion to Dismiss the claim with the Commission; and

106 Whereas, a hearing was held before the chief deputy commissioner of the Commission on March 28,
107 2003; and

108 Whereas, on July 17, 2003, the chief deputy commissioner issued a decision dismissing the claim;
109 and

110 Whereas, Andrew appealed the dismissal, however, in the process of working through the appeal
111 Sturgis Kidder was told by the chief deputy commissioner that only the Governor and the General
112 Assembly could resolve the claim; and

113 Whereas, Andrew Kidder has no other means to obtain adequate and just relief except by this body;
114 now, therefore,

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

116 1. § 1. That upon the execution of a release by Andrew Patrick Kidder of all claims he may have
117 against the Commonwealth or any agency, instrumentality, officer, employee, or political subdivision in
118 connection with the aforesaid occurrence, the Birth-Related Neurological Injury Compensation Program
119 (Program) shall provide (i) Andrew Patrick Kidder all benefits for which he would have been entitled
120 under the Program, and (ii) reimbursement of expenses incurred by the parents of Andrew Patrick

121 *Kidder to care for him since February 28, 1990, that would have been covered by the Program*
122 *pursuant to § 38.2-5009 of the Code of Virginia, provided that no expense shall be reimbursed by the*
123 *Program if it has been reimbursed from another source.*

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