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SENATE BILL NO. 1323

Senate Amendments in [] — February 3, 2005

A *BILL to amend and reenact §§ 38.2-5001, 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.*

Patron Prior to Engrossment—Senator Devolites Davis

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-5001, 38.2-5004, 38.2-5006, and 38.2-5008 of the Code of Virginia are amended and reenacted as follows:

§ 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 necessitated by a deprivation of oxygen or mechanical injury that occurred in the course of labor or delivery, 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.

[*"Deprivation of oxygen" means oxygen deprivation sufficient to cause metabolic acidosis as reflected in fetal umbilical cord arterial blood obtained at delivery and exhibiting a pH of less than seven and a base deficit of greater than or equal to 12 millimoles per liter.*]

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

"Participating physician" means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time or, as authorized in the plan of operation, a licensed nurse-midwife who performs obstetrical services, either full or part time, within the scope of such licensure and who 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 physician 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 Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury occurred. The term "participating physician" includes a partnership, corporation, professional corporation, professional limited liability company or other entity through which the participating physician practices.

"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established

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59 by this chapter.

60 § 38.2-5004. Filing of claims; review by Board of Medicine; review by Department of Health; filing
61 of responses; medical records.

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

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

66 b. The name and address of the injured infant;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

112 § 38.2-5006. Hearing; parties.

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

119 B. The parties to the hearing required under this section shall include the claimant and the Program.

120 § 38.2-5008. Determination of claims; presumption; finding of Virginia Workers' Compensation

Commission binding on participants; medical advisory panel.

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

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

a. *A Except where a rebuttable presumption arises pursuant to subdivision 1 c of this subsection, a rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury where it has been demonstrated, to the satisfaction of the Virginia Workers' Compensation Commission, that the infant weighed at least 1,800 grams at birth and has sustained a brain or spinal cord injury caused by oxygen the deprivation of oxygen or mechanical injury, and that the infant was thereby rendered permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled; however, this rebuttable presumption shall not arise unless the brain or spinal cord injury caused by the deprivation of oxygen or mechanical injury occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.*

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

b. *A Except where a rebuttable presumption arises pursuant to subdivision 1 c of this subsection, a rebuttable presumption of fetal distress, an element of a birth-related injury, shall arise if the hospital fails to provide the fetal heart monitor tape to the claimant, as required by subsection E of § 38.2-5004.*

c. *Where the infant weighs 1,800 or fewer grams at birth, a rebuttable presumption shall arise that the injury is not a birth-related neurological injury but resulted from premature birth.*

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

3. Whether the birth occurred in a participating hospital.

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

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

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

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

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