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SENATE BILL NO. 1323

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Commerce and Labor
on February 17, 2005)

(Patron Prior to Substitute—Senator Devolites Davis)

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

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-5004 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 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.

F. As used in this chapter, fetal monitoring strips, whether printed or in electronic format, shall be

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60 deemed to constitute part of the medical records relating to an infant who allegedly suffered a
61 birth-related neurological injury.

62 § 38.2-5008. Determination of claims; presumption; finding of Virginia Workers' Compensation
63 Commission binding on participants; medical advisory panel.

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

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

67 a. *Except where a rebuttable presumption arises pursuant to subdivision 1 c of this subsection, a*
68 *rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury where it*
69 *has been demonstrated, to the satisfaction of the Virginia Workers' Compensation Commission, that the*
70 *infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury,*
71 *and that the infant was thereby rendered permanently motorically disabled and (i) developmentally*
72 *disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled.*

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

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

78 c. *Where the infant weighs 1,800 or fewer grams at birth, or is at less than 32 weeks gestation, a*
79 *rebuttable presumption shall arise that the injury alleged is not a birth-related neurological injury but*
80 *resulted from the premature birth.*

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

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

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

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

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

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

98 C. The panel created pursuant to subsection B shall prepare a report that provides a detailed
99 statement of the opinion of the panel's members regarding whether the infant's injury does or does not
100 satisfy each of the criteria of a birth-related neurological injury enumerated in such term's definition in
101 § 38.2-5001. The report shall include the panel's basis for its determination of whether each such criteria
102 was or was not satisfied. In addition, the report shall include such supporting documentation as the
103 board of directors of the program may reasonably request. The panel shall file its report with the
104 Commission 60 days from the date the petition was filed with the Commission. At the same time that
105 the panel files its report with the Commission, the panel shall send copies thereof to the Program and all
106 parties in the proceeding. At the request of the Commission, at least one member of the panel shall be
107 available to testify at the hearing. The Commission shall consider, but shall not be bound by, the
108 recommendation of the panel.