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SENATE BILL NO. 643

Offered January 17, 2006

A BILL to amend and reenact §§ 38.2-5001, 38.2-5003, 38.2-5004, 38.2-5006, 38.2-5008, 38.2-5009, 38.2-5010, and 38.2-5013 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 38.2-5009.2 and 38.2-5013.1, and to repeal § 38.2-5014 of the Code of Virginia, relating to the Birth-Related Neurological Injury Compensation Program.

Patron—Watkins

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-5001, 38.2-5003, 38.2-5004, 38.2-5006, 38.2-5008, 38.2-5009, 38.2-5010, and 38.2-5013 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 38.2-5009.2 and 38.2-5013.1, 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 (a) genetic or congenital abnormality, (b) degenerative neurological disease, ~~or~~ (c) maternal disease, infection, or neglect including, but not limited to, chorioamnionitis in cases in which no objective medical evidence indicates hypoxia during the time of labor, delivery, or resuscitation, maternal substance abuse, or willful maternal failure during pregnancy to take medications prescribed or adhere to directives from health care providers; or (d) prematurity in cases in which no objective medical evidence indicates hypoxia during the time of labor, delivery or resuscitation. 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 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

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59 of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the participating physician
60 assessment pursuant to § 38.2-5020 for the period of time in which the birth-related neurological injury
61 occurred. The term "participating physician" includes a partnership, corporation, professional corporation,
62 professional limited liability company or other entity through which the participating physician practices.
63 "Program" means the Virginia Birth-Related Neurological Injury Compensation Program established
64 by this chapter.

65 § 38.2-5003. Virginia Workers' Compensation Commission authorized to hear and determine claims.

66 The Virginia Workers' Compensation Commission is authorized to hear and pass upon all claims
67 filed pursuant to this chapter. The Commission may exercise the power and authority granted to it in
68 Chapter 2 of Title 65.2 as necessary to carry out the purposes of this chapter.

69 When a circuit court refers a civil action to the Commission pursuant to § 8.01-273.1 for the
70 purposes of determining whether the cause of action satisfies the requirements of this chapter, the
71 Commission shall set the matter for hearing pursuant to ~~§ 38.2-5006~~ referral order shall instruct the
72 parties to provide all of the information required of initial proceedings pursuant to subsection A of
73 § 38.2-5004, together with copies of all documents previously filed in the circuit court, to the clerk for
74 forwarding to the Commission. The referral order shall also instruct the clerk to forward the completed
75 file to the Commission pursuant to § 8.01-273.1. The Commission shall serve the completed file upon the
76 Program pursuant to subdivision A 2 of § 38.2-5004. The Commission shall set the matter for hearing
77 pursuant to § 38.2-5006 and shall communicate its decision to the referring circuit court in due course.
78 If the Commission determines that the cause of action does not satisfy the requirements of this chapter,
79 it shall return the file to the referring circuit court.

80 § 38.2-5004. Filing of claims; review by Board of Medicine; review by Department of Health; filing
81 of responses; medical records.

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

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

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

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

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

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

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

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

96 h. ~~Appropriate assessments.~~ Any assessment utilizing the Recommended Format for Expert Panel
97 Assessment of Birth Injury Claims, approved by the Program on December 13, 2005, and published by
98 the Obstetrical Physicians of Eastern Virginia Medical School, University of Virginia, Virginia
99 Commonwealth University, and the Virginia Section of the American College of Obstetrics and
100 Gynecology, or as may be subsequently amended in conformance with subsection B of § 38.2-5008,
101 hereafter referred to as the Recommended Format, together with other evaluations, and prognoses and
102 such other records and documents as are reasonably necessary for the determination of the amount of
103 compensation to be paid to, or on behalf of, the injured infant on account of a birth-related neurological
104 injury. Any departure from the Recommended Format shall be explained in the assessment, which
105 explanation shall include the reasons for the departure;

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

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

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

116 3. By filing a petition pursuant to this chapter, a claimant shall be deemed to have waived his
117 confidentiality privileges and privacy rights pursuant to state or federal law regarding the injury and
118 disability he has claimed, and as a consequence thereof the medical advisory panel established by
119 subsection B of § 38.2-5008, the Program, its legal counsel, reviewing experts, the Commission, and the
120 courts of the Commonwealth shall have full and complete access to all relevant medical records held by

health care facilities and treating health care providers.

4. The Program shall make available to individuals seeking to file a claim such assistance as may be necessary to complete the petition including, but not limited to, assistance in obtaining all necessary medical records.

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 file a response to the petition and 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 of the medical advisory panel established by subsection C B of § 38.2-5008 is filed with the Commission shall be presumed to be correct regarding whether the injury alleged is a birth-related neurological injury within the meaning of this chapter and shall be prima facie evidence of the findings and conclusions therein. If any party disagrees with or objects to the report, he shall give notice to the Commission and other parties within 21 days of receipt of the report. Such notice shall set forth with particularity any objection and the basis for objection. If a party files an objection, the other party or parties shall file a response within 21 days of receipt of the objection.

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

§ 38.2-5006. Hearing; parties.

A. Immediately after the Program's response is If no objections are filed pursuant to subsection D of § 38.2-5004, the Commission shall within 10 days after the time for filing objections has expired dispose of the case in a manner consistent with the report of the panel filed pursuant to subsection C of § 38.2-5008 by either dismissing the case or entering enter an award pursuant to § 38.2-5009.

B. If any objections are filed pursuant to subsection D of § 38.2-5004, the Commission shall set the date for a hearing, which shall be held no sooner than 45 45 days and no later than 90 days after the filing of the Program's response those objections, and shall notify the parties to the hearing of the time and place of such hearing. The hearing shall be held in the city or county where the birth-related neurological injury occurred, or in a contiguous city or county, unless otherwise agreed to by the parties and authorized by the Commission.

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

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

A. ~~The~~ If a hearing is required pursuant to subsection B of § 38.2-5006, the Commission shall determine, on the basis of the medical advisory panel's report, and any other evidence presented to it prepared in conformity with subdivision A 1 h of § 38.3-5004, the following issues:

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

a. 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 has sustained a brain or spinal cord injury caused by oxygen deprivation 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.

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 rebuttable presumption of fetal distress, an element of a birth-related injury, shall arise if the

182 hospital fails to provide the fetal heart monitor tape to the claimant, as required by subsection E of
183 § 38.2-5004. No inference or presumption shall arise from the absence of a documented umbilical cord
184 blood gas test result.

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

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

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

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

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

196 B. The deans of the *Schools of Medicine of the Eastern Virginia Medical School, University of*
197 *Virginia School of Medicine, and Medical College of Virginia of Virginia Commonwealth University*
198 *shall develop a plan whereby each claim filed with the Commission is reviewed by a panel of three*
199 *qualified and impartial physicians for reviewing cases pursuant to this chapter. Such plan shall provide*
200 *that each of the three aforementioned medical schools shall maintain a review panel of physicians to*
201 *review claims, with responsibility for reviewing claims rotating among each medical school's panel on a*
202 *case-by-case basis at the direction of that school's dean. The deans of such schools shall also develop a*
203 *plan for the periodic review of the Recommended Format for Expert Panel Assessment of Birth Injury*
204 *Claims as approved by the Program on December 13, 2005, hereafter referred to as the Recommended*
205 *Format; publish the Recommended Format with any proposed amendments thereto; and provide copies*
206 *thereof to the Commission for its approval. Any amendment to the Recommended Format that is not*
207 *objected to by the Commission within 90 days of publication shall be deemed acceptable. Each claim*
208 *filed with the Commission shall be reviewed, utilizing such plan and the Recommended Format, by a*
209 *panel of three qualified and impartial physicians, consisting of an obstetrician, a neonatologist, and a*
210 *neurologist. The chair of the panel shall be determined by the school's dean. The Commission shall*
211 *accept a report in conformity with this provision and shall then direct the Program to pay to the*
212 *medical schools that performed the assessment and prepared the report the sum of \$3,000.*

213 C. The panel created pursuant to subsection B shall prepare a report that provides a detailed
214 statement of the opinion of the panel's members regarding whether the infant's injury does or does not
215 satisfy each of the criteria of a birth-related neurological injury enumerated in such term's definition in
216 § 38.2-5001. The report shall include the panel's basis for its determination of whether each such criteria
217 was or was not satisfied. In addition, the report shall include such supporting documentation as the
218 board of directors of the program may reasonably request. The panel shall file its report with the
219 Commission 60 days from the date the petition was filed with the Commission. At the same time that
220 the panel files its report with the Commission, the panel shall send copies thereof to the Program and all
221 parties in the proceeding. At the request of a party, the Commission, shall summon at least one member
222 of the panel shall be available to testify at the hearing. The Commission shall consider, but shall not be
223 bound by, the recommendation of the panel. If a report prepared by the panel created pursuant to
224 subsection B does not conform to the requisites of that subsection and this subsection, the Commission
225 shall, on its own motion, or upon a party's request, return the report to the panel for clarification,
226 amendment, or both, in conformance herewith

227 § 38.2-5009. Commission awards for birth-related neurological injuries; notice of award.

228 A. Upon determining (i) that an infant has sustained a birth-related neurological injury and (ii) that
229 obstetrical services were delivered by a participating physician at the birth or that the birth occurred in a
230 participating hospital, the Commission shall make an award providing compensation for the following
231 items relative to such injury:

232 1. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative,
233 residential and custodial care and service, special equipment or facilities, and related travel, such
234 expenses to be paid as they are incurred. However, such expenses shall not include:

235 a. Expenses for items or services that the infant has received, or is entitled to receive, under the laws
236 of any state or the federal government except to the extent prohibited by federal law;

237 b. Expenses for items or services that the infant has received, or is contractually entitled to receive,
238 from any prepaid health plan, health maintenance organization, or other private insuring entity;

239 c. Expenses for which the infant has received reimbursement, or for which the infant is entitled to
240 receive reimbursement, under the laws of any state or federal government except to the extent prohibited
241 by federal law; and

242 d. Expenses for which the infant has received reimbursement, or for which the infant is contractually
243 entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy

or other private insurance program.

Expenses of medical and hospital services under this subdivision shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person.

In order to provide coverage for expenses of medical and hospital services under this subdivision, the Commission, in all cases where a comparative analysis of the costs, including the effects on the infant's family's health insurance coverage, and benefits indicates that such action is more cost-effective than awarding payment of medical and hospital expenses, shall (i) require the claimant to purchase private health insurance providing coverage for such expenses, provided that the premium or other costs of such coverage shall be paid by the Fund; (ii) require the claimant to participate in the State Medicaid Program, the Children's Health Insurance Program or other state or federal health insurance program for which the infant is eligible; or (iii) if the Commission determines that it would be unreasonably burdensome to require the claimant to purchase private health insurance and that the infant is ineligible for a health insurance program described in clause (ii), to make an award providing compensation for the cost of private accident and sickness insurance for the infant.

2. Loss of earnings from the age of 18 are to be paid in regular installments beginning on the eighteenth birthday of the infant. An infant found to have sustained a birth-related neurological injury shall be conclusively presumed to have been able to earn income from work from the age of 18 through the age of 65, if he had not been injured, in the amount of 50 percent of the average weekly wage in the Commonwealth of workers in the private, nonfarm sector. *Payments shall be first calculated based on the Commonwealth's reporting period immediately preceding the eighteenth birthday of the claimant child, and subsequently adjusted based on the succeeding annual reports of the Commonwealth.* The provisions of § 65.2-531 shall apply to any benefits awarded under this subdivision.

3. Reasonable expenses incurred in connection with the filing of a claim under this chapter, including reasonable attorneys' fees, which shall be subject to the approval and award of the Commission *and which shall be set pursuant to the provisions of § 38.2-5009.2.*

A copy of the award shall be sent immediately by registered or certified mail to the parties.

B. The amendments to this section enacted pursuant to Chapter 535 of the Acts of Assembly of 1990 shall be retroactively effective in all cases arising prior to July 1, 1990, that have been timely filed and are not yet final.

§ 38.2-5009.2. Attorney fees.

Any attorney fees awarded pursuant to subdivision A 3 of § 38.2-5009 that relate to services provided in connection with a petition for entry into the Program shall be only for services provided after the claimant has received a copy of the report of the medical advisory panel, issued in and made available in conformity with subsection C of § 38.2-5008.

§ 38.2-5010. Rehearing on Commission determination or award.

A. If an application for review is made to the Commission within twenty days from the date of a determination pursuant to subdivisions A 1 through A 3 of § 38.2-5008, or within twenty days from the date of an award by the Commission pursuant to § 38.2-5009, the full Commission, excluding any member of the Commission who made the determination or award, if the first hearing was not held before the full Commission, shall review the evidence. If deemed advisable and as soon as practicable, the Commission instead may hear the parties, their representatives and witnesses and shall make a determination or award, as appropriate. Such review or determination, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue, shall be filed with the record of the proceedings and shall be sent immediately to the parties.

B. The legal representative of a child who was born between January 1, 1988, and July 1, 1990, may file an application for review by July 1, 2000, upon meeting the following conditions: (i) a claim was timely filed for such child and was dismissed; upon an application for review, on the basis of a determination pursuant to subdivision A 1 of ~~§ 38.2-5008~~ that, although the child's injuries were caused by deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital, such injuries had not rendered the child permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living as required by the definition of "birth-related neurological injury" as such definition was in effect prior to July 1, 1990, and (ii) the panel required by subsection B of ~~§ 38.2-5008~~ had reported to the Commission in the hearing held pursuant to the dismissed claim that such injuries did meet the definition as effective on July 1, 1990, i.e., that the injuries had rendered the child permanently motorically disabled and developmentally disabled or, if the child is sufficiently developed to be cognitively evaluated, cognitively disabled, and permanently in need of assistance in all activities of daily living. Such application for review may be filed regardless of whether or not the legal representative has filed for review of the dismissed claim by the Commission. Such review shall only be filed for live births and shall not be filed for claims dismissed as caused by genetic or congenital abnormalities, degenerative

305 neurological diseases, or maternal substance abuse.

306 The full Commission shall review the evidence and make a determination on the petition as though
307 the definition in effect on July 1, 1990, had been in effect on the date of the child's birth and no
308 previous review or dismissal had occurred.

309 § 38.2-5013. Limitation on claims.

310 Any claim under this chapter that is filed more than ten years after the birth of an infant alleged to
311 have a birth-related neurological injury is barred; however an application for review filed in accordance
312 with the provisions of § ~~38.2-5010 B~~ may be filed by July 1, 2000, for a child whose birth occurred
313 more than ten years prior to such application, if the dismissed claim upon which the application is filed
314 was filed before the child's tenth birthday.

315 § 38.2-5013.1. *Time limits not jurisdictional.*

316 *The time limits set forth in this chapter, except for those set forth in §§ 38.2-5010, 38.2-5011, and*
317 *38.2-5013, are not jurisdictional and any such time limit may be extended for good cause shown.*

318 **2. That § 38.2-5014 of the Code of Virginia is repealed.**