

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 38.2-5009 of the Code of Virginia, relating to the Virginia Birth-Related*
 3 *Neurological Injury Compensation Program; awards for reimbursement of expenses of parties.*

4 [H 2170]

5 Approved

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

7 **1. That § 38.2-5009 of the Code of Virginia is amended and reenacted as follows:**

8 § 38.2-5009. Commission awards for birth-related neurological injuries; notice of award.

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

13 1. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative,
 14 therapeutic, nursing, attendant, residential and custodial care and service, medications, supplies, special
 15 equipment or facilities, and related travel, such expenses to be paid as they are incurred. Reimbursement
 16 may be provided for nursing and attendant care that is provided by a relative or legal guardian of a
 17 Program beneficiary so long as that care is beyond the scope of child care duties and services normally
 18 and gratuitously provided by family members to uninjured children. However, such expenses shall not
 19 include:

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

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

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

27 d. Expenses for which the infant has received reimbursement, or for which the infant is contractually
 28 entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy
 29 or other private insurance program.

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

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

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

52 3. Reasonable expenses incurred *by the claimant* in connection with the filing of a claim under this
 53 chapter, including reasonable attorneys' fees, ~~which of the claimant's attorney, but excluding attorney~~
 54 ~~fees incurred in opposing a claimant's admission pursuant to § 8.01-273.1.~~ Any award for expenses,
 55 including attorney's fees, incurred by the claimant in connection with the filing of a claim under this
 56 chapter shall be subject to the approval and award of the Commission.

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

58 B. *Regardless of whether the Commission makes either of the determinations described in clauses (i)*
59 *and (ii) of subsection A, the Commission shall not award compensation in connection with a claim*
60 *under this chapter, or any claim pursuant to § 8.01-273.1, for any attorney's fees or other expenses*
61 *incurred by any physician, hospital, or nurse midwife that is party to a proceeding under this chapter,*
62 *or pursuant to § 8.01-273.1, or by a medical malpractice liability insurer of such party. This prohibition*
63 *shall not affect the requirement that the Program make reimbursement for photocopying costs as set*
64 *forth in § 8.01-273.1, or the requirement under § 38.2-5002.1 that the Program compensate the Office of*
65 *the Attorney General for its provision of legal services to the Program.*

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