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SENATE BILL NO. 395

Offered January 10, 2018

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A BILL to amend and reenact § 38.2-5009 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act; awards for injuries.

Patron—Barker

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

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

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

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

1. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, therapeutic, nursing, attendant, residential and custodial care and service, medications, supplies, special equipment or facilities, and related travel, such expenses to be paid as they are incurred. Reimbursement may be provided for nursing and attendant care that is provided by ~~a~~ *an adult* relative or legal guardian of ~~a Program beneficiary~~ *an admitted claimant* so long as that care is beyond the scope of child care duties and services normally and gratuitously provided by family members to uninjured children. *If nursing or attendant care is provided by an adult relative or legal guardian of an admitted claimant, reimbursement shall not be provided for such care unless the admitted claimant's primary care physician or other appropriate specialist physician has (i) certified that the intended caregiver is appropriately trained, qualified, and physically capable of performing the required home medical and attendant care duties and (ii) provided a letter of medical necessity setting forth (a) the number of nursing or attendant care hours that are medically necessary per day and (b) the physician's assessment regarding the level of care required for the admitted claimant. The total number of hours per week for which reimbursement may be afforded is determined by the admitted claimant's primary care physician's, or other appropriate specialist physician's, letter of medical necessity or doctor's order prescribing the care. No reimbursement, whether for care provided through an agency, an independent caregiver, or a relative or legal guardian of an admitted claimant, shall be afforded by the Program for more than 16 hours per day, or for seven days per week, unless the admitted claimant has a tracheostomy, is ventilator-dependent, or provides a doctor's order that expressly states why more than 16 hours of care per day, and seven days of care per week, are medically necessary for the injured infant. The rate of reimbursement for nursing and attendant care that is provided by an adult relative or legal guardian of an admitted claimant shall be the average hourly rate for a home health aide (combined all industries) as reported in the most recent Quarterly Census of Employment and Wages report of the U.S. Bureau of Labor Statistics for the applicable metropolitan statistical area or, if the service is not provided in a metropolitan statistical area, the locality where the service is provided.* However, such expenses shall not include:

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

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

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

d. Expenses for which the infant has received reimbursement, or for which the infant is contractually 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.~~

Reimbursement for, and payment of, expenses to be paid pursuant to an award under this subdivision, except for reimbursement provided for nursing or attendant care that is provided by an adult relative or legal guardian of an admitted claimant, shall be limited to (a) the allowable amounts

as determined by the primary payer's contracted rates or allowable rates or (b) the applicable reimbursement rate as set forth in the most recent Medicare Physician Fee Schedule adopted by the U.S. Centers for Medicare and Medicaid Services for reimbursement for, or payment of, medically necessary goods or services that are not covered under the primary payer's agreement. If a reimbursement rate has not been established for a medically necessary treatment, facility use, product, service, pharmacy service, or drug for which payment by the Program has been requested, the reimbursement rate shall be determined by the Commission.

In order to provide coverage for expenses ~~of medical and hospital services~~ *to be paid pursuant to an award* 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~~ *each admitted claimant's parent or legal guardian shall be required, upon the injured infant's admission into the Program, to purchase private health insurance for the benefit of the admitted claimant and provide coverage for such expenses that were, or are, incurred as a result of the admitted claimant's birth-related neurological injury if he has not already done so prior to the injured infant's admission into the Program. The premiums for the admitted claimant's health insurance policy, whether the policy was purchased prior to or subsequent to the injured infant's admission into the Program, shall be paid by the Program's Fund from the date of the order admitting the injured infant into the Program going forward, provided the policy is comparable to no greater than the gold-tier health plans under the Patient Protection and Affordable Care Act (P.L. 111-148), as amended (ACA), and so long as appropriate documentation verifying payment of the premiums is provided to the Program. If coverage for the expenses that were or are incurred as a result of the admitted claimant's birth-related neurological injury is achieved through the admitted claimant's parent's or legal guardian's purchase of a family health insurance plan, the Program shall reimburse the portion of the premiums that is attributable to the admitted claimant's coverage, provided that (1) the policy is comparable to no greater than the gold-tier health plans under the ACA and (2) appropriate documentation verifying payment of the premiums by the admitted claimant's parent or legal guardian is provided to the Program. If health insurance is provided through the admitted claimant's parent's or legal guardian's employer, the Program shall reimburse the portion of the premiums that is attributable to the admitted claimant's coverage and that is paid by the admitted claimant's parent or legal guardian, provided that (A) the policy is comparable to no greater than the gold-tier health plans under the ACA; and (B) appropriate documentation verifying payment of the premiums by the admitted claimant's parent or legal guardian is provided to the Program. The Program shall not reimburse any portion of the premiums that is paid by the employer.*

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 calculated based on the Commonwealth's reporting period immediately preceding the 18th birthday of the claimant child, and subsequently adjusted based upon the succeeding annual reports of the Commonwealth. The provisions of § 65.2-531 shall apply to any benefits awarded under this subdivision. *Any benefits awarded under this subdivision shall be placed in a trust established by the parent or legal guardian of the admitted claimant for the sole benefit of the admitted claimant and shall be subject to a pay-back provision whereby any payments made by Medicaid on behalf of the admitted claimant for expenses incurred as a result of the birth-related neurological injury shall be repaid to the Medicaid program.*

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

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

B. Regardless of whether the Commission makes either of the determinations described in clauses (i) and (ii) of subsection A, the Commission shall not award compensation in connection with a claim under this chapter, or any claim pursuant to § 8.01-273.1, for any ~~attorney's~~ *attorney* fees or other

expenses incurred by any physician, hospital, or nurse midwife that is party to a proceeding under this chapter, or pursuant to § 8.01-273.1, or by a medical malpractice liability insurer of such party. This prohibition shall not affect the requirement that the Program make reimbursement for photocopying costs as set forth in § 8.01-273.1, or the requirement under § 38.2-5002.1 that the Program compensate the Office of the Attorney General for its provision of legal services to the Program.

~~C. 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.~~