

VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

CHAPTER 806

An Act to amend and reenact §§ 38.2-5001, 38.2-5010, and 38.2-5013 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act.

[S 1018]

Approved March 29, 1999

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-5001, 38.2-5010, and 38.2-5013 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 in the immediate post-delivery period 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.

"Participating hospital" means a 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.

"Program" means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter.

§ 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 neurological diseases, or maternal substance abuse.

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

§ 38.2-5013. Limitation on claims.

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