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SENATE BILL NO. 632

Senate Amendments in [] — February 14, 2006

A BILL to amend and reenact § 38.2-5011 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 38.2-5011.1, relating to the Virginia Birth-Related Neurological Injury Compensation Act; redetermination of claim based on new evidence.

Patron Prior to Engrossment—Senator Edwards

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 38.2-5011 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 38.2-5011.1, as follows:

§ 38.2-5011. Conclusiveness of determination or award; appeal.

A. The determination of the Commission pursuant to subdivisions A 1 through A 3 of § 38.2-5008, or the award of the Commission, as provided in § 38.2-5009, if not reviewed within the time prescribed by § 38.2-5010, or a determination or award of the Commission upon such review, as provided in § 38.2-5010, shall be conclusive and binding as to all questions of fact, *except as provided in § 38.2-5011.1*. No appeal shall be taken from the decision of one commissioner until a review of the case has been held before the full Commission, as provided in § 38.2-5010. Appeals shall lie from the full Commission to the Court of Appeals in the manner provided in the Rules of the Supreme Court.

B. The notice of appeal shall be filed with the clerk of the Commission within thirty days from the date of such determination or award or within thirty days after receipt by registered or certified mail of such determination or award whichever occurs last. A copy of the notice of appeal shall be filed in the office of the clerk of the Court of Appeals as provided in the Rules of the Supreme Court.

C. Cases so appealed shall be placed upon the privileged docket of the Court and be heard at the next ensuing term thereof. In case of an appeal from an award of the Commission to the Court of Appeals, the appeal shall operate as a suspension of the award, and the Program shall not be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined in accordance with the provisions of this chapter.

§ 38.2-5011.1. Redeterminations based on new evidence.

A. ~~[Notwithstanding any other provision of law or rule of court, a claimant~~ A claimant who has not obtained a judgment in a civil proceeding arising from an injury that is claimed to involve the tortious conduct of a health care provider associated with the infant's birth, or entered into a settlement in such a proceeding] may, by motion to the Commission, apply for a redetermination of a finding by the Commission pursuant to subdivision A 1 of § 38.2-5008 that an injury claimed is not a birth-related neurological injury, if the claimant asserts that it has obtained new evidence on the issue of whether the injury claimed is a birth-related neurological injury, which evidence (i) results from the application of medical or scientific discoveries and developments that were not known or available to the claimant or the Commission at the time of the Commission's previous determination pursuant to subdivision A 1 of § 38.2-5008; (ii) is materially relevant, noncumulative, and necessary; and (iii) may prove that the injury claimed is a birth-related neurological injury. [Such claim shall be made within three years of a final determination by the Commission that the injury claimed is not a birth-related neurological injury. For claims found by the Commission not to be a birth-related neurological injury prior to July 1, 2006, such claims for redetermination by the Commission under this section shall be filed within two years of the effective date of this section.]

B. The claimant shall assert categorically and with specificity, under oath, (i) facts to support the requirements enumerated in subsection A, (ii) the reason or reasons the evidence was not known or available at the time of the Commission's prior determination pursuant to subdivision A 1 of § 38.2-5008, and (iii) the reason or reasons that the newly discovered or available evidence may prove that the injury claimed is a birth-related neurological injury. Such motion shall contain all relevant allegations and facts that are known to the claimant at the time of filing.

C. The petitioner shall serve a copy of such motion upon the attorney for the Program. The Program shall file its response to the motion within 30 days of the receipt of service. The Commission shall, no sooner than 30 and no later than 90 days after such motion is filed, hear the motion.

D. The Commission shall, after a hearing on the motion, set forth its findings specifically as to each of the items enumerated in subsections A and B and either (i) dismiss the motion for failure to comply with the requirements of this section or (ii) if it finds by clear and convincing evidence that the requirements of subsection A have been met, schedule a hearing of the full Commission to determine de

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59 *nov*o whether the injury claimed is a birth-related neurological injury as defined in § 38.2-5001.

60 *E. A determination by the Commission pursuant to subsection D shall be conclusive and binding as*
61 *to all questions of fact. Appeals shall lie from the full Commission to the Court of Appeals in the*
62 *manner provided in the Rules of the Supreme Court.*