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## HOUSE BILL NO. 2170

AMENDMENT IN THE NATURE OF A SUBSTITUTE  
(Proposed by the House Committee on Commerce and Labor  
on February 3, 2011)

(Patron Prior to Substitute—Delegate Phillips)

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

**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 relative or legal guardian of a Program beneficiary 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. 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.

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 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.

3. Reasonable expenses incurred by the claimant in connection with the filing of a claim under this chapter, including reasonable attorneys' fees, ~~which 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 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.

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

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