

LD1520156

**HOUSE BILL NO. 200**

Offered January 17, 1994

*A BILL to amend and reenact §§ 38.2-5001, 38.2-5002, 38.2-5011, 38.2-5012 and 38.2-5014 of the Code of Virginia and to repeal §§ 38.2-5015 through 38.2-5021 of the Code of Virginia, relating to the Birth-Related Neurological Injury Compensation Act.*

Patrons—Cohen and Copeland

Referred to Committee on Corporations, Insurance and Banking

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

**1. That §§ 38.2-5001, 38.2-5002, 38.2-5011, 38.2-5012 and 38.2-5014 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 occurring in this Commonwealth on or after January 1, 1988, but before July 1, 1994, 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.

"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 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 former § 38.2-5020 for the period of time in which the birth-related neurological injury occurred.

"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 former § 38.2-5020 for the year in which the birth-related neurological injury occurred.

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

§ 38.2-5002. Virginia Birth-Related Neurological Injury Compensation Program; exclusive remedy; exception.

A. There is hereby established the Virginia Birth-Related Neurological Injury Compensation Program.

B. Except as provided in subsection D, the rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out

INTRODUCED

HB200

60 of or related to a medical malpractice claim with respect to such injury.

61 C. Notwithstanding anything to the contrary in this section, a civil action shall not be foreclosed  
62 against a physician or a hospital where there is clear and convincing evidence that such physician or  
63 hospital intentionally or willfully caused or intended to cause a birth-related neurological injury,  
64 provided that such suit is filed prior to and in lieu of payment of an award under this chapter. Such suit  
65 shall be filed before the award of the Commission becomes conclusive and binding as provided for in  
66 § 38.2-5011.

67 D. Notwithstanding anything to the contrary in this section, a civil action arising out of or related to  
68 a birth-related neurological injury under this chapter, brought by an infant, his personal representative,  
69 parents, dependents, or next of kin, shall not be foreclosed against a nonparticipating physician or  
70 hospital, provided that (i) no participating physician or hospital shall be made a party to any such action  
71 or related action, and (ii) the commencement of any such action, regardless of its outcome, shall  
72 constitute an election of remedies, to the exclusion of any claim under this chapter; provided that if  
73 claim is made, accepted and benefits are provided by the Fund established under pursuant to this  
74 Virginia Birth-Related Neurological Injury Compensation Program, the Fund Commonwealth shall have  
75 the right, and be subrogated, to all of the common law rights, based on negligence or malpractice, which  
76 the said infant, his personal representative, parents, dependents or next of kin may have or may have  
77 had against the non-participating physician or hospital, as the case may be.

78 § 38.2-5011. Conclusiveness of determination or award; appeal.

79 A. The determination of the Commission pursuant to subdivisions A 1 through A 3 of § 38.2-5008,  
80 or the award of the Commission, as provided in § 38.2-5009, if not reviewed within the time prescribed  
81 by § 38.2-5010, or a determination or award of the Commission upon such review, as provided in  
82 § 38.2-5010, shall be conclusive and binding as to all questions of fact. No appeal shall be taken from  
83 the decision of one commissioner until a review of the case has been held before the full Commission,  
84 as provided in § 38.2-5010. Appeals shall lie from the full Commission to the Court of Appeals in the  
85 manner provided in the Rules of the Supreme Court.

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

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

95 § 38.2-5012. Enforcement, etc., of orders and awards.

96 *All awards by the Commission pursuant to this chapter shall be paid out of the general fund of the*  
97 *state treasury.* The Commission has full authority to enforce its orders and protect itself from deception.  
98 While the language of this section is permissive and provides that a party may enforce an award in  
99 court, it must be read and considered in pari materia with the Commission's power pursuant to  
100 § 65.2-202 to punish for disobedience of its orders.

101 § 38.2-5014. Scope.

102 This chapter applies to all claims for birth-related neurological injuries occurring in this  
103 Commonwealth on and after January 1, 1988. The chapter shall not apply to disability or death caused  
104 by genetic or congenital abnormalities.

105 2. That §§ 38.2-5015 through 38.2-5021 of the Code of Virginia are repealed.

106 3. That all moneys in the former Birth-Related Neurological Injury Compensation Fund be  
107 deposited in the general fund of the State Treasury. Prior to July 1, 1994, the State Treasurer  
108 shall develop a plan of operation to provide for the efficient administration and prompt processing  
109 of the awarding of claims pursuant to Chapter 50 of Title 38.2 (§ 38.2-5000 et seq.). On and after  
110 September 1, 1994, the State Treasurer shall remit, with assistance from the Birth-Related  
111 Neurological Program, fifty percent of all assessments paid into the former Birth-Related  
112 Neurological Injury Compensation Fund pro rata without interest, to all persons having paid into  
113 such Fund. All amounts remaining after remitting such assessments shall be dedicated to the  
114 Commonwealth's funding of Medicaid.