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SENATE BILL NO. 793

Offered January 8, 2025

Prefiled December 28, 2024

A BILL to amend and reenact §§ 38.2-5004 and 38.2-5008 of the Code of Virginia, relating to Virginia Birth-Related Neurological Injury Compensation Program; electronic filing; review of claims.

Patron—Head

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-5004 and 38.2-5008 of the Code of Virginia are amended and reenacted as follows:

§ 38.2-5004. Filing of claims; review by Board of Medicine; review by Department of Health; filing of responses; medical records.

A. 1. In all claims filed under this chapter, the claimant shall electronically file with the Commission a petition; setting forth including the following information and documentation:

a. The name and address of the legal representative and the basis for his representation of the injured infant;

b. The name and address of the injured infant;

c. The name and address of any physician providing obstetrical services who was present at the birth and the name and address of the hospital at which the birth occurred;

d. A description of the disability for which claim is made;

e. The time and place where the birth-related neurological injury occurred;

f. A brief statement of the facts and circumstances surrounding the birth-related neurological injury and giving rise to the claim;

g. All available relevant medical records relating to the person who allegedly suffered a birth-related neurological injury, including prenatal medical records, and an identification of any unavailable records known to the claimant and the reasons for their unavailability;

h. Appropriate assessments, evaluations, and prognoses and such other records and documents as are reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the injured infant on account of a birth-related neurological injury;

i. Documentation of all expenses and services incurred to date, including attorney fees, which indicates whether such expenses and services have been paid for, and if so, by whom; and

j. Documentation of any applicable private or governmental source of services or reimbursement relative to the alleged impairments.

2. ~~The~~ In addition to filing the petition, the claimant shall furnish pay to the Commission with as many copies of the petition as required for service upon the Program, any physician and hospital named in the petition, the Board of Medicine and the Department of Health, along with a \$15 filing fee. Upon receipt of the petition and filing fee, the Commission shall immediately serve the Program by service upon send copies of the petition by registered or certified mail or by electronic mail to the agent designated to accept service on behalf of the Program in the plan of operation by registered or certified mail, and shall mail copies of the petition to any physician and hospital named in the petition, the Board of Medicine, and the Department of Health.

3. If a claimant is unable to file an electronic petition, he may file a petition in paper format upon the Commission's approval. Such petition shall include all information and documentation required by subdivision 1.

B. Upon receipt of the petition or the filing of a claim relating to the conduct of a participating physician, the Department of Health Professions shall investigate the petition or claim, utilizing the same process as it does in investigating complaints filed under any provision contained in Title 54.1. Conduct of health care providers giving rise to disciplinary action shall be referred to the Board of Medicine for action consistent with the authority granted to the Board in Article 2 (§ 54.1-2911 et seq.) of Chapter 29 of Title 54.1. If a notice or order is issued by the Board of Medicine, a copy shall be mailed to the petitioner or claimant.

C. Upon receipt of the petition or the filing of a claim relating to the conduct of a participating hospital, the Department of Health shall investigate the petition or claim, utilizing the same process as it does in investigating complaints filed under any provision of Title 32.1. If it determines that there is reason to believe that the alleged injury resulted from, or was aggravated by, substandard care on the part of the hospital at which the birth occurred, it shall take any appropriate action consistent with the authority granted to the Department of Health in Title 32.1.

D. The Program shall file a response to the petition and submit relevant written information relating to the

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59 issue of whether the injury alleged is a birth-related neurological injury within the meaning of this chapter
 60 within ~~40~~ 21 days after the date the panel report prepared pursuant to subsection C of § 38.2-5008 is filed
 61 with the Commission served on the Program.

62 E. Any hospital at which a birth occurred, upon receipt of written notice from the legal representative of
 63 an injured infant that he intends to file a petition under this chapter, shall promptly deliver to such person all
 64 available medical records relating to the infant who allegedly suffered a birth-related neurological injury.

65 F. As used in this chapter, fetal *heart rate* monitoring strips, ~~whether printed or~~ in an *uncondensed and*
 66 *uncompressed* electronic format, shall be deemed to constitute part of the medical records relating to an infant
 67 who allegedly suffered a birth-related neurological injury.

68 **§ 38.2-5008. Determination of claims; presumption; finding of Virginia Workers' Compensation**
 69 **Commission binding on participants; medical advisory panel.**

70 A. The Commission shall determine, on the basis of the evidence presented to it, the following issues:

71 1. Whether the injury claimed is a birth-related neurological injury as defined in § 38.2-5001.

72 a. A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury where it
 73 has been demonstrated, to the satisfaction of the Virginia Workers' Compensation Commission, that the
 74 infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that
 75 the infant was thereby rendered permanently motorically disabled and (i) developmentally disabled or (ii) for
 76 infants sufficiently developed to be cognitively evaluated, cognitively disabled.

77 If either party disagrees with such presumption, that party shall have the burden of proving that the
 78 injuries alleged are not birth-related neurological injuries within the meaning of the chapter.

79 b. A rebuttable presumption of fetal distress, an element of a birth-related injury, shall arise if the hospital
 80 fails to provide the fetal heart *rate* monitor ~~tape~~ *record* to the claimant, as required by subsection E of § 38.2-
 81 5004.

82 2. Whether obstetrical services were delivered by a participating physician at the birth.

83 3. Whether the birth occurred in a participating hospital.

84 4. How much compensation, if any, is awardable pursuant to § 38.2-5009.

85 5. If the Commission determines (i) that the injury alleged is not a birth-related neurological injury as
 86 defined in § 38.2-5001, or (ii) that obstetrical services were not delivered by a participating physician at the
 87 birth and that the birth did not occur in a participating hospital, it shall dismiss the petition and cause a copy
 88 of its order of dismissal to be sent immediately to the parties by registered or certified mail.

89 6. All parties are bound for all purposes including any suit at law against a participating physician or
 90 participating hospital, by the finding of the Virginia Workers' Compensation Commission (or any appeal
 91 therefrom) with respect to whether such injury is a birth-related neurological injury.

92 B. The deans of the schools of medicine of the Eastern Virginia Health Sciences Center at Old Dominion
 93 University, University of Virginia School of Medicine, and Medical College of Virginia of Virginia
 94 Commonwealth University shall develop a plan whereby each claim filed with the Commission is reviewed
 95 by a panel of three qualified and impartial physicians drawn from the fields of obstetrics, pediatrics, pediatric
 96 neurology, neonatology, physical medicine and rehabilitation, or any other specialty particularly appropriate
 97 to the facts of a particular case. Such plan shall provide that each of the three aforementioned medical schools
 98 shall maintain a review panel of physicians to review claims, with responsibility for reviewing claims rotating
 99 among each medical school's panel on a case-by-case basis. The chair of the panel shall be determined by the
 100 school's dean. In no event shall the panel contain more than one panel member from the field of obstetrics.
 101 The Commission shall direct the Program to pay to the medical school that performed the assessment and
 102 prepared a report in conformity with this provision the sum of ~~\$3,000~~ \$6,000 per claim reviewed.

103 C. The panel created pursuant to subsection B shall prepare a report that provides a detailed statement of
 104 the opinion of the panel's members regarding whether the infant's injury does or does not satisfy each of the
 105 criteria of a birth-related neurological injury enumerated in such term's definition in § 38.2-5001. The report
 106 shall include the panel's basis for its determination of whether each such criteria was or was not satisfied. In
 107 addition, the report shall include such supporting documentation as the board of directors of the program may
 108 reasonably request. The panel shall file its report with the Commission 60 days from the date the petition was
 109 filed with the Commission. At the same time that the panel files its report with the Commission, the panel
 110 shall send copies thereof to the Program and all parties in the proceeding. At the request of the Commission,
 111 at least one member of the panel shall be available to testify at the hearing. The Commission shall consider,
 112 but shall not be bound by, the recommendation of the panel.