IN THE SUPREME COURT OF FLORIDA

CASE NO.s: 86,485 and
86,486
(consolidated)

ROBERT BAZLEY, M.D. and GALEN OF FLORIDA, INC., et al.,

Petitioners,

vs.

LORI ANN BRANIFF, and CHRISTOPHER J. BRANIFF,

Respondents.

ANSWER BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

ON REVIEW OF A QUESTION CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE BY THE FIRST DISTRICT COURT OF APPEALS TALLAHASSEE, FLORIDA.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Pages**

STATUTES

PUBLICATIONS

PRELIMINARY STATEMENT

In this answer brief, the parties will be referred to as follows:

The Respondent, Lori Ann Braniff will be referred to as BRANIFF. The Petitioner, Robert **Bazley,** M.D. will be referred to as "BAZLEY". The Petitioner, **Galen** of Florida, Inc. will be referred to as "HOSPITAL". The Academy of Florida Trial Lawyers will be referred to as the "ACADEMY".

The Florida Birth Related Neurological Injury Compensation Act will be referred to as **"NICA".**

STATEMENT OF THE CASE AND THE FACTS

The Academy of Florida Trial Lawyers adopts the Statement of the Case and the Facts as filed by Lori Ann Braniff and Christopher J. Braniff.

SUMMARY OF ARGUMENT

Section 766.301, et seq., Florida Statutes potentially limits an obstetrical patient's access to the courts of the State of Florida. Any such law must provide procedural due process protections and must also provide a viable alternative to the traditional tort system of just compensation.

The statute itself, however, does not place the obstetrical patient upon notice that the act will apply to her, but only that it has the potential to do so. It will apply to her not based upon something she has done, but something her physician has done, i.e., whether or not her physician or her hospital has elected to participate in the statutory program.

Section 766.316, Florida Statutes addresses the procedural due process concerns by giving the obstetrical patient a clear legal right to notice that her hospital or physician has opted to participate in the statutory program. Further, the statute makes clear that the reason for this notice is so that the obstetrical patient will be given notice of the statutory plan as an alternative. In order for this alternative to have any meaning whatsoever, the notice must be given prior to the delivery of the child.

ARGUMENT

SECTION 766.316, FLORIDA STATUTES, REQUIRES THOSE PHYSICIANS AND HOSPITALS WHO ELECT TO PARTICIPATE IN THE PLAN DESCRIBED THEREIN, TO NOTIFY OBSTETRICAL PATIENTS PRIOR TO DELIVERY OF THE CHILD OF THEIR PARTICIPATION UNDER THE STATUTE AS A CONDITION PRECEDENT TO THE APPLICATION OF THE EXCLUSIVE REMEDY PROVISIONS OF THE STATUTE.

Black's Law Dictionary defines the word "alternative" as follows:

> One or the other of two things; giving an option or choice; allowing a choice between two or more things or acts to be done. Black's Law Dictionary, Rev. 4th Ed. (1968).

This word is embodied in Section 766.316, Florida Statutes as follows:

> "Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan." (Emphasis added).

If an obstetrical patient is to be able to exercise any option between her common law rights and the "limited no-fault alternative", the exercise of that right must take place before the birth of the child.

The fact that this was the intention of the legislature is demonstrated by a review of the legislative history of the statute. Section 766.301, et seq., Florida Statutes (1991) (hereinafter "NICA") was proposed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems. [1] The Task Force recommended legislative adoption of a statute along the same lines as an experimental Virginia plan.

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[1] For the convenience of the Court, copies of the relevant pages of the Task Force's November 6, 1987 . Medical Malpractice Recommendations", including the Virginia Statute have been attached as an appendix to the back of this brief.

Both in the Virginia plan and the proposed Task Force plan, neither the physician nor the hospital was required to participate in the program. [2] They were given the option to participate. If they did so, they would obtain certain specified limitations upon their traditional common law liability for malpractice in specified birth related neurological injuries.

With regard to the proposed Florida legislation, however, the Task Force was concerned that the Virginia legislation did not contain a notice requirement. It noted:

> "The Virginia statute does not require participating physicians and hospitals to give notice to obstetrical patients that they are participating in the limited no-fault alternative for birth related neurological injuries, The Task Force recommends that health care providers who participate under this plan should be required to provide reasonable notice to patients of their participation. This notice requirement is justified on fairness grounds and arguably may be required in order to insure that the limited no-fault alternative is constitutional." (Appendix Page 6).

These constitutional concerns, in the absence of advance notice, are well founded. Once state action (or, as here, an election between two alternatives as a result of state action) can amount to a deprivation of a person's pre-existing rights, it is an "elementary and fundamental requirement of due process" that the affected persons be given reasonable advance notice of the action, so that they can take steps to protect those rights before the deprivation occurs. Mennonite Board of Missions v. Adams, 462 U.S. 791, 792, 103 S.Ct. 2706, 711 Law Ed.2d 180 (1983). Because the deprivation of rights effected by NICA occurs at the instant an injured

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[2] While this statement is technically true, it is also true that all physicians licensed in Virginia, who perform obstetrical services, either full-time or part-time, were to be considered "participating physicians". Thus, unlike in Florida, a doctor could not perform full or part-time obstetrical services and opt out of participation in the plan. King v. Virainia Birth Related Neurological Iniurv Compensation Program, 410 S.E.2d 656 (Virginia 1991).

baby is born, our fundamental notions of due process necessarily require that an obstetrical patient be given advance notice that her legal rights will be restricted by utilizing a participating physician or hospital. It is only before the birth that the fundamental notions of fairness are realized by giving the mother this "alternative".

Further, the statute requires that the notice "shall" be given. In this regard, it is thoroughly recognized in Florida that at least in ordinary usage -- and subject to exceptions not applicable here [3] -- the word "shall" in a statute is mandatory, and permits no discretion in those who are subject to its requirements. Neal v. Bryant, 149 So.2d 529, 532 (Fla. 1962); Florida State Racing Commission v. Bourquardez, 42 So.2d 87, 88-89 (Fla. 1949); White v. Means, 280 So.2d 20, 21 (Fla. 1st DCA 1973); Florida Tallow Corp. v. Bryan, 237 So.2d 308, 309 (Fla. 4th DCA 1970); Headley v. State Ex Rel. Bethune, 166 So.2d 479, 480-481 (Fla. 3rd DCA 1964); Brooks v. Anatasia Mosquito Control District, 148 So.2d 64, 66 (Fla. 1st DCA 1963). The mandatory import of the statute is reinforced by the Task Force's insistence that "reasonable notice" of the "alternatives" be provided, and in its stated reasons for recommending this provision -- which were "fairness" to the patient who might be stuck with the plan if she chooses to remain with a participating physician, and the unconstitutionality of depriving such a patient of her legal rights without advance notice of the potential deprivation. The clear purpose of the "notice" requirement is to insure that the patient can make an informed decision as to whether to forego her

[3] The word "shall" has been construed to be permissive only in cases in which it relates solely to an immaterial and tangential aspect of the statutory scheme, which is considered more a matter of convenience than substance. See Patry v. Caps, 633 So.2d 9 (Fla. 1994).

traditional legal rights and elect to proceed under the care of the participating Florida physician, whose liability is limited, or instead, to seek the care of a physician who remains subject to common law liability.

This interpretation, that NICA requires pre-delivery notice, has been adopted uniformly by the district courts of this state.

The issue of notice was first addressed in Turner v. Hubrich, 656 So.2d 970 (Fla. 5th DCA 1995). In Turner, the Fifth District Court of Appeals noted:

> The statute is quite clear that the burden is on the NICA participants to give the enlightening notice to their patients. This statute is silent as to when the notice is to be given, but it would make little sense to construe the statute to allow the patients to be apprised of rights and limitations after the services leading to the alleged injuries have been performed. Id. at 971.

Similarly, in the instant case below, the First District Court of Appeals noted:

> It would make little sense to inform an obstetrical patient of her "alternative" after the patient had already utilized the services of a NICA participant, and thus, had given up her chance to pursue a civil remedy, It would make still less sense to require predelivery notice as a means of informing patients of their options, yet not make such notice a condition precedent to the defendant's assertion of NICA exclusivity. Braniff v. Galen, 20 FLW 02140, (Fla. 1st DCA 1995).

Most recently, the Fourth District Court of Appeals aligned itself with the First District and the Fifth District Courts of Appeals and noted:

> "We conclude that the failure to give notice to plaintiffs before the provision of medical services, that the doctors had elected participation in the Neurological Injury Compensation Act, deprives the agency of its exclusive jurisdiction and authorizes the circuit court to herein adjudicate their claim." Mills v. North Broward Hospital District, 1995 W.L. 733082 (Fla. 4th DCA 1995).

In response to these decisions, and the previously noted arguments, the

HOSPITAL and BAZLEY assert that NICA is really no different from the Workers' Compensation Act and that the legislative intent can only be served if notice is not a precondition for coverage under the act. This is not the case.

The Workers' Compensation Act (Section 44.02(13)(a), Florida Statutes, and Section 440.03, Florida Statutes) is designed to apply to all employees. Although there are exceptions and options within the Workers' Compensation Act, it is still statutorily mandated to apply to all employers and employees. The act itself is intended to constitute notice to all employers and employees of their rights under it. In other words, while an exception or opt out may exist, the act places all employees on notice of that fact by its very terms. Similarly, where notice is required under the Workers' Compensation Act and where that notice is not a condition precedent under the Workers' Compensation Act it is specifically set forth in the statute. Section 440.04(2), Florida Statutes.

This interplay between an act which covers all, and one which allows some to opt out, is demonstrated by the distinctions between NICA and the Virginia Birth Related Neurological Injury Compensation Act. King v. Virginia Birth Related Neurological Injury Compensation Proaram, 410 S.E.2d 656 (Va. 1991). Under the Virginia act, all obstetricians who perform obstetrics either full or part-time are participants in the program. They do not have an option not to participate. Other physicians who do not hold themselves out as obstetricians, but who may, for whatever reason, perform obstetrical services, are not participants. Thus, in Virginia the public is on notice that a physician who holds himself out as performing

obstetrical services is a participant in the plan. Thus, as with the Workers' Compensation Act in Florida, the Virginia act does not require notice. Conversely, NICA gives no notice in and of itself to obstetrical patients as to who may or may not be a participant in the plan. Thus, the notice must be given prior to delivery, both to satisfy constitutional muster and also to meet the requirements of the statute.

The HOSPITAL and BAZLEY also cite Florida Birth Related Neurological Injury Compensation Association v. Carreras, 633 So.2d 1103 (Fla. 4th DCA 1994) in support of their position. See BAZLEY's brief Page 11, and HOSPITAL's brief, Page 8(f.n. 1). While Carreras did not deal with a notice issue, it did discuss in general the intent and effect of the NICA program. The discussion, however, in Carreras ignored the fact that NICA only applies to participating physicians and hospitals. Thus, the statement in Carreras at Page 1105 that "the NICA program is a no-fault plan which provides benefits where there has been a birth related neurological injury", is not wholly correct. In order for this statement to be accurate, the following phrase must be added:

> "When the hospital and physician have elected to participate in the plan."

It is this very distinction which makes predelivery notice an absolute requirement for consideration of constitutional due process, the requirements of the statute and common sense.

CONCLUSION

Based upon the foregoing analysis, it is respectively submitted that the question certified to this Court by the First District Court of Appeals be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing instrument has been furnished by U.S. Mail this 21st day of December, 1995 to Jack W. Shaw, Jr., Esquire, and Michael J. Obringer, Esquire, 225 Water Street, Suite 1400, Jacksonville, Florida 32202-5147 and F. Shields McManus, Esquire, Waterside Professional Building, 221 East Osceola Street, Stuart, Florida 34994, Edna Caruso, Esquire, Barristers Building, 1615 Forum Place, Suite 3-A, West Palm Beach, Florida 33401, Stephen E. Day, Esquire, 50 North Laura Street, Suite 3500, Jacksonville, Florida 32202, and Robert E. Broach, Esquire, Post Office Box 447, Jacksonville, Florida 32201.

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APPENDIX

ACADEMIC TASK FORCE FOR REVIEW Of THE INSURANCE AND TORT SYSTEMS

MEDICAL MALPRACTICE RECOMMENDATIONS

November 6, 1987

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c. No-Fault Plan for Birth-Related Neurological Injuries

In its Preliminary Fact-Finding Report on Medical Malpractice, the Task Force found that obstetricians were among the physicians most severely affected by current medical malpractice problems. Obstetricians were more likely than other physicians to have claims filed against them, their malpractice

premiums were among the highest and the recent increases in malpractice premiums for obstetricians were greater than for other physicians. The Fact-Finding Report specifically noted that in today's society, anything other than a normal birth is considered an aberration and aftrn leads to a claim against the obtrtrician.

To remedy these problems, thr Task Force recommends adoption of a no-fault camprnration plan for birth related neurological injuries, similar to the plan adopted undmt a 1987 Virginia statute. The Task Force ● ■♎□□♦○♦ this separate treatment for birth related neurological injuries for two reasons: first, because claims costs in this area have bun particularly high, and, second, because a no-fault system in this limited area is feasible and would involve manageable coats.

For other types of medical injury, the Task Force does not recommend a no-fault compensation alternative to the tort system. This negative conclusion is compelled by findings that a comprehensive no fault system for all medical injuries would be prohibitively expensive, many times more expensive than the existing medical malpractice systems. In order to develop a no-fault system at reasonable cost, it is necessary to ● t&blish a framework for distinguishing compensable events from non-compensable events. In most areas of medical injury, this is not ● canonicrlfy feasible at the present time. For ● ♦□●♋♊ daf ining the compensable avant for a no-fault plan to cover medical injuries in emergency rooms and trauma centers would require terms broad enough to include injuries of every degree to any part of the body resulting from an unlimited variety of medical

interventions. Because of its ● potential, such a broad definition of the compensable event would make no-fault insurance costs prohibitively ● xpmnrivm, at worst, and impossible to predict, at best.

A feasible structure determining compensable ● vanrs in birth-related neurological injuries does exist, as demonstrated by the Virginia statutm vhich is attached as Appendix A to these recommendations. The Task Force recommendation, based upon the Virginia plan, would provide immediate compensation, on a no-fault basis, for a very limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. The statute would define these injuries in terms of *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 nonambulatory, ● incontinent, and in need of assistance in all phases of drily living."

The Virginia ● tatutm does not take effect until January 1, 1988, so that actual ● prtirnca under the ● +rtutm is not yrt available. However, enactment of the plan has ● lrmrdy produced noticeable results in terms of improved availability and ● ffordrbility of liability insurance coverage for obstatricians in Virginia.

Full details of the plan will not be presented here, because ● well-developed statute is available for a model. A copy of the

Virginia statute is attached as an Appendix. The ● ♦♦♋■♦▭♋▭ features of the plan ♋□O amfollows:

1. Establish a no-fault compensation fund to provide life-time care of infants with severe birth-related neurological injuries; compensation limited to net ● conomic losses.

2. No-fault benefits vould be the ● xclumivm remedy ... injuries suffered by infmntm covered by the plan.

3. Claims for statutory compensation benefits must be heard within 120 days by an administrative agency (the Division of Workers' Compensation, in Florida).

4. Voluntary participation by hospitals and by physicians vho practice obstetrics; initial fee of $5,000 for participating physicians, $50 per delivery for participating hospitals, and assessment of $250 for all other physicians; annual fees thereafter on actuarial basis.

5. Deficiency assessment against all liability insurance carriers in the ● tatm, if the fund becomes inadequate.

6. Participating physicians and hospitals must agree to submit to review for disciplinary of regulatory purposes in rny case where ● ubot8nd8rd care is indicated.

The Virginia statute does not require participating physicians and hospitals to give notice to obstetrical patients that they are participating in the limited no-fault alternative for birth-related neurological injuriar. The Task Force recommends that health care providers vho participate under this plan should be required to provide reasonable notice to patients of their participation. This notice requirement is justified on fairness grounds and arguably may be required in order to assure that the limited no fault alternative is constitutional.

VIRGINIA ACTS OF ASSEMBLY - CHAPTER 540

An Act to amend the Code of Virginia by adding in Title 38.2 a chapter numbered 50 consisting of sections numbered 38.2-5000 through 38.2-5021, establishing the Birth-Related Neurological Injury Compensation Act.

[H 1216]

Approved Mar 27 1987

Be it ● rctrd by the General Assembly of Virginia:

1. That the Coda of Virginia is amended by adding in Title 33.2 a chpater numbered 50, consisting of sections numbered 38.2-5000 through 38.2-5021, as follows:

CHAPTER so
VIRGINIGAL BIRTH-RELATED NEUROLOGICALINJURY COMPENSATION ACT.

§ 382.5000, Short title.-The provisions of this chapter shall ba known and may be citad as the Virginia Birth-Related Neurological Injury Compensation Act.

§ 38.2-5001. Definitions.-As used in this Act:

"Birth-related neuroliqcal injury* mean injury to the brain or spinal cord of ● infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in thr immediate post-delivery period in a hospital which renders the infant permanently nonambulatory, aphasic, incontinent, and in need □↗ ● afrtancm in all phases of daily living. This definition shall apply to live births only.

"Claimant" means any parson vho filu a claim pursuant to § 38.2-50004 for compensation for a birth-related neurological to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case Of 8 deceased infmt, the claims may be filed by an administrator, executor, or other legal representative.

"Commission" means the Industrial Commission of Virginia.

"Participating physician" means 8 physician licensed in Virginia to practice medicine, vho practice obstetrics or performsobstetrical services ● ithmr full or part time and vho *at* the time of the inury (i) had in force an agreement with *the* Commissioner of Health or his designee, in 8 form prescribed by *thr* Commissioner, whereby the physician ● gra+d to participate in thr development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients vho 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 Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine wherebythe physician● ℽ□◆Ω to submit to review by the Board of Medicine as required by subsection B of ● 38.2-5004, and (iii) had paid the assessment required pursuant to this chapter for the year in which the 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 • □□□%□ ♦□ provide obstetrical care to patients ● lfUl* 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 fores an agreement with the State Departmetn of Health whereby the hospital greed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the assessment required pursuant to this chapter for the year in vhfch the injury occurred.

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

§ 38.2-5002. Virginia Birth Related Neurological Injury □□□■♦♦□■ program: • ♦♦♦ remedy, • There is hereby ● rtablirhad the Virginia Birth-Related Neurological Injury Compensation Program.

B. The rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies o f such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury.

C. Notwithstanding anything to tha contrary in this saction, a civil action shall not be foreclosed against a physician or • hospital where there is clear and convincing ● vidmncm that much physician or hospital intentionally or willfully caused or intended t o cause a birth-related neurological injury, provided that such suit is filed prior to and *in* lieu of payment of an award under this chapter. Such suit shall be filed before the award of the Commission becomes conclusive and binding as provided *for* in § 38.2-5011.

§ 38.2-5003. Industrial Commission ● uthorfzmd to hear and determine claims.-The Industrial Commission is authorized to hear and apss upon all claims filed pursuant to Chapter 2 (§ 65.1-10 et seq.) of Title 65.1 Of this Code • 8 necessary to carry out the puposes of this chapter.

8 38.25004. Filing Of claims; review by Board of Medicine; review by Department of Health; filing Of responses.-A.1. In all claims filed under this chapter, the claimant shall file with the Commission a petition, ● attinp forth the following information:

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

b. The name and address of the injured infant;

c. The name and address o f 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 fat which claim is made;

e. The time and place where the injury occurred;

f. A brief ● t8taamnt of the facts and circumstances surrounding the injury ■Ω giving rise to the claim;

g. All available relevant medical records relating to the person who allegedly ● uffarti a birth-related neurological injury

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:

1. Documentation of expenses and services incurred to date, which indicates whether such expenses and services have been paid for, and if so, by whom; and

j. Documentation of any ● pplicrblm private or governmental source of services or reimbursement relative c o the alleged impairments.

2. The claimant shall furnish the Commission with as many copies of the petition as required for service upon the Program, any physician rnd hospital named in the petition, the Board of Medicine and the Department of Health, along with a fifteen dollar filing fee. Upon receipt of the *petition* the Commission shall immediately serve the program by service upon the agent designated to accept service on behalf of the Program in the plan of operation by resigtered or certified mail, and shall mail copies of the petition to any physician and hospital names in the patitian, the Board of *Wmdicinr,* and the Department of Health.

B. upon receipt of the petition, the Board of Medicine shall ● valuatr the claim, and 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 physician, it shall take any appropriate action consistent with the ● *utkmrity* granted to the Board in §§ 54-316 through 54-325.

c. Upon receipt of t&a petition, the Department of Health shall ● vrlurto the claim, and if It determines that there is reason to believe that the alleged injury resulted from, or was ● ggravatad 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 *of this* Coda.

D. The program shall hrvm thirty days from the date of service in which to file • response to the petition, and to submit relevant written information relating tat ho issue of vhrthat tha injury alleged is • birth-related nourological injury, within the meaning of this chapter.

§ 38.2-5005. Tolling of statute *of* limitations. - The statute of limitations with respect to any civil action that may be brought by or on behalf of an injured infant allegedly arising out of or related to • birth-related injury shll be tolled by the filing of a claim in accordance with this ● etlon, and the time such claim is pending shall not be computed u part of the period within which much civil action may be brought.

§ 38.2-5006. Hearing; parties. - A. Immediately after such petition has been received, the Commission shall set the date fot a hearing, which shall be hrld no sooner than 45 days, no later than 120 days after the filing of a peitition, and shall notify the parties thereto of the time and place of such hearing. The hearing shall be held in the City or county where the injury occurred, or in a contiguous city or county, unless otherwise

agreedto by the parties and authorized by the Commission.

B. The parties to the hearing required under this section shall include the claimant and the program.

§ 38.2-5007. Interrogatories and depositions. - Any party to a proceeding under this chapter may, upon application to the Commission setting forth the materiality of the evidence to be given, serve interrogatories or cause the depositions of witnesses residing within or without the Commonwealth to be taken, the costs to be taxed as expenses incurred in connection with the filing of a claim, in accordinace with subdivision 2 of § 38.2-5009. Such depositions shall be taken after giving notice and in the manner prescribed by law, for depositions in actions at law, [illegible] that theyshall bedirected 'co the Commission, the Commissioner or thr deputy commissioner before whom the proceedings may be pending.

§ 38.2-5008 Determination of claims; presumption; finding of Industrial Commission binding on participants: medical advisory panel. - A. The commission Shall determine, on the basis of the evidancr presented to it, the following issues:

1. Whether the injuries claimed arm birth-related neurological injuries as defined in § 38.2-5001. A rebuttable presumption shall arise that the injury alleged is a birth-related surological injury where it has been demonstrated, to the satisfaction of the Industrial Commission, that the infant ha8 sustainmd a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that the infant was thereby rendered permanently nonambulatory, [illegible] andincontinent.

If ithu party disagrees with such presumption, that party shall have the burden of proving t&t the injuries alleged arm not birth-related neurological injuries within thm meaning of the Act.

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

3. Whether the birth occurred in a participating hospital.

4. How much compensation, if any, is awardable pursuant to § 38.2-5008.

5. If the Commission determines (i) that the injury alleged is not 8 birth related neurological injury within thr meaning of this chapter, (ii) that obstetrical services were not delivered by a participating physician at the birth, of (iii) that the birth did not occur in a participating hospital, it shall cause a copy of such determination to be sent immediately to the parties by registered or certified mail.

6. By becoming a participating physician or hospital each participant is bound for all purposes including my suit at law against a participating [illegible] or participating hospital, by the finding of thr Industrial Commission (or any appeal therefrom) with respect towhether such injury is birth related.

B. The Deans of the medical schools of the Commonwealth shall develop 8 plan whereby each claim filed with the Commission 18 reviewed by a panel of three qualified and impartial physicians. This panel shall file its report and recommendations as to whether the injury alleged is 8 birth-related neurological injury within the meaning of this Act vita the commission at least ten days prior to the date set for hearing pursuant to § 38.2-

5006. At the request of the Commission at least one member of the panel shall be available to testify at the hearing. The Commission must consider, but shall not be bound by, the recommendation of the panel.

§ 38.2-5009. Commission awards for birth-related neurological injuries; notice of award. Upon determining (i) that an infant has sustained a birth-related neurological injury, (ii) that obstetrical services were delivered by a participating physician at the birth, and (iii) that the birth occurred in a participating hospital, the Commisison shall make an award providing compensation for the following items relative to such injury:

1. Acutal medically necessary and reasonable expenses of medical and hospital rehabilitative, residential and custodial care and service, special facilities and related travel. However, such 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 provision of any health or sickness insurance policy or other private insurance program.

2. Expenses of medical and hospital services under subdivision 1 of this section 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.

3. Loss of earnings from the age of eighteen. 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 eighteen through the age of sixty-five, if he had not been injured, in the amount of fifty percent of the average weekly wage in the Commonwealth of workers in the private, nonfarm sector.

4. Reasonable expenses incurred in connection with the filing of a claim under this Chapter, including reasonable attorneys fees, which shall be subject to the approval and award of the Commission.

5. A copy of the award shall be sent immediately by registered or certified mail to the parties.

§ 38.2-5010. Rehearing on Commission determination or award. If an request for review is made to the Commission within twenty days from the date of a determination pursuant to subdivisions 1 through 3 of § 38.2-5008, the full Commission, upon review of an award by the Commission pursuant to § 38.2-5009,

(11)

the full Commission, a [illegible] any member of the Commission who made the determination of an 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 [illegible] as a [illegible]. Such review and determination, together with a [illegible] of the finding of fact, rulings of law and other matters pertinent to the question at issue, shall be filed with the record of the proceedings and shall be sent immediately to thr parties.

§ 38.2-5011. Conclusiveness of determination or award; appeal. - A. The determination of the Commission pursuant to subdivisions 1 through 3 of § 38.2-5008, or the award of the Commission, as provided in § 38.2-5009, if not reviewed in due time, or a determination or a vrrd Of the Commission upon such review, as provided in § 38.24010, shall be conclusive and binding as to all questions of fact. No appeal shall be taken from the decision of one commissioner until a review of the case has been had before the full Commission, a8 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 thr Supreme Court.

B. Thr notice of appeal shall be filed with the clerk of the Commission within thirty day8 from tha date of such determination [illegible] a ward or within thirty days after receipt by registered or certified mail of such determination or award. 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 a pprrl from an award of the Commission to the Court of Appeals, the appeal rhrll 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.

§ 38.2-5012. Enforcement, etc. of orders and awards. - The Commission has full authority to enforce its orders and protect itself from deception. While the language of this section is permissive and provides that a party m y enforce an award in court, it must be read and considered in pari materia with the Commission's power pursuant to § 65.1-20 to punish for disobedience of its orders.

§ 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.

§ 38.2-5014. Scope. - This chapter applies to all claims for birth-related neurological injuries occurring in this Commonwealth on and after January 1, 1988. The chapter shall not apply to disability or death caused by genetic or congenital abnormalities.

§ 38.24015. Birth-Related Neurological Injury Compensation Fund. - There is a 8t&blirhrd the Birth-Related Neurological Injury Compensation Fund to finance the Virginia Birth-Related

Neurological Injury Compensation Program created by this chapter.

§ 38.2-5016. Board of directors; [illegible] vacancies; term. → A. The Birth-Related Neurological Injury Compensation Program shall be governed by a board of five directors.

B. Directors shall be appointed for a term of three years or until their successors are appointed and *hrvr* qualified.

C. 1. The directors shall be appointed by the Governor as follows:

a. One citizen representative;

b. One representative of participating physicians;

c. One representative of participating hospitals;

d. One representative of liability insurers; and

e. One representative of physicians other than participating physicians.

2. Thm *Govmrnor* may select the representative of the participating physicians [illegible] a list of at *lust* three names to be recommended by the Virginia Society of Obstetrics and Gynecology; the representative of participating hospitals from a list of at least three names to be recommended by the Virginia Hospital Association: the representative of liability insurers [illegible] a list of at least three names, one of which is recommended by the American Insurance Association, one *by* the Alliance of American Insurers, and one by thm national Association of Independent Insurers; and the representative of physicians other than participating physicians *from* a list of at least three names to be recommended by the Medical Society of Virginia. In no case shall the Governor be bound to make any appointment from among the nominees of the respective associations.

D. The Governor shall promptly notify the association, which may make nominations, of any vacancy other than by expiration among the members of the Board representing a particular interest and like nominations may be made *for* the filling of the vacancy.

E. The directors shall act by majority votr with five directors constituting a quorum for the transaction of any business or the exercism of *any* power of thr program. The directors shall serve without salary, but each director shall be reimbursed for actual and necessary expenses incurred in thm performance of his official duties as a director of the program. The directors shall not be subject to any personal liability with respect to the administration of the program.

F. The Board established by this [illegible] shall have the power to (i) administer the program, (ii) administer the Birth-Related Neurological Injury Compensation Fund, (iii) appoint a service company or companies to administer the payment of claims on behalf of the program, (iv) direct thr investment and reinvestment of any surplus in the fund over losses and expenses, provided my investment income generated thereby remains in the fund, and (v) reinsure the risks of the fund in whole or in part.

§ 38.2-5017. Plan of operation. → A. On or before September 30, 1907, the directors of the program shall submit to the State Corporation Commission for review a proposed plan of operation consistent with this chapter.

B. The plan of operation shall provide for the efficient

C 13

administration of the program *and* for the prompt processing of claims made against the fund pursuant to an award under this Act. The plan shall contain other provisions including:

1. Establishment of necessary facilities;

2. Management of the fund;

3. Appointment of servicing carriers or other servicing arrangements to ● dPrinirt*r the processing Of claims against the fund;

4. Initial and annual assessment Of the parsons and entitites listed in § 38.2-5019 to pay awards ♋■♎ ● xpansal, which assessments shall be on an actuarially sound basis subject tothe limits set forth in § 38.2-5019; and

5. Any other matters necessary for the ● fficiont operation of the program.

C. The *plan of* operation *shall* be subject to *approval* by the State Corporation Commission after consultation with representatives of interested individuals and organizations. If the State Corporation Commission disapproves all of any part of the proposed plan of operation,the directors shall within thirty day8 submit for review an appropriate revised plan of operation. If the directors fail to do so, the State Corporation Commission shall promulgate a plan of operation. The plan of operation or promulgated by the State Corporation Commission shall become ● ffrctivr *and* operational upon order of the State Corporation Commission.

D. Amendments to th. plan of operation may be made by the directors of the program, subject to the ● □□□□❖□● ofthe State Corporation Commission.

§ 38.2-5018. Assessments to be held in restricted cash account. - All assessments paid pursuant to the plan OF operation, shall be hold in a separate restricted cash ● caunt under the sole control of an independent fund manager to be selected by the directors. The Fund, and any income from it, shall be disbursed for the payment of ● w8.H.m as provided in this Act and for the payment of the expenses of administration of the fund.

§ 38.2-5019. Initial assessments.- A. On or before January 1, 1988, the following persons and entities shall pay into the fund an initial assessment in accordance with the plan of operation:

1. Physicians who wish to participate in the Virginia Birth-Related Neurological Injury Compensation Program and who otherwise qualify as participating physicians under this chapter shall pay an initial assessment of $5,000. Physicians who are employed by the Commonwealth who wish to participate in the program and who otherwise qualify as participating physicians may pay the assessment required by this subsection or or before July 31, 1988, provided they have notified the program on or before January 1, 1988, of their desire to participate in the program. Such participation shall become effective retroactive to January 1, 1988, at the time the assessment is received by the program.

2. Hospitals which wish to participate in the Virginia Birth-Related Neurological Injury program and that otherwise qualify as particpating hospitals under this chapter shall pay an initial assessment of $50 per delivery for the prior year, as

reported to the Department of Health in the most recent Annual Licensure Survey of Hospitals, not to exceed $150,000 per hospital in any one twelve-month period. State hospitals which wish to participate in the program and which otherwise qualify as participating hospitals may pay the assessment required by this subsection an or before July 31, 1988, provided they have notified the program on or before January [illegible]1988 of their desire to participate. Such participation shall become retroactive to January 1, 1988, at the time the assessment is received by the program.

3. All physicians licensed by rnd practicing in the Commonwealth as of September JO, 1987, other than participating physicians, shall pay into thr fund an initial assessment of $250, in the manner required by the plan of operation.

B. Upon so certifying to the program, any physician who comes within one of the following categories hmll be xampt from paying the initial and annual assessments imposed upon physicians other than participating physicians pursuant to this chapter:

1. A phymicirn who is employed by the Commonwealth and whose income from professional fees is less an amount to tan percent of hi8 annual salary.

2. A physician vho is enrolled in a full-time graduate medical ducrtion program accredited by the American Council for Graduate Medical Education.

3. A phymicirn vho has retired from active clinicai practice.

a 38.2-5020. Annual m8.88m.nt8. - A. Beginning January 1, 1989, the persons and ntititu listed a&divirianm 1 through 3 of ubmmction A of § 38.2-5019, as of thr data determined in ccordancr with the plan of operation, shall pay an annual 8ma8mmant the amount qu81 to their initial assessments, in the manner required by the plan of operation.

B. Taking into CcOunt the assessments collected pursuant ubmrc+ion A of this action, if required to maintain the fund on an actuarially mound basis, all insurance carriers licensed to write nd ng8gmd in writing liability insurance in the Commonwealth 88 of September 30, 1988, h811 pay into the fund an annual assessment, in an ount determined by the State Corporation Commission pursuant to subsection A of § 38.2-5021, in the manner required by the plan of operation. Liability insurance for the purposes of this provision h811 Include the classes of insurance defined in §§ 38.2-2-124, 38.2-125 and 38.2-130 through 38.2-132.

1. All annual assessments against liability insurance carriers shall be made on thr basis of net direct premiums written for the business activitiy which forms the basis for each such entity's inclusion as funding source for the program in the Commonwealth during the prior year nding December 31 am reported to the State Corporation Commission, and shall be in the proportion that the nrt direct premiums written by each an account 0 f the business activity forming the basis for their inclusion in the progran bears to the aggregate net direct premiums for 8 1 1 such business activity written in this Commonwealth by 811 such entities. For purposes of this chapter "net direct premiums written" means gross direct premiums written

in this Commonwealth on all policies of liability insurance less (i) all return premiums on the policy, (ii) dividends paid or credited to policyholders, and (iii) the unused or unabsorbed portions of premium deposits on liability insurance.

2. The [illegible] listed in this subsection shall not be individually liable for an [illegible] assessment in [illegible] of one quarter of one percent of that entity's net direct premiums written.

C. Liability insurance carriers shall be entitled to recover their initial and annual assessments through (i) a surcharge on future policies, (ii) a rate increase applicable prospectively, or (iii) a combination of the two, at the discretion of the State Corporation Commission.

§ 38.2-5021. Acturial investigation, valuations, gain/los[illegible] notice if [illegible] prove insufficient. A. The Bureau of Insurance of the State Corporation Commission shall undertake *an* [illegible] *ctuarirl* investigation of the requirements of the fund based on the fund's experience in the first year of operation, including without limitation the assets and liabilities of the fund. Pursuant to such investigation, the State Corporation Commission shall [illegible] rtrbli8h the rate of contribution of thm entities listed in subsection *B* of § 38.2-5020 for the tax *year* beginning January *1,* 1989.

Following the initial valuation, the State Corporation Commission shall cause an actuarial valuation to be made of the [illegible] and liabilities of the fund no less frequently than biennially. Pusuant to the results of such valuations, the State Corporation Commission shall prepare a statement am to thr contribution rata applicable to contributors listed in subsection B of § 38.2-5020. However, at no time shall the rate be greater than onm quarter of one percent *of* nmt direct premiums written.

B. In the event that the State Corporation Commission finds that the fund cannot be maintained on an acutarially sound basis subject to the maximum assessments listed in §§ 38.2-5019 and 38.2-5020, the Commission shall promptly notify the Speaker of the House of Delegates, the President of the Senate, and the Industrial Commission.

2. That the provisions of §§ 38.2-5002 through 38.2-5014 shall become effective on January 1, 1988.

President of the Senate

Speaker of the House of Delegates

Approved:

Governor