

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 45 Workers' Compensation for First Responders
SPONSOR(S): Jobs & Entrepreneurship Council; Adams
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Jobs & Entrepreneurship Council		Callaway	Thorn
1) Jobs & Entrepreneurship Council	11 Y, 2 N, As CS	Callaway	Thorn
2) Policy & Budget Council		Martin	Hansen
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

In 2003 the Legislature made numerous changes to chapter 440, F.S., governing workers' compensation. After the 2003 workers' compensation reform passed, the Homeland Security Workers' Compensation Workgroup was created to study workers' compensation issues affecting first responders and to recommend changes, if warranted. The workgroup identified nine primary areas of concern for first responders created by the 2003 changes to worker's compensation. This bill addresses some of the areas of concern identified.

The bill relaxes the compensability standard of proof for first responder injuries caused by occupational disease and exposure to toxic substances, allows first responders to receive payment of permanent total disability supplemental benefits after age 62 in certain instances, relaxes the compensability for psychiatric injuries sustained by first responders and removes the statutory limit on payment of indemnity benefits associated with these injuries, and allows first responders to receive workers' compensation benefits for adverse reactions to smallpox vaccines.

The National Council on Compensation Insurance (NCCI) estimates workers' compensation costs for first responder classes will increase 5.4 percent (\$11.0 million) if this bill is enacted. Individual self-insureds do not report data to NCCI and are not included in NCCI's estimate. As a result, additional costs are expected from individual self-insureds that employ first responders or that do not participate in the Social Security program. This includes a number of major governmental agencies (e.g. cities and counties) across the state.

The bill has no direct fiscal impact on the Division of Workers' Compensation, but has an impact on State Risk Management because the state employs law enforcement officers who will fall under the scope of "first responders." Thus, the bill will have a fiscal impact on the state's workers' compensation insurance program. The fiscal impact is the additional costs that would be incurred by the State Risk Management Trust Fund, in the form of medical and indemnity (compensation) payments, which will be realized on a statewide basis for the "first responder" workers compensation classes. Risk Management estimates the increased payment of losses for first responders in FY 2006-07 at \$50,000, with increased costs each year up to \$210,000 in FY 2009-2010. These costs are paid from the State Risk Management Trust Fund within the Department of Financial Services, and will primarily be passed through to state agencies with law enforcement employees. The extent to which these passed through costs will impact the General Revenue Fund versus various trust funds is indeterminate.

The bill is effective upon becoming law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0045b.PBC.doc
DATE: 4/21/2007

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Ensure lower taxes: The bill is likely to increase the cost of workers' compensation insurance paid by employers of first responders, primarily cities and counties.

B. EFFECT OF PROPOSED CHANGES:

In 2003 Special Session A, the Legislature made numerous changes to chapter 440, F.S., governing workers' compensation.¹ On August 19, 2003, The Speaker of the Florida House of Representatives, Speaker Byrd, created the Homeland Security Workers' Compensation Workgroup to study workers' compensation issues affecting first responders such as firefighters, police officers and other emergency personnel. The workgroup's charge was to study workers' compensation problems and issues that particularly affect first responders, changes in current statutes that would alleviate those problems or address those issues, the fiscal impact of the recommended changes on the agencies that employ first responders, and the impact on public safety upon making or not making the recommended changes. The workgroup held three meetings to gather testimony from interested parties and stakeholders about workers' compensation issues affecting first responders. Oral testimony was heard at each meeting from interested parties, and written testimony was also received by the workgroup. A written report was issued on February 3, 2004 covering the testimony heard at the workgroup meetings and the issues raised by the stakeholders.

Based on the oral and written testimony received during the workgroup meetings from stakeholders, the workgroup identified nine primary areas of concern for first responders created by the 2003 changes to worker's compensation. This bill addresses most of the nine areas identified by the legislative workgroup. The bill addresses these areas by creating new statutory provisions in Chapter 112, the public officers and employees chapter, rather than chapter 440, the workers' compensation chapter.

Permanent Total Supplemental Benefits

The first area of concern was the revision to s. 440.15(1)(f)1, F.S., which ends payment of permanent total disability (PTD) supplemental benefits (cost-of-living adjustments) at age 62 for workers unless the worker has not been able to work enough quarters to qualify for Social Security retirement due to the work-related injury. According to testimony received at each meeting, some local governments have opted out of the Social Security program. Thus, their first responders are not eligible for Social Security retirement. These same first responders would not be eligible for PTD supplemental benefits after age 62 either under the current law.

The bill amends current law to allow any injured first responder to receive PTD supplemental benefits for life if the injured first responder is employed by an employer who does not participate in the Social Security program.

Standard of Proof for Occupational Disease, Repetitive Exposure, and Exposure to Toxic Substances Claims

Another area of concern involved the change made to the standard of proof for occupational disease, repetitive exposure, and exposure to toxic substances claims.² The standard of proof is the level of proof necessary for the injured worker/claimant to prevail.

Section 440.09(1), F.S., requires that an accidental compensable injury must be the major contributing cause of any resulting injury, meaning that the cause must be more than 50 percent responsible for the injury as compared to all other causes combined, as demonstrated by medical evidence only. This statutory section also requires an injured employee alleging an injury involving an occupational disease or repetitive exposure to prove causation and sufficient exposure to support causation by clear and convincing evidence.

An injury or disease caused by a toxic substance requires clear and convincing evidence establishing that:

- The injured employee was exposed to the specific substance;
- The injured employee was exposed to the substance at a specific level; and
- Exposure to the specific substance caused the injury or diseases sustained by the employee.³

Prior to the 2003 legislation changing the standard of proof for injuries caused by exposure to toxic substances, occupational disease, and repetitive exposure cases to clear and convincing, the standard of proof was a preponderance of the evidence.

The firefighters contended, in part, at the legislative workgroup meetings that a heightened burden of proof for first responders to prove exposure to toxic substances is unwarranted because the dangerousness of certain substances has already been determined. The State Fire Marshal's office has published a list of toxic substances (Florida Substance List) that are hazardous and has required employers to notify fire departments of the existence of the toxic substance in the workplace.⁴ By promulgating the Florida Substance List, the firefighters contend the State Fire Marshal's office has recognized the hazardous nature of the materials contained on the List and that these materials pose a particular hazard to firefighters exposed to the substances fires in a workplace or in a house. Thus, the firefighters argue it is illogical to make them prove by clear-and-convincing evidence their exposure to substances on the Florida Substance List caused the work-related injury because this standard requires proving the worker's specific exposure to the substance was toxic, and the exposure to the substance has already been determined to be toxic by the State Fire Marshal.

The bill amends current law regarding first responders that are exposed to toxic substances and that contract occupational diseases. The burden of proof for first responders in these cases is reduced from a clear and convincing standard to a preponderance of the evidence standard. Thus, the standard of proof in these claims is that which existed prior to the passage of chapter 2003-412, LOF, a preponderance of the evidence standard.

The bill also provides a definition of the term "occupational disease." The bill provides that such term means "only a disease that arises out of employment as a first responder and is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed, unless the incidence of the disease is substantially higher in the particular trade, occupation, process, or

² s. 440.02(1), F.S.; s. 440.09(1), F.S. (2006).

³ s. 440.02(1), F.S. (2006).

⁴ Rule 69A-62.004, F.A.C.

employment than for the general public." This definition is modeled after the definition provided in the chapter of law governing workers' compensation, Chapter 440, F.S.

Psychiatric Injuries

Three issues relating to medical benefits for psychiatric injuries were addressed by stakeholders in the workgroup meetings. The first issue was the creation of s. 440.093, F.S., in the 2003 revision that precludes medical treatment for a psychiatric injury unless it is accompanied by a physical injury requiring medical treatment. The second issue was the 1-percent permanent impairment rating cap for psychiatric injuries imposed by s. 440.15(3) (c), F.S. Prior to the 2003 revision, there was no limit on the permanent impairment rating for a psychiatric injury. The third issue was the limit on payment of temporary indemnity benefits for psychiatric injuries to 6 months after maximum medical improvement (MMI) is obtained for the injured worker's physical injuries.⁵

Prior to the enactment of the 2003 reforms, a mental or nervous injury due to stress, fright, or excitement only did not qualify as an accidental injury and was not compensable.⁶ Florida case law determined that a mental or nervous injury, even with a physical injury or accident, was not compensable unless the physical injury was the causal factor. In 1989, the Florida Supreme Court stated:

For a mental or nervous injury to be compensable in Florida there must have been a physical injury. Otherwise, the disability would have been caused only by a mental stimulus, and must be denied coverage under the statutory exclusion. A mere touching cannot suffice as a physical injury.⁷

Subsequently, the Florida First District Court of Appeal held that eligibility for compensation for psychiatric injury resulting from compensable work-related physical injury required a finding by clear and convincing evidence that the mental or nervous injury was directly linked to the initial injury, not that the physical injury was the major contributing cause of the psychiatric injury.⁸

The 2003 legislation created s. 440.093, F.S., that continued the mental nervous injury exclusions and codified the clear and convincing evidence standard and the case law that prohibited the payment of benefits for mental or nervous injuries without an accompanying physical injury. However, the law also provided that the compensable physical injury be the major contributing cause of the mental or nervous injury. Also, a physical injury resulting from a mental or nervous injury unaccompanied by a physical trauma requiring medical treatment was not compensable. The law also limited the duration of "temporary benefits" for a compensable mental or nervous injury to no more than six months after the employee reaches maximum medical improvement for the physical injury. In context, this six month limitation is understood to apply to the temporary disability benefits payable under s. 440.15, F.S., but not to medical benefits payable under s. 440.13, F.S. The 2003 act also placed a 1 percent limitation for permanent impairment benefits for psychiatric impairment. The permanent impairment benefit is based on the impairment rating schedule that provides the duration of the benefit is 3 weeks for each percent of impairment. The amount of the benefit is 50 percent of the temporary total disability benefit (i.e., 50 percent of 66.6 percent of average weekly wage, or about 33.3 percent of average weekly wage).

The bill changes current law relating to the psychiatric injuries sustained by first responders. First, the bill allows a first responder to receive medical care even if the psychiatric injury is not accompanied by a physical touching but does not allow the first responder to receive payment of indemnity benefits (lost wages) unless a physical injury accompanies the psychiatric injury. Second, the bill exempts psychiatric benefits for first responders from the limits contained in current law for psychiatric benefits

⁵ s. 440.093(3), F.S. (2006).

⁶ s. 440.02(1), F.S. (2002)

⁷ *City of Holmes Beach v. Grace*, 598 So.2d 71 (Fla. 1989).

⁸ *Cromartie v. City of St. Petersburg*, 840 So.2d 372 (Fla. 1st DCA 2003).

for injured workers other than first responders. In this regard, the bill allows first responders to receive unlimited temporary indemnity and permanent impairment benefits for psychiatric injuries whereas all other workers can only receive temporary indemnity benefits for six months after the worker reaches MMI for the physical injury and can only receive a maximum 1 percent permanent impairment rating for the psychiatric injury.

The bill maintains the clear and convincing standard of proof in current law for psychiatric injuries sustained by first responders. Thus, first responders will be treated like all other injured workers in this regard.

Independent Medical Examinations

Testimony was received at the workgroup meetings about the limit of one independent medical examination (IME) per employee per accident imposed by chapter 2003-412, L.O.F. Concern was also raised about that requirement in chapter 2003-412, L.O.F. that the employee pay for his or her IME. Prior to chapter 2003-412, L.O.F., the carriers paid for the injured worker's IMEs.

The bill does not address the IME issue for first responders. Thus, current law will govern IMEs by first responders and first responders will be limited to one IME per accident and will be required to pay for the IME.

Definition of First Responder

Current law provides no definition of the term "first responder." The bill proposes a definition of the term. Under the proposed definition, a first responder is a law enforcement officer as defined in s. 943.10, F.S., a firefighter as defined in s. 633.30, F.S., an emergency medical technician or paramedic as defined in s. 401.23, F.S., and a volunteer firefighter, law enforcement officer, emergency medical technician, or paramedic engaged in employment by the state or local government.

Smallpox Vaccination

At the first workgroup meeting, an Orange County Department of Health (Health Department) representative testified about the problems that may face first responders who take the smallpox vaccine. According to the statistics given by the Health Department, 3,942 people have received the smallpox vaccination in Florida. Florida ranks second among the nation in the total number of vaccinations given.⁹

One problem faced by first responders vaccinated for smallpox is whether any adverse reaction they may have in response to the vaccination is compensable (i.e. in the course and scope of employment) and thus covered under workers' compensation. Representatives from the Health Department testified that 14 of the 3,942 people vaccinated for smallpox in Florida have had adverse reactions to the vaccination.¹⁰ According to testimony received at the workgroup meetings, it appeared the law was not clear as to whether an adverse reaction to a smallpox vaccine is covered under workers' compensation.

In 2003, Congress created the Smallpox Vaccine Injury Compensation Program.¹¹ This program compensates law enforcement, firefighters, emergency medical personnel, and other public safety personnel for medical benefits, death benefits, and lost wages due to an adverse reaction to a smallpox vaccination. In order to be compensated under the program, the first responder must volunteer and be selected to serve as a member of a smallpox emergency response plan prior to an outbreak of smallpox. The program also provides medical, death, and lost-wage benefits to family members or

⁹ Statistics as of October 31, 2003.

¹⁰ Id.

¹¹ Public Law 108-20, 117 Stat. 638 a/k/a The Smallpox Emergency Personnel Protection Act of 2003

others in contact with the vaccinated first responder who sustains a medical injury from exposure to the smallpox virus through physical contact with the vaccinated first responder. Any payments under the program are secondary to payments made or due from health insurance, workers' compensation, or any other entity. The program is administered by the U.S. Department of Health and Human Services and is subject to statutory filing deadlines.

The bill clarifies any uncertainty in the workers' compensation community regarding the compensability of an adverse reaction to a smallpox vaccination by a first responder. The bill provides that any adverse result or complication by a first responder to a smallpox inoculation is compensable. Accordingly, the first responder can receive medical care and lost wages under workers' compensation for adverse reactions.

C. SECTION DIRECTORY:

Section 1. Creates s. 112.1815, F.S.; relating to workers' compensation benefits for first responders.

Section 2. Expresses legislative intent that the bill fulfills an important state interest.

Section 3. Provides that the bill takes effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Fiscal Impact on State Risk Management

The Division of Risk Management of the Department of Financial Services has indicated that the bill will have fiscal impact on the state, since the state employs law enforcement officers and other employees who will fall under the scope of "first responders." Claim development for workers compensation claims takes approximately 4 years. The Division of Risk Management projects this bill will increase workers' compensation cost for the program by the fourth year by \$210,000 per year. The increase will be less in the first three years; but by the fourth year, and thereafter, the additional cost will be \$210,000. The division estimates the cost for fiscal year 2006-2007, \$50,000, for fiscal year 2007-2008, \$100,000, and for fiscal year 2008-2009, \$150,000. The increased cost will primarily be passed through to state agencies with law enforcement employees. The extent to which these passed through costs will impact the General Revenue Fund versus various trust funds is indeterminate.

Also see Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Permanent total disability supplemental benefits for first responders that were employed by a state or local government unit that does not participate in the social security program would be extended beyond age 62, regardless of whether their public employer provides an alternative retirement program. Under current law, generally permanent total disability benefits cease at age 75 and supplemental permanent total disability benefits end at age 62.

By lowering certain compensability standards for first responders for occupational diseases, toxic exposure, and mental and nervous injuries, it is expected that first responders would likely prevail more often in those types of claims against their employers.

D. FISCAL COMMENTS:

Fiscal Impact on Costs of Workers Compensation

The National Council on Compensation Insurers, Inc. (NCCI) estimates that costs for first responder classes would increase 5.4 percent (\$11.0 million) if this proposal were enacted in its current form. Individual self-insureds do not report data to the NCCI and are therefore not included in this estimate. As a result, additional costs are expected from individual self-insureds that employ first responders. This includes a number of major governmental agencies across the state. The magnitude of the fiscal impact is unknown.

Fiscal Impact on the Florida Retirement System

According to the Division of Retirement of the Department of Management Services, the in-line-of-duty disability retirement experience could worsen for the "first responders" group, thereby producing actuarial losses that would slowly emerge and be identified in future valuations and experience studies. If such increased costs are incurred, they would be funded through increases in the contribution rate by the state or local government employer, as recommended in future valuations of the Florida Retirement System.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision appears to apply because to this bill because it requires counties or municipalities to spend funds or to take an action requiring the expenditure of funds: however, an exemption applies. The bill contains a statement of important state interest and the provisions of the bill apply to all persons similarly situated. State government and all local governments, not just counties and municipalities, are subject to the provisions of the bill. Accordingly, the bill does not require a two-thirds vote of the membership of each house.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Workers' compensation is governed by chapter 440, Florida Statutes. This bill creates new statutory provisions regarding workers' compensation for first responders but places them in chapter 112, Florida Statutes, the chapter governing public officers and employees. Accordingly, it may be confusing to find these workers' compensation provisions.

D. STATEMENT OF THE SPONSOR

None needed as the bill is a proposed council substitute.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

None.