

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1999 (PCB IN 04-06) Workers' Compensation Affecting First Responders  
**SPONSOR(S):** Committee on Insurance  
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance	14 Y, 3 N	Callaway	Cooper
2)			
3)			
4)			
5)			

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### SUMMARY ANALYSIS

In 2003 Special Session A, the Legislature made numerous changes to chapter 440, F.S., governing workers' compensation. On August 19, 2003, Speaker Johnnie 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 of making or not making the recommended changes.

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. The areas of concern were: permanent total disability supplemental benefits; standard of proof for occupational disease, repetitive exposure, and exposure to toxic substances claims; attorney fees; psychiatric injuries (which includes three recommendations by the first responders); independent medical examinations (IMEs); the definition of "first responder"; and smallpox vaccinations.

The proposed committee bill addresses most of the nine primary areas of concern presented to the workgroup. Only recommendations relating to IMEs are not directly addressed within the scope of the bill. Thus, current law will govern IMEs by first responders. This means first responders will be limited to one IME per accident and will be required to pay for the IME.

According to a preliminary estimate by the National Council on Compensation Insurance, Inc. (NCCI), the proposed committee bill will increase costs for first responder classes 2.8 percent (\$6.3 million). Individual self-insureds do not report data to NCCI and are not included in NCCI's estimate. As a result, according to NCCI, 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 across the state.

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:** h1999.in.doc  
**DATE:** April 25, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

##### **BACKGROUND AND PROPOSED CHANGES**

In 2003 Special Session A, the Legislature made numerous changes to chapter 440, F.S., governing workers' compensation.<sup>1</sup> On August 19, 2003, Speaker Johnnie 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 of 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.

##### **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.

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<sup>1</sup> Senate Bill 50A (chapter 412, LOF)

## **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.<sup>2</sup> The standard of proof is the level of proof necessary for the injured worker/claimant to prevail. The 2003 revision changed the standard of proof for occupational disease, repetitive exposure, and exposure to toxic substance claims to clear-and-convincing evidence rather than the preponderance-of-evidence standard of proof required before the change

The firefighters contended, in part, at the workgroup meetings 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 Marshall'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.<sup>3</sup> By promulgating the Florida Substance List, the firefighters contend the State Fire Marshall'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 in 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. 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 Marshall.

The bill amends current law to eliminate the clear-and-convincing standard of proof for first responders involved in occupational exposure and exposure to toxic substances claims. Thus, the standard of proof in these claims is that which existed prior to the passage of SB 50A, i.e. a preponderance of the evidence standard.

### **Attorney Fees**

The third area of concern for first responders identified in the testimony to the workgroup was the limit on attorney fees imposed by SB 50A (chapter 412, LOF). Senate Bill 50A allows for a one-time attorney fee of \$1,500 for medical-only claims if the Judge finds the contingency guideline fee set by statute is not adequate to compensate the attorney. The attorney fee for claims involving indemnity only or indemnity and medical issues is set at the contingency guideline fee set forth by statute.<sup>4</sup> The contingency percentages were not changed by the revision.

The bill amends current law relating to attorney fees for first responders involved in occupational exposure and exposure to toxic substances claims. In claims with these alleged injuries, a first responder's attorney will be able to receive an hourly fee in excess of the statutory guideline fee if the circumstances of the case warrant a higher fee based on enumerated factors.

Additionally, the proposed committee bill does not limit a first responder's attorney to a fee of \$1,500 for a medical-only claim if the Judge finds the contingency guideline fee set by statute is not adequate to compensate the attorney.

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<sup>2</sup> s. 440.02(1), F.S.; s. 440.09(1), F.S.

<sup>3</sup> Rule 69A-62.004, F.A.C.

<sup>4</sup> s. 440.34(1), F.S.

## **Psychiatric Injuries**

Three issues relating to medical benefits for psychiatric injuries were addressed by stakeholders in the workgroup meetings. First, the creation of s. 440.093, F.S., in the 2003 revision precludes medical treatment for a psychiatric injury unless it is accompanied by a physical injury requiring medical treatment. Second, 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. Third, 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.<sup>5</sup>

The bill allows a first responder to have a compensable psychiatric claim without a physical injury. However, first responders sustaining a psychiatric injury without a physical one can only receive medical treatment. In order for the first responder sustaining a psychiatric injury to obtain indemnity benefits, the first responder must sustain a physical injury.

Additionally, the standard of proof for first responders to prove a psychiatric injury is lowered. First responders do not have to prove a psychiatric injury by clear-and-convincing evidence as do all other injured workers.

## **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 SB 50A. Concern was also raised about that requirement in SB 50A that the employee pay for their IME. Prior to SB 50A, 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**

A concern raised by many who testified at the workgroup meetings is how to define first responder. Although first responders are usually thought to be firefighters, law enforcement personnel, and emergency services personnel, testimony at the workgroup meeting from other employee and employer representatives illustrated how a "first responder" could include many other employees.

The bill proposes a definition of first responder. 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 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.

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)

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<sup>5</sup> s. 440.093(3), F.S.

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. According to testimony received at the workgroup meetings, it appears the law was not clear as to whether an adverse reaction to a smallpox vaccine is covered under workers' compensation.

Staff research revealed a federal law covering adverse reactions to smallpox vaccinations for first responders. In 2003, Congress created the Smallpox Vaccine Injury Compensation Program.<sup>6</sup> 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 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 corrects any uncertainty in the workers' compensation community regarding the compensability of an adverse reaction to a small pox vaccination by a first responder. According to the proposed committee bill, any adverse result or complication by a first responder to a smallpox inoculation is compensable.

#### C. SECTION DIRECTORY:

**Section 1** amends s. 440.02, F.S., to exempt first responders from the clear-and-convincing standard of proof if their injury or disease was caused by exposure to a toxic substance and to define "first responder."

**Section 2** amends 440.09, F.S., to exempt first responders from the clear-and-convincing standard of proof if their injury or disease involves occupational disease or repetitive exposure.

**Section 3** amends 440.091, F.S., to make any adverse result or complication a first responder has from a small pox inoculation a compensable accident.

**Section 4** amends s. 440.093, F.S., to exempt first responders from the clear-and-convincing standard of proof for psychiatric injuries; to allow a first responder to receive medical benefits for a psychiatric injury without an accompanying physical injury; to allow a first responder to receive indemnity benefits for a psychiatric injury only if there is an accompanying physical injury.

**Section 5** amends 440.15, F.S., to allow first responders to receive PTD supplemental benefits for life if their employer does not participate in the Social Security program.

**Section 6** amends s. 440.151, F.S., to exempt first responders involved in an occupational disease claim from proving causation and exposure to the harmful substance in the workplace by clear-and-convincing evidence and from having to show with epidemiological studies the alleged occupational disease was caused by exposure to the alleged substance.

**Section 7** amends s. 440.34, F.S., to allow attorneys representing first responders with exposure to toxic substances or occupational disease claims to obtain an attorney's fee on an hourly basis; to exempt attorneys representing first responders from the \$1,500 cap on attorney fees for medical-only claims.

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<sup>6</sup> Public Law 108-20, 117 Stat. 638 a/k/a The Smallpox Emergency Personnel Protection Act of 2003

**Section 8** provides an effective date of upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

See comments under "Direct Economic Impact On Private Sector."

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

See comments under "Direct Economic Impact On Private Sector."

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to a preliminary estimate by the National Council on Compensation Insurance, Inc. (NCCI), the bill will cause costs for first responder classes to increase by 2.8 percent (\$6.3 million).<sup>7</sup> Individual self-insureds do not report data to NCCI and are not included in NCCI's estimate. As a result, according to NCCI, 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 across the state.

Out of the estimated 2.8 percent increase in workers' compensation costs, the bill's changes to the attorney fee law are estimated to cause .5 percent.<sup>8</sup>

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

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<sup>7</sup> Class codes applying to first responders make up approximately 4 – 5 percent of the insurance company and self-insured group data in Florida's workers' compensation marketplace, according to NCCI.

<sup>8</sup> NCCI Analysis

None.

B. RULE-MAKING AUTHORITY:

None given and none needed.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On April 19, 2004, the Committee on Insurance considered the bill with three amendments. Two of the three amendments were adopted and the bill was reported favorably. The two amendments that were adopted:

- Clarified that PTD supplemental benefits would only be paid for life for injured first responders working for employers that do not participate in social security.
- Clarified that only adverse reactions by first responders to a smallpox inoculation is compensable.