

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 35 CS    Workers' Compensation For First Responders  
**SPONSOR(S):** Adams and others  
**TIED BILLS:**    **IDEN./SIM. BILLS:** 1744

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>State Administration Appropriations Committee</u>	<u>9 Y, 0 N, w/CS</u>	<u>Rayman</u>	<u>Belcher</u>
2) <u>Domestic Security Committee</u>	<u>8 Y, 0 N, w/CS</u>	<u>Garner</u>	<u>Newton</u>
3) <u>Insurance Committee</u>	_____	_____	_____
4) <u>Fiscal Council</u>	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

In 2003 the Legislature made numerous changes to chapter 440, F.S., governing workers' compensation. On August 19, 2003, 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 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. HB 35 w/CS addresses some of the nine primary areas of concern presented to the workgroup.

According to a preliminary estimate by the National Council on Compensation Insurance, Inc. (NCCI), the bill will increase costs for first responder classes by 3.3 to 3.5 percent (\$6.1 million). Individual self-insureds do not report data to NCCI and would not be included in a NCCI 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 governmental agencies across the state.

The mandate provision appears to apply because the bill requires counties or municipalities to expend funds. The bill does not appear to qualify for an exemption, accordingly the bill needs to include a statement of important state interest and have a 2/3 vote of the membership of each house.

The bill has no direct fiscal impact on the Division of Workers' Compensation. It does have an impact on State Risk Management. The state employs law enforcement officers who will fall under the scope of "first responders" and will have an impact on the state's workers' compensation insurance program. Risk Management estimates the payment of losses for first responders in FY 2005-06 at \$50,000 from the State Risk Management Trust Fund within the Department of Financial Services. According in the Department of Management Services, Division of Retirement, the bill creates an impact on the retirement benefits for first responders in the State Retirement System. The magnitude of the fiscal impact on the State Retirement System is unknown.

The bill is effective upon becoming law.

## 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.<sup>1</sup> On August 19, 2003, 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 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.

#### **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

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

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

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 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.<sup>3</sup> 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 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 Marshal.

The bill amends current law to allow claims for injury or disease relating to employment-related accidents and injuries to first responders that are involved in occupational exposure and exposure to toxic substances. Thus, the standard of proof in these claims is that which existed prior to the passage of chapter 2003-412, LOF, i.e. 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 which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment, and to exclude 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 employment than for the general public." This definition is modeled after the definition provided in Chapter 440, F.S.

### **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 chapter 2003-412, LOF. Chapter 2003-412, LOF, 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 provides that a finder of fact and law is not bound by any statutory provisions regarding attorney's fees relating to the provision of indemnity or medical benefits for employment related accidents or injuries involving exposure to a toxic substance or occupational disease. Instead, the bill requires consideration of the following factors:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly.
- The fee customarily charged in the locality for similar legal services.
- The amount involved in the controversy and the benefits payable to the claimant.
- The time limitations imposed by the claimant or the circumstances.
- The experience, reputation, and ability of the attorney or attorneys performing services.
- The contingency or certainty of a fee.

### **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 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

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

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

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.<sup>5</sup>

The bill does not allow a first responder to have a compensable psychiatric claim.

### **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, LOF. Concern was also raised about that requirement in chapter 2003-412, LOF that the employee pay for his or her IME. Prior to chapter 2003-412, LOF, 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 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) 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.

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

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

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

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 small pox vaccination by a first responder. The bill provides that any adverse result or complication by a first responder to a smallpox inoculation is compensable.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 112.18, F.S., to allow emergency response personnel claims for their injury or disease that was caused by exposure to a toxic or harmful substance if there is a preponderance of the evidence establishing the exposure, to make any adverse result or complication a first responder has from a small pox vaccination a compensable accident, to allow first responders to receive PTD supplemental benefits for life if their employer does not participate in the Social Security program, and to provide a means to determine attorney's fees in controversies involving the provisions of this bill.

**Section 2.** Provides that the bill takes effect upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

	(FY 05-06) Amount / FTE	(FY 06-07) Amount / FTE
1. Revenues:		
None.		
2. Expenditures:		
Recurring		
State Risk Management TF		
Payment of Losses	\$50,000	\$100,000

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:  
    None.
2. Expenditures:  
    See the FISCAL COMMENTS section, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See the FISCAL COMMENTS section, below.

D. FISCAL COMMENTS:

According to a preliminary estimate by the NCCI, the bill will increase costs for first responder classes by 3.3 to 3.5 percent (\$6.1 million).<sup>7</sup> The bill will have an effect on payment of claims for first responders. Many first responders are employed by local governments. Individual self-insureds do not report data to NCCI and are not included in NCCI's estimate. As a result, according to NCCI, additional

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<sup>7</sup> National Council on Compensation Insurance, Inc., *ANALYSIS OF AMENDMENT TO FLORIDA HB 35 (AS AMENDMENTED ON MARCH 23, 2005) FOR FIRST RESPONDERS*, 3/25/05.

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.

NCCI explained loosening compensability is likely to add claims. In order to estimate the additional costs, NCCI reversed the savings attributed to tightened compensability standards anticipated by chapter 2003-412, LOF. NCCI estimates that the combined impact of the above provisions may increase the number of compensable claims for first responder classes. An additional impact will be reflected in subsequent data that is collected and used in future rate filings.

The Office of Insurance Regulation (OIR) has stated that the legislation will have no regulatory or fiscal impact for the OIR. This legislation has no direct/fiscal impact on the Division of Workers' Compensation. It does however, have an impact on State Risk Management. The state employs law enforcement officers and others who will fall under the scope of "first responders", the bill will have an impact on the state's workers' compensation insurance program. Claim development for workers compensation claims is approximately 4 years. Risk Management projects this bill will increase workers' compensation cost for our program by the 4th year by \$210,000 per year. The increase will be less in the first three years, but by year four and thereafter the additional cost will be \$210,000. The increased cost will primarily be passed to State agencies with law enforcement employees.

According in the Department of Management Services, Division of Retirement, the bill creates an impact on the retirement benefits for first responders in the State Retirement System. The magnitude of fiscal impact is unknown.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

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

The mandate provision appears to apply because the bill requires counties or municipalities to expend funds. The bill does not appear to qualify for an exemption, accordingly the bill needs to include a statement of important state interest and have a 2/3 vote of the membership of each house.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

None.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

At the March 23, 2005, meeting of the State Administration Appropriations Committee, the committee adopted a strike-all amendment with an amendment to the strike-all and reported the bill favorably an amended with a committee substitute.

The strike-all amendment changes the reference to statutes from the Workers' Compensation, Chapter 440, F.S. to Public Officers and Employees: Conditions of Employment; Retirement; Travel Expenses, Chapter 112, Part I, F. S. The amendment provides a definition for "first responders"; requires standard of proof for first

responders with an injury or disease caused by exposure to a toxic substance; allows any adverse result or complication relating to small pox vaccinations be considered an injury by accident arising out of employment by a first responder; requires standard of proof for first responders involving occupational disease; and allows for the continuation of permanent total supplemental benefits after age 62 for certain first responders.

The amendment removes exemption to first responders from the clear-and-convincing standard of proof:

- If their injury or disease is caused by exposure to a toxic substance;
- If their injury or disease involves occupational disease or repetitive exposure;
- For psychiatric injuries;
- For those involved in an occupational disease claim from proving causation and exposure to the harmful substance in the workplace;
- From having to show with epidemiological studies the alleged occupational disease was caused by exposure to the alleged substance.

The strike-all amendment also removes the provision for attorneys to exceed the cap on attorney fees for medical-only claims.

On March 30, 2005, the Committee on Domestic Security adopted a strike-everything amendment and then reported the bill favorably as amended with a committee substitute. The amendment brought the provisions into the existing statutory section 112.18, F.S., to reduce ambiguity as to the impact the provisions might have on the Florida Retirement System. In addition, the amendment added language providing a method of determining attorney's fees in actions related to the matters addressed by the bill.