SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: SB 346

INTRODUCER: Senator Alexander

SUBJECT: Workers' Compensation for First Responders

DATE: March 30, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	**Favorable**
2.	Wilson	Wilson	GO	**Favorable**
3.				
4.				
5.				
6.				

I. Summary:

Effective October 1, 2003, legislation was enacted that provided significant reforms to the workers' compensation system that included changes related to benefits for injured workers, attorney's fees, and affordability and availability of coverage.[1] This bill establishes lower compensability standards and increases benefits for a class of state and local governmental employees and volunteers defined as "first responders" and allows for increased attorney's fee awards for certain cases involving first responders. The bill defines the term, "first responder," to include a law enforcement officer, a firefighter, an emergency medical technician or paramedic, and a volunteer firefighter. The bill provides the following changes in workers' compensation for first responders only:

- Lowers compensability standards for toxic substance exposure, occupational disease, repetitive exposure, and mental or nervous injury;
- Authorizes payment for medical benefits in cases involving a mental or nervous injury without an accompanying physical injury requiring medical treatment;
- Eliminates the current six-month limitation on temporary total disability benefits for compensable mental or nervous injuries after a first responder reaches maximum medical improvement and the 1 percent limitation for permanent impairment benefits for psychiatric impairment;
- Allows increased attorney fee awards for cases involving a first responder with alleged exposure to toxic substances or occupational diseases by allowing the judges of compensation claims to award hourly fees as an alternative to the contingency fee schedule based on certain factors. Currently, the judges of compensation claims may

[1] Ch. 2003-412, L.O.F.

award an attorney's fee based on the contingency fee schedule, or as an alternative to the contingency fee for medical-only claims, an attorney's fee not to exceed $1,500 once per accident, if the judge of compensation claims determines that the contingency fee schedule, based on benefits secured, fails to compensate fairly the attorney.

- Provides that any adverse result or complication caused by a smallpox vaccination is deemed to be an injury arising out of work performed in the course and scope of employment; and
- Extends the payment of permanent total disability (PT) supplemental benefits beyond age 62 for first responders that were employed by a public employer that did not participate in the social security program whether or not the employer provided an alternative retirement program. Currently, PT benefits and PT supplemental benefits generally end at age 75 and 62, respectively.

The National Council on Compensation Insurers (NCCI) estimates that costs for first responder classes would increase approximately 6.2 – 6.7 percent ($13.6 – 14.0 million) if this proposal were enacted in its current form. Individual self-insureds do not report data to NCCI and are therefore not included in this estimate. As a result, additional costs are expected from individual self-insureds that employ first responders, which include state and local governmental agencies.

This bill creates the following section of the Florida Statutes: 112.1815.

II. Present Situation:

Florida Retirement System (FRS)[2]

The FRS is the fourth largest public retirement system in the United States, covering 648,379 active employees, 237,730 annuitants (retirees and their surviving beneficiaries), and 31,457 participants of the Deferred Retirement Option Program (DROP). All state and county employees are compulsory members of the FRS, and as of June 30, 2005, about 151 Florida cities were covering firefighters, police, and/or general employees under the FRS. On that date, there were also 190 independent special districts with members in the FRS. As of June 30, 2005, state employees represented 21.59 percent of the FRS membership. Remaining members are employed by local agencies, including all counties (23.23 percent), district school boards (48.70 percent), and community colleges (2.81 percent), as well as cities and special districts (3.67 percent) that have opted to join the FRS.

The active membership of the FRS is divided into five membership classes: The Regular Class consists of 565,276 members; the Special Risk Class includes 68,466 members (10.56 percent), the Special Risk Administrative Support Class has 80 members, the Elected Officers' Class has 1,999 members, and the Senior Management Service Class has 6,751 members. Each class is separately funded based upon the costs attributable to the members of that class.

Special Risk Class of the FRS

The Special Risk Class of the FRS consists of state and local government employees who meet the criteria for special risk membership. The class covers persons employed in law enforcement, firefighting, criminal detention, and emergency and forensic medical care who meet statutory

[2]Member counts are based on a "snapshot" of the FRS taken on June 30, 2005.

criteria for membership as set forth in s. 121.0515, F.S. As of June 30, 2005, with over 68,400 active members in the Special Risk Class and 80 members in the Special Risk Administrative Support Class, special risk employees made up nearly 11 percent of the active FRS membership.

In creating the Special Risk Class of membership within the FRS, the Legislature recognized that persons employed in certain categories of law enforcement, firefighting, criminal detention, and emergency medical care positions must, as an essential function of their positions, perform work that is physically demanding or arduous, or work that requires extraordinary agility and mental acuity. The Legislature further found that as persons in such positions age, they may not be able to continue performing their duties without posing a risk to the health and safety of themselves, the public and their coworkers. In response, the Legislature established a special class to permit these employees to retire at an earlier age and with less service without suffering economic deprivation compared to other members with normal retirement after 30 years of service or age 62 and vested.

Special Risk Class Benefits, Generally
Special Risk Class membership and benefits differ from the Regular Class membership in the following ways:

1. A Special Risk Class member earns retirement credit at the rate of 3 percent of average final compensation for each year of service, as opposed to the 1.60-to-1.68 percent credit per year of service earned by a Regular Class member.
2. A Special Risk Class member qualifies for normal retirement at an earlier age (age 55 vs. age 62) or with fewer years of service (25 years vs. 30 years) than a Regular Class member.
3. A Special Risk Class member who is totally and permanently disabled in the line of duty qualifies for a 65 percent minimum option 1 benefit payment compared to a Regular Class member similarly disabled who qualifies for a 42 percent minimum option 1 benefit payment.

The benefit improvements enjoyed by members of the Special Risk Class are funded by higher employer contributions. For the 2005-06 plan year under the FRS, the retirement portion of the employer contribution rate for the Special Risk Class is 17.37 percent or nearly three times the 6.67 percent retirement contribution rate for the Regular Class.[3] Thus when a membership group moves from the Regular Class to the Special Risk Class, the monthly employer contributions triple for affected employees.

Special Risk Class Criteria
FRS members must meet specified eligibility requirements to qualify for membership in the Special Risk Class. These requirements limit membership to persons who are employed as law enforcement officers, firefighters, correctional officers, correctional probation officers, emergency medical technicians or paramedics, specified forensic and health care workers, and youth custody officers, and who meet the criteria set forth in applicable s. 121.0515, F.S. At the state level, specified professional health care and forensic positions in the Departments of

[3] Under the FRS Investment Plan, the amount contributed to an individual member account increases from 9.25% to 21.33% when the member moves from the Regular Class to the Special Risk Class.

Corrections and Children and Families were included in the Special Risk Class effective January 1, 2001. To qualify for special risk membership, the members filling these state positions must spend at least 75 percent of their time performing duties involving inmate or patient contact.

Special Risk Class Disability Benefits

The FRS provides disability benefits for its active members who are totally and permanently disabled from useful employment. All state and county employees are compulsory members of the FRS, and as of June 30, 2005, about 151 Florida cities were covering firefighters, police, and/or general employees under the FRS. On that date, there were also 190 independent special districts with members in the FRS. On June 30, 2005, there were 13,234 disability annuitants receiving disability benefits from the FRS Pension Plan.

Under s. 121.091(4), F.S., any member of the FRS who is totally and permanently disabled due to a condition or impairment of health caused by an injury or illness (including tuberculosis, heart disease, or hypertension) is entitled to disability benefits. The disabling injury or illness must have occurred before the member terminated employment. If the injury or illness arises out of and in the actual performance of duty required by his job, the member is entitled to in-line-of-duty disability benefits. There are several important differences in the laws applicable to disability benefits, depending on whether the disability is found to be due to an injury or illness occurred in the line of duty:

- *Eligibility.*—A FRS member is eligible for in-line-of-duty disability benefits from the first day on the job. In contrast, the member must have 8 years of creditable service before becoming disabled in order to receive disability retirement benefits for any disability occurring other than in the line of duty.
- *Threshold Benefit Amount.*—The level of disability benefit to which an eligible disabled member is minimally entitled depends upon his/her membership class and whether the disabling injury or illness was job related. If the disabling injury or illness occurs in the line of duty, the benefit will be at least 42 percent of the member's average final compensation (AFC) as of the disability retirement date. For special risk members retiring on or after July 1, 2000, the in-line-of-duty disability benefit threshold is 65 percent of AFC as of the member's disability retirement date. If the disabling injury or illness did not occur in the line of duty, the benefit threshold is 25 percent of AFC, regardless of membership class.
- *Burden of Proof.*—Proof of disability is required, including certification by two Florida-licensed physicians that the member's disability is total and permanent (i.e., that the member is prevented by reason of a medically determinable physical or mental impairment from engaging in gainful employment of any type). It is the responsibility of the applicant to provide such proof. Unless a legal presumption applies such as the one provided under s. 112.18, F.S.(described below), to qualify to receive the higher in-line-of-duty disability benefits, a member must also show by competent evidence that the disability occurred in the line of duty.

In-Line-of-Duty Disability Presumptions

Section 112.18, F.S., establishes a presumption for state and local firefighters, law enforcement, correctional and correctional probation officers regarding determinations of job-related disability. This law provides that certain diseases (tuberculosis, heart disease, and hypertension)

acquired by these officers are presumed to have been suffered in the line of duty. This presumption in law has the effect of shifting from the employee to the employer the burden of proving by competent evidence that the disabling disease resulted from the person's employment. The presumption applies to disability determinations under all public retirement systems providing disability coverage for firefighters, law enforcement officers, correctional officers, and correctional probation officers, including the Florida Retirement System, and to disability determinations under the Worker's Compensation Law. Sections 185.34 and 175.231, F.S., establish similar presumptions for municipal police officers' pension systems and municipal firefighters' pension systems. Section 112.181, F.S., establishes a similar presumption for firefighters, paramedics, emergency medical technicians, law enforcement officers, and correctional officers who are disabled or die as a result of contracting hepatitis, meningococcal meningitis, or tuberculosis.

Local Pension Plans for Firefighters and Police Officers

Chapters 175 and 185, F.S., provide funding for municipal firefighters' and police officers' plans, and numerous city plans cover firefighters and police officers under these plans. Both chapters provide a "uniform retirement system" for firefighters/police officers and set standards for operation and funding of pension systems through a trust fund supported by a tax on insurance premiums. Most Florida firefighters and local law enforcement officers participate in these plans. Each of these chapters governs two types of plans, “chapter plans” and “local law plans.” To be found totally and permanently disabled, “chapter plan” employees must only be found disabled from rendering useful and efficient service as a firefighter or police officer. Under “local law plans” the standards for determining eligibility for disability retirement and/or death benefits, and the benefits paid, vary from plan to plan, although certain minimum standards are established under ss. 175.351 and 185.35, F.S.

Members are covered for disability suffered “in the line of duty” from the first day of employment. The minimum in-line-of-duty disability benefit is 42 percent of average monthly salary. By contrast, to qualify for non-duty-related disability benefits, a member must have 10 years of service, and the minimum benefit for regular disability is 25 percent of the average monthly salary. So, it is often to a member's advantage, if he is disabled, to have suffered the disability in the line of duty. In addition to the pension plans governed by chapters 175 and 185, F.S., there are numerous other local plans that provide coverage for firefighters/police officers for disability and death. Under these plans, the standards for determining eligibility for disability retirement, death benefits, and the benefits paid, also vary from plan to plan.

Workers’ Compensation Insurance

Permanent Total Disability Benefits

In order to be eligible for permanent total disability benefits, an employee must either have a catastrophic injury or be unable to engage uninterruptedly in at least sedentary employment under the provisions of s. 440.15(1), F.S. Permanent total disability is determined at the time of maximum medical improvement, based upon reasonable medical probability that no further medical improvement can reasonably be anticipated. The benefit is calculated at 66 2/3 percent of the average weekly wage, subject to the maximum compensation rate. In addition, an employee will generally receive an annual supplemental income benefit equal to 3 percent per

year of the compensation payment, multiplied by the number of calendar years since the date of the injury, until age 62.

Generally, permanent total disability benefits are payable until the employee reaches age 75. If the accident occurs on or after the employee reaches age 70, benefits are payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability. An employee is eligible to receive permanent total disability benefits after age 75, and to receive the annual 3 percent permanent total disability supplementary benefit after age 62, if the employee is not eligible for social security benefits due to the compensable injury preventing the employee from working sufficient quarters to be eligible for such benefits.[4]

An indeterminate number of municipalities and special districts do not participate in the social security program. However, the federal Omnibus Budget Reconciliation Act of 1990 (Public Law No.101-508) requires social security coverage for state and local employees who are not covered by a state voluntary agreement that provides social security coverage or a retirement system. The state, as an employer, and the counties are mandatory participants in the FRS and participate in the social security program through a state voluntary agreement. Municipalities and special districts may participate in the FRS and thereby participate in the social security system, or establish their own retirement system that may participate in the social security system.

Compensability for Certain Exposures and Injuries

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. An injury or disease caused by a toxic substance requires clear and convincing evidence establishing that exposure to the specific substance caused the injury or diseases sustained by the employee. Both causation and sufficient exposure to support causation must be proven by clear and convincing evidence in cases involving occupational disease or repetitive exposure.

Courts have held that a higher standard of proof applies for occupational disease and exposure cases than other types of claims. Causation for exposure and occupational disease claims must be proven by clear evidence; a preponderance of the evidence is not enough. The District Court of Appeal noted:

> *In cases involving diseases or physical defects of an employee as distinguished from external occurrences to an employee such as an automobile accident, a claimant must prove a causal connection other than by merely showing that it is logical that the injury arose out of the claimant's employment or that by a preponderance of the probabilities it appears that it arose out of such employment. There must be some clear evidence rather than speculation or conjecture establishing the causal connection between the claimant's injury and her employment.*[5]

[4] Section 440.15, F.S.
[5] *Harris v. Joseph's of Greater Miami,* 122 So.2d 561 (Fla. 1960).

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 and the law also required that a mental or nervous injury occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence.[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.[7] 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*.[8]

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.[9]

The 2003 legislation continued the mental nervous injury exclusions and the clear and convincing evidence standard noted above and codified case law that prohibited the payment of benefits for mental or nervous injuries without an accompanying physical injury; however, the law also provides that the physical injury must require medical treatment.[10] Before the 2003 legislative changes, case law provided that the lack of medical treatment was relevant to whether or not a sufficient injury had been sustained. The 2003 act required the compensable physical injury be the major contributing cause of the mental or nervous injury.[11] The act also provided that a physical injury resulted from a mental or nervous injury unaccompanied by a physical trauma requiring medical treatment is not compensable. It 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 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).

Attorney's Fees

The 2003 legislation continued the use of the existing contingency fee schedule in awarding attorney's fees and eliminating the authorization for hourly fees in most cases. The fee for benefits secured are limited to 20 percent of the first $5,000 of benefits secured, 15 percent of the next $5,000 of benefits secured, 10 percent of the remaining amount of benefits secured to be

[6] Section 440.02(1), F.S.
[7] *City of Holmes Beach v. Grace*, 598 So.2d 71 (Fla. 1989).
[8] Ibid.
[9] *Cromartie v. City of St. Petersburg*, 840 So.2d 372 (Fla. 1st DCA 2003).
[10] Section 440.093, F.S.
[11] Ibid.

provided during the first 10 years after the claim is filed, and 5 percent of the benefits secured after 10 years. Except for cases involving medical-only claims, the legislation eliminated the discretionary hourly fees. As an alternative to the contingency fee for medical-only claims, the judge of compensation claims may approve an attorney's fee not to exceed $1,500 once per accident, based on a maximum hourly rate of $150 per hour, if the judge of compensation claims determines that the contingency fee schedule, based on benefits secured, fails to compensate fairly the attorney.

The attorney fee changes, provided in the 2003 act, have generated concerns regarding the ability of an injured worker to obtain legal representation and access to courts. Opponents contend, particularly for medical-only claims that the contingency fee schedule, or as an alternative the hourly fee of $150 per hour, or up to $1,500 per accident, does not adequately compensate them for their time, thereby discouraging them from litigating smaller claims. Proponents of the fee change contend that the $1,500 fee is a reasonable financial incentive for litigating smaller medical-only claims and that the contingency fee schedule allows for a greater amount for larger medical-only claims (exceeding $8,333).

In response to a recent request by committee staff, the Office of the Judges of Compensation Claims provided attorney's fee data associated with medical-only claims. A review of the 1,463 cases having medical only claims with dates of accident after October 1, 2003 reveals that 100 of those cases had attorneys' fees greater than $1,500. The largest fee was $10,382 and the average fee was $1,431. The Office of the Judges of Compensation Claims also indicated that the percentage of unrepresented claimants has declined from an average of 0.71 percent, for the period of October 1, 2002 through September 30, 2003, to an average of 0.41 percent, for the period of October 1, 2005 through February 28, 2006.

Some claimant attorneys argue that by only applying the fee cap to the claimant's attorney, and not the defense attorney, it places the employee at a competitive disadvantage in litigating the claim. In justifying such limits, the courts have relied on the legitimacy of the legislature's objective of protecting the injured worker's interest and the rationality of regulating only workers' attorneys as a reasonable means of furthering this objective. The prohibition on the claimant's attorney collecting a fee, unless approved by the court, was upheld on the basis that the statute serves a legitimate state interest in affording a worker necessary minimum living funds.[12]

In response to a request by committee staff, the Division of Risk Management (division) of the Department of Financial Services provided the following information concerning litigation involving toxic substance, repetitive trauma, or occupational disease compensability for law enforcement officers, forest firefighters, and emergency medical technicians. The reports looked at five years of workers' compensation claims, with dates of accident from January 1, 2000 through December 31, 2004. According to the division, of the three classes of employees affected by this bill, the state primarily employs law enforcement officers. The division was unaware of any state employee classified as an emergency medical technician. As to firefighters, as defined in s. 663.30, the state has a limited number within the Division of State Fire Marshall of the Department of Financial Services. The division provided the following information:

[12] *Samaha v. State*, 389 So.2d 639 (Fla. 1980).

2000-2004 Division of Risk Management Claims Data	
Average number of claims filed per year (toxic substance, repetitive trauma, or occupational disease) by a law enforcement, firefighter, or emergency medical technician employee.	103
Average amount of claim paid per year on this group of claims	$209,418
Average defense attorney's fee & cost paid per year on this group of claims	$10,850
Average plaintiff attorney fees & cost paid per year on this group of claims	$8,836

Adverse Reactions to Smallpox Vaccinations

According to the Florida Department of Health, 14 out of 3,942 people vaccinated for smallpox in Florida have had adverse reactions to the vaccination. Some contend that the law is not clear as to whether an adverse reaction to a smallpox vaccine is compensable under workers' compensation. Section 440.09, F.S., provides that an employer must pay compensation or furnish under ch. 440, F.S., if the employee suffers an accidental compensable injury or death arising out of work performed in the scope and course of employment. The law does not address smallpox vaccinations.

In 2003, Congress created the Smallpox Vaccine Injury Compensation Program.[13] 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, these employees 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 employee who sustains a medical injury from exposure to the smallpox virus through physical contact with the vaccinated employee. However, any payments under the program are secondary to payments made or due from health insurance, workers' compensation, or any other entity.

III. Effect of Proposed Changes:

Section 1 creates s. 112.1815, F.S., relating to first responders, to define a "first responder" to mean 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., or a volunteer firefighter engaged by a state or local government. This definition would appear to include first responders employed or engaged by the state, a county, municipality, or special district. For purposes of determining benefits of this section relating to employment-related accidents and injuries for a first responder, the bill provides:

- An injury or disease caused by the exposure to a toxic substance is not an injury by accident arising out of employment unless there is a preponderance of evidence establishing that exposure to the specific substance to which the first responder was

[13] Public Law 108-20, "The Smallpox Emergency Personnel Protection Act of 2003"

exposed can cause the injury or disease sustained by the employee. A "preponderance of evidence" is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.[14] Currently, s. 440.09. F.S., requires, for purposes of workers' compensation compensability, such evidence be proven by a clear and convincing standard for cases involving occupational disease or repetitive exposure and s. 440.151, F.S., defines occupational disease to mean only a disease for which there are epidemiological studies showing that exposure to the specific substance involved, at the levels to which the employee was exposed, may have caused the precise disease sustained by the employee.

- Any adverse result or complication caused by a smallpox vaccination of a first responder would be considered an injury by accident arising out of work performed in the course and the scope of employment. Currently, ch. 440, F.S., does not specifically address compensability for adverse results or complications related to smallpox vaccinations.

- The bill would allow a first responder to receive compensability for mental or nervous injuries without an accompanying physical injury requiring medical treatment. The bill would continue to require that such a mental or nervous injury occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence. The section provides that a first responder would be entitled to the payment of medical benefits for mental or nervous injuries even if the mental or physical injury were not accompanied by a physical injury. For a first responder, compensability for indemnity benefits would not be made unless a physical injury accompanied the mental or nervous injury. The bill eliminates the current six-month limitation on temporary total disability benefits for compensable mental or nervous injuries after a first responder reaches maximum medical improvement and the 1 percent limitation for permanent impairment benefits for psychiatric impairment. Under current law, the duration of the impairment benefit is 3 weeks for each percent of impairment. The compensation amount of the benefit is 50 percent of the temporary total disability benefit.

  Section 440.093, F.S., prohibits the payment of benefits for mental or nervous injuries without an accompanying physical injury; requires compensability to be demonstrated by clear and convincing evidence, and provides that the physical injury must require medical treatment.[15] The law also requires that the compensable physical injury be the major contributing cause of the mental or nervous injury.[16] A physical injury resulting from a mental or nervous injury unaccompanied by a physical trauma requiring medical treatment is not compensable. The duration of "temporary benefits" for a compensable mental or nervous injury is limited to no more than six months after the employee reaches maximum medical improvement for the physical injury. 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.

[14] Black's Law Dictionary, 6th edition. 1991 West Publishing.
[15] Section 440.093, F.S.
[16] Ibid.

- The bill increases certain permanent total disability (PT) benefits for first responders by allowing a first responder to continue to receive permanent total disability supplemental benefits beyond age 62, if the employer does not participate in the social security program. Currently, permanent total disability supplemental benefits cease at 62, unless the employee is not eligible for social security because the compensable injury prevented the employee from working sufficient quarters to be eligible for such benefits. The permanent total supplemental benefits are a cost-of-living benefit that is equal to 3 percent of the employee's compensation rate multiplied by the number of calendar years since the date of the injury. A public employer may not participate in the social security program; however, federal law requires the employer to provide an alternative retirement plan. This section of the bill does not specifically extend the permanent total disability benefit beyond age 75, as currently limited by s. 440.15, F.S. It may have been the intent to extend PT benefits beyond age 75 for first responders if their employer did not participate in the social security program and regardless of whether or not the employer provided an alternative retirement program.

- In cases involving occupational diseases, both causation and sufficient exposure to a specific substance must be shown to be present in the workplace to support causation and must be proven by a preponderance of evidence. The bill defines the term, "occupational disease," to mean a disease that 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 employment. Section. 440.09, F.S. provides that in such cases both causation and sufficient exposure to a specific harmful substance known to be present in the workplace to support causation be proven by clear and convincing evidence. Currently, case law generally requires that the claimant must prove a causal connection other than by merely showing that it is logical that the injury arose out of the claimant's employment or that by a preponderance of the probabilities it appears that it arose out of such employment. This change in the law would appear to lower the standard for causation to a preponderance of evidence.

- Provisions relating to attorney's fees for first responders involved in occupational or toxic exposure claims are increased by allowing an attorney to receive hourly fees as an alternative to the statutory fee schedule for lost-time cases as well as medical-only claims, if the judge of compensation claims determines additional fees are appropriate, given certain factors. Currently, s. 440.34, F.S., provides for the use of a contingency fee schedule in awarding attorney's fees. The fee for benefits secured are limited to 20 percent of the first $5,000 of benefits secured, and 15 percent of the next $5,000 of benefits secured, 10 percent of the remaining amount of benefits secured to be provided during the first 10 years after the claim is filed, and 5 percent of the benefits secured after 10 years. As an alternative to the contingency fee for cases involving medical-only claims, the judge of compensation claims may approve an attorney's fee not to exceed $1,500 once per accident, based on a maximum hourly rate of $150 per hour, if the judge of compensation claims determines that the contingency fee schedule, based on benefits secured, fails to compensate fairly the attorney.

Section 2 provides that the Legislature finds that this act fulfills an important state interest.

Section 3 provides that this act will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Inasmuch as this bill requires local governments to incur expenses, i.e., to pay additional workers' compensation benefits, the bill may fall within the purview of Art. VII, Section 18 of the Florida Constitution, which provides that cities and counties are not bound by general laws requiring to spend funds or to take an action that requires the expenditure of funds unless certain specified exemptions or exceptions are met. The bill provides that this act fulfills an important state interest, which is one of the criteria that must be met.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Permanent total disability supplemental benefits for first responders that were employed by a state or local government unit that did not participate in the social security program would be extended beyond age 62, regardless of whether their public employer provided 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.

Attorneys representing first responders in cases involving alleged exposure to toxic substances or occupational disease claims would benefit from the lower compensability standards for litigating those claims and the increased potential attorney's fees for these

lost-time cases as well as medical only cases. The impact of the increased attorney's fees on the first responders' ultimate benefits is indeterminate at this time.

Any additional costs of funding workers' compensation coverage for state and local governments could be ultimately passed through to taxpayers.

C. Government Sector Impact:

National Council on Compensation Insurers, Inc. (NCCI) Cost Analysis of the Bill
The NCCI cost analysis is provided below:

Senate Bill 346 would create Section 112.1815, F.S. This new section defines "first responder" and in part reverses the application to first responder workers of certain sections of Senate Bill 50A, which was enacted in October 2003. For first responder workers' compensation claims, this proposal loosens compensability standards including a broadened definition of "occupational disease," pays basic and supplemental permanent total benefits for life in the absence of social security, leaves the attorney fees for first responder claims subject to the determination by the judge of compensation claims, and removes the limitation of 1 percent on psychiatric impairments.

NCCI estimates that costs for first responder classes would increase 6.2 - 6.7 percent ($13.6 - 14.0 million) if this proposal were enacted in its current form. *Individual self-insureds do not report data to 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.*

Actuarial Analysis of Proposal
First responders are defined as law enforcement officers, firefighters (including volunteers), and emergency medical technicians employed by state or local government. The classification codes that apply to these professionals are 7720, 7704, 7370 and 7380. Based on the premium and losses reported in NCCI's unit statistical plan data, these class codes make up approximately 5 percent of the insurance company and self-insured group data of the Florida workers' compensation system. Individual self-insureds that employ first responders and do not report data to NCCI are not included in this estimate. As a result, additional costs would be expected from these individual self-insureds, including a number of major governmental agencies across the state.

Compensability Standards
This proposal would allow for the compensation of complications from small pox inoculation and would reverse the application to first responders of some provisions of Senate Bill 50A currently in effect, including:

- Clear and convincing evidence is needed to prove causation of disease caused by toxic substance or occupational disease.
- Mental or nervous injury without accompanying physical injury requiring medical treatment is not compensable. The physical injury must be the major contributing cause of the mental or nervous injury.

This bill amends Section 112.18, F.S., to now include a definition of "occupational disease" corresponding to the definition in Section 440.151(2), F.S., with the exception that an epidemiological study is not required to prove that the employee was exposed to a specific substance that could cause the precise disease sustained by the employee. This provision is expected to have a negligible impact on first responder classes.

Loosening compensability is likely to add claims. Depending on judicial interpretation, compensability of any mental injury 'occurring as a manifestation of an employment' may not only allow compensation of first responders traumatized by the suffering they've seen in the course of their employment, but may also allow compensation as a result of the stress from routine activities, interactions and employment decisions. Given that the legislative intent is to broaden benefits for first responders and the increased subjectivity in determining attorney fees, we expect the number of compensable claims for first responders to increase. In order to estimate the additional costs, we reversed the savings attributed to tightened compensability standards from NCCI's pricing analysis of Senate Bill 50A. We estimate that the combined impact of the above provisions may increase the number of compensable claims for first responder classes by 1 percent. Any additional impact will be reflected in subsequent data that is collected and used in future rate filings.

Permanent total supplemental benefits
This proposal continues the payment of basic and supplemental benefits for life for a first responder's permanent total claim if the first responder's employer does not participate in the social security program. Using life mortality tables and annuity calculations, NCCI estimates that benefits would increase 53 percent on permanent total (PT) claims. Given the increase in benefits, we expect an additional increase of 25 percent due to utilization. Since PT represents approximately 5.4 percent of costs, the expected impact in cases where the employer does not participate in the social security program would be an increase of 3.6 percent.

Benefits for Mental or Nervous Injury
This proposal would reverse the application to first responders of some provisions of Senate Bill 50A currently in effect, including:

- Temporary benefits for a compensable mental or nervous injury shall not be paid for more than 6 months after the date of maximum medical improvement for the injured employee's physical injuries and is included in the period of 104 weeks allowed for temporary benefits under Section 440.15, F.S., and
- The portion of the impairment rating associated with psychiatric impairment is limited to 1 percent.

The change in temporary benefits was included in the 1 percent impact associated with the change in compensability standards in Senate Bill 50A. In order to estimate the additional costs due to removal of the limit on psychiatric impairment, we reversed the savings from NCCI's pricing analysis of Senate Bill 50A. We estimate that the removal of the limit on psychiatric impairments would increase costs for first responder classes by 1 percent.

Attorney Fees
Senate Bill 346 would reverse the application to first responders *with alleged exposure to toxic substance or occupational disease* of the following items currently in effect from Senate Bill 50A:

- Elimination of hourly fees for cases with alleged exposure to toxic substances or occupational disease; and
- Alternate fee of up to $1,500 per accident for medical-only petitions

In addition, SB 346 would allow any reasonable attorney fees for those cases with alleged exposure to toxic substances or occupational diseases. This proposal could potentially allow attorney fees to exceed the pre-Senate Bill 50A provisions. A savings of 2.1 percent was filed in Senate Bill 50A due to the change in how attorney fees were determined, but the impact from this provision is expected to be less than a full reversal of the 2.1 percent because it would only apply to claims with alleged exposure to toxic substances or occupational disease. The cost of this provision is estimated to be between 0.5 and 1.0 percent on first responder classes.

Fiscal Impact on Individual, Self-Insured Public Employers
The bill would have an indeterminate fiscal impact on individual self-insured governmental units, as indicated by NCCI. The fiscal impact of extending permanent total disability supplemental benefits for first responders, if a public employer that does not participate in the social security program employs them, is indeterminate. Although a local government could be providing an alternative retirement program to the first responders, in lieu of the social security program, the bill would require the local government to continue to pay these permanent total supplemental benefits beyond age 62. The magnitude of the fiscal impact is unknown.

Fiscal Impact on the State of 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.

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.

VI. Technical Deficiencies:

The definition of "first responders" provides that "A volunteer engaged by state or local government is also considered a first responder for purposes of this section." An individual must be a member of the FRS to be covered for FRS benefits and a volunteer would not necessarily be a member. A volunteer would not be covered for FRS purposes. However, an FRS member volunteering in a first responder capacity for a different employer might seek in-line-of duty disability retirement benefits as a result of this bill for a non-job-related injury or illness.

The bill provides that "A mental or nervous injury involving a first responder and occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence." However, the bill does not define what a "mental or nervous injury" is. The current language may be too broadly interpreted and it would require a rule to implement this provision if it becomes law. Section 440.093, F.S., provides that mental or nervous injury due to stress, fright, or excitement only is not compensable and requires that there be an accompanying physical injury needing medical treatment which is the major contributing cause of the mental or nervous injury. The mental or nervous injury must be demonstrated by clear and convincing evidence by a licensed psychiatrist, meeting criteria of the most recent edition of a specified publication of the American Psychiatric Association.

Section 110.120, F.S., provides for a fifteen-day period of paid administrative leave for state employees volunteering their services to the American Red Cross for a level II disaster event within the state's boundaries. That statute specifically deems such a volunteer to **not** be an employee of the state for the purposes of workers' compensation benefits. Because this provision is located in another section of law unamended by this bill, it can only add to the interpretive confusion in the expansion of coverage to non-public safety occupations.

VII. Related Issues:

Presently, an employee is eligible to receive permanent total disability benefits after age 75, and to receive the annual 3 percent permanent total disability supplementary benefit after age 62, if the employee is not eligible for social security benefits due to the compensable injury preventing the employee from working sufficient quarters to be eligible for social security benefits. This language provides a financial safety net for employees that are unable to receive social security benefits and rely on the workers' compensation benefits for their sole income. However, the bill provides that first responders would receive the permanent total disability supplemental benefits beyond age 62 even if their employer provides an alternative retirement program to social security.

VIII. Summary of Amendments:

None.