

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 1088

INTRODUCER: Senators Torres and Perry

SUBJECT: Workers' Compensation for First Responders

DATE: April 14, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Pre-meeting
2.			AGG	
3.			AP	
4.			RC	

I. Summary:

SB 1088 revises benefits and standards for determining benefits for employment-related accidents and injuries of “first responders,” which will generally increase the likelihood of eligibility for workers’ compensation benefits. “First responders” are law enforcement officers, firefighters, or emergency medical technicians or paramedics employed by state or local government. First responders includes volunteer law enforcement officers, firefighters, or emergency medical technicians or paramedics engaged by the state or a local government.

The bill:

- Authorizes the payment of indemnity benefits or death benefits to first responders that experience a mental or nervous injury that is unaccompanied by a physical injury. Currently, only medical benefits are allowed for a mental or nervous injury that is unaccompanied by a physical injury.
- Changes the evidentiary standard from clear and convincing evidence to a preponderance of evidence.

The bill may have an indeterminate fiscal impact on state and local governments.

II. Present Situation:

Florida Workers’ Compensation System

Employers are required to pay compensation or furnish benefits that are required under ch. 440, F.S., if an employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of the employment.¹ Generally, employers may secure

¹ Section 440.09(1), F.S.

coverage from an authorized carrier, qualify as a self-insurer,² or purchase coverage from the Workers' Compensation Joint Underwriting Association, the insurer of last resort.³

Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.⁴ 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.⁵ An injury or disease caused by a toxic substance is not an injury by accident arising out of employment unless there is clear and convincing evidence establishing that exposure to the specific substance caused the injury or diseases sustained by the employee.⁶

Section 440.093, F.S., sets forth the conditions under which a mental or nervous injury is compensable. A mental or nervous injury due to stress, fright, or excitement only is not an injury by accident arising out of the employment. Mental or nervous injuries without an accompanying physical injury requiring medical treatment are not compensable. In addition, a physical injury resulting from a mental or nervous injury unaccompanied by a physical trauma requiring medical treatment is not compensable.

Further, s. 440.093, F.S., provides that mental or nervous injuries occurring as a manifestation of an injury compensable under ch. 440, F.S., must be demonstrated by clear and convincing medical evidence. The compensable physical injury must be the major contributing cause of the mental or nervous injury. The law also limits the duration of temporary benefits for a compensable mental or nervous injury to no more than 6 months after the employee reaches maximum medical improvement.

Injured workers are entitled to receive all medically necessary remedial treatment, care, and attendance, including medications, medical supplies, durable medical equipment, and prosthetics, for as long as the nature of the injury and process of recovery requires.⁷

Indemnity benefits only become payable to employees who are disabled for at least 8 days due to a compensable workplace injury.⁸ These benefits are generally payable at 66 2/3 percent of the employee's average weekly wage (AWW),⁹ up to the maximum weekly benefit established by law.¹⁰ Indemnity benefits fall into one of four categories: temporary partial disability, temporary total disability, permanent partial disability, and permanent total disability.

² Section 440.38, F.S.

³ Section 627.311(5)(a), F.S.

⁴ "Compensable" means a determination by a carrier or judge of compensation claims that a condition suffered by an employee results from an injury arising out of and in the course of employment. s. 440.13(1)(d), F.S.

⁵ Section 440.09(1), F.S.

⁶ Section 440.02(1), F.S.

⁷ Section 440.13(2)(a), F.S.

⁸ Section 440.12(1), F.S.

⁹ An injured workers' average weekly wage is an amount equal to one-thirteenth of the total amount of wages earned during the 13 weeks immediately preceding the compensable accident. s. 440.14(1), F.S.

¹⁰ Section 440.15(1)-(4), F.S.

- Temporary partial disability and temporary total disability benefits are payable for up to a combined total of 260 weeks.¹¹
- Permanent partial disability benefits are payable as impairment income benefits that are provided for a variable number of weeks depending upon the value of the injured worker's permanent impairment rating pursuant to a statutory formula.¹²
- Permanent total disability benefits are payable until the age of 75, unless the work-related accident occurs after the worker's 70th birthday, then the benefit is paid for 5 years.¹³

Section 440.15(3), F.S., provides that permanent impairment benefits are limited for a permanent psychiatric impairment to one percent permanent impairment.

Workers' Compensation Benefits for First Responders

In 2007, the Legislature enacted significant changes in workers' compensation benefits for first responders that provide benefits and standards for determining benefits for employment-related accidents and injuries of first responders. A "first responder" is a law enforcement officer, as defined in s. 943.10, F.S., a firefighter as defined in s. 633.102, F.S., or an emergency medical technician or paramedic as defined in s. 401.23, F.S., employed by state or local government.¹⁴ Further, a volunteer law enforcement officer, firefighter, or emergency medical technician or paramedic engaged by the state or a local government is considered a first responder of the state or local government.¹⁵

In regards to compensability for a mental or nervous injury involving a first responder, s. 112.1815, F.S.:

- Requires that a mental or nervous injury occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence.
- Authorizes the payment of only medical benefits in employment-related cases involving a mental or nervous injury without an accompanying physical injury requiring medical treatment.
- Prohibits the payment of indemnity benefits unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury.
- Provides that benefits for first responders are not subject to any limitation on temporary benefits under s. 440.93, F.S., or the one percent limitation on permanent psychiatric impairments benefits under s. 440.15, F.S.

¹¹ Section 440.15(2) and (4), F.S. Section 440.15(2)(a), F.S., specifies that temporary total disability benefits are payable for 104 weeks; however, the Florida Supreme Court has found this provision unconstitutional and the statute has reverted to 260 weeks of temporary total disability benefits pursuant to this case law. *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. Jun. 9, 2016). Section 440.15(4)(e), F.S., provides that temporary partial disability benefits; however, the 1st DCA applied the holding in *Westphal* to these benefits finding the limitation unconstitutional and reverted the limitation to the 260 weeks previously allowed. *Jones v. Food Lion, Inc.*, No. 1D15-3488, 2016 Fla. App. LEXIS 16710 (Fla. 1st DCA Nov. 9, 2016).

¹² Section 440.15(3), F.S.

¹³ Section 440.15(1), F.S.

¹⁴ Ch. 2007-1, Laws of Fla.

¹⁵ Section 112.1815, F.S.

State Survey of Compensability for Workers' Compensation Mental Injuries

Often stress-related injuries do not result from a physical injury. These types of injuries are referred to as “mental-mental” injuries because they are caused by a purely mental stimulus that leads to a mental impairment, such as depression or post-traumatic stress disorder (PTSD). This stimulus could be witnessing, but not being physically injured by, a particularly horrific accident, workplace incident, or crime scene.

In 2017, the National Council on Compensation Insurance issued a report summarizing compensability for injuries¹⁶ in the United States.¹⁷ Highlights of the study include:

- **Compensability for Mental-Mental Injuries:** 27 jurisdictions, including Florida, have statutory language expressly allowing compensation for nonphysical mental (mental-mental) injuries or stress in limited circumstances.¹⁸
- **Mental-Mental and Mental-Physical Exclusions:** Montana is the only state that specially denies compensability for both mental-physical and mental-mental injuries.
- **Personnel Actions:** 21 states specify that stress arising out of a personnel action is not compensable.

2016 Pulse Shooting in Orlando, Florida

On June 12, 2016, 49 people were killed and at least 68 others were injured at a shooting at the Pulse nightclub in Orlando, Florida. The shooting has been characterized as one of the deadliest mass shootings in modern U.S. history.¹⁹ One police officer was recently profiled who was diagnosed with post-traumatic stress disorder and has been out of work since shortly after the shooting.²⁰ While the City of Orlando Police Department is paying his full salary, Florida law does not require the employer to pay because workers' compensation compensability for PTSD must be accompanied by a physical injury, which the officer does not have.

Florida Retirement System

Today, the Florida Retirement System (FRS)²¹ is the fourth largest public retirement system in the United States. The FRS offers members a choice between the Pension Plan (a defined benefit plan) and the Investment Plan (a defined contribution plan). Generally, FRS membership is compulsory for employees filling a regularly established position in a state agency, county

¹⁶ Reference to mental injuries also includes mental impairments or disorders that are occupational diseases. The District of Columbia and Kansas laws do not expressly provide for compensation of mental injuries, but they do reference mental conditions and/or mental providers.

¹⁷ NCCI, *Compensability for Workers' Compensation Mental Injuries* (2017) (on file with Senate Banking and Insurance Committee).

¹⁸ Compensable mental-mental injuries must typically be considered extraordinary and the predominate or substantial contributing cause.

¹⁹ CBS News, *Report reveals dramatic new details from Orlando nightclub massacre*, (Apr. 14, 2017) available at <http://www.cbsnews.com/news/orlando-nightclub-shooting-report-reveals-new-details-inside-pulse/> (last viewed Apr. 14, 2017).

²⁰ Orlando Sentinel, *Proposed bills would cover first responders who have PTSD* (Feb. 27, 2017) available at <http://www.orlandosentinel.com/news/breaking-news/> (last viewed Apr. 14, 2017).

²¹ Florida Retirement System Pension Plan and Other State Administered Systems Comprehensive Annual Financial Report Fiscal Year Ended June 30, 2016, available at http://www.myflorida.com/audgen/pages/pdf_files/2017-073.pdf (last viewed Apr. 11, 2017).

agency, state university, state college, or district school board with some limited exceptions. Participation by cities, municipalities, special districts, charter schools, and metropolitan planning organizations, although optional, is generally irrevocable after the election to participate is made. The five classes of membership are Regular Class, Senior Management Service Class, Special Risk Class, Special Risk Administrative Support Class, and Elected Officers' Class.

Special Risk Class of the FRS

The Special Risk Class is composed of state and local government employees who are employed in certain categories of law – enforcement officers, firefighting, criminal detention, and emergency medical care -- and meet the criteria to qualify for this class.²² A person who is a member in the Special Risk Class may retire at an earlier age and is eligible to receive higher disability and death benefits than Regular Class members.

In creating the Special Risk Class of membership within the FRS, the Legislature recognized that certain employees must, as an essential function of their positions, perform work that is physically demanding or that requires extraordinary agility and mental acuity.²³ 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.

Disability Benefits for Members of the FRS

The FRS provides disability benefits for its active members who are permanently, totally disabled from useful employment. The level of disability benefit an eligible disabled member is minimally entitled depends upon membership class, and whether the disabling injury or illness was job related. For Special Risk Class members retiring on or after July 1, 2000, the minimum in-line-of-duty disability benefit is 65 percent of average final compensation (AFC) as of the member's disability retirement date.

Criteria for disability benefits under the FRS. Section 121.091(4), F.S., provides that any FRS²⁴ member 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 “suffered in the line of duty”:

²² Section 121.0515(1), F.S.

²³ Id.

²⁴ Members of both the FRS Pension Plan and the FRS Investment Plan are eligible for disability coverage.

- *Eligibility* — An FRS member is eligible for in-line-of-duty disability benefits from his/her first day on the job. In contrast, the member must have 8 years of creditable service²⁵ before becoming disabled in order to receive disability retirement benefits for any disability occurring other than in the line of duty.
- *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., to qualify to receive the higher in-line-of-duty disability benefits, the member must also show by competent evidence that the disability occurred in the line of duty.
- *Chapter 175, F.S. plans* — Pension plans established pursuant to ch. 175, F.S., must provide a minimum line of duty benefit equal to the firefighter's accrued retirement benefit, but no less than 42 percent of his or her average monthly salary at the time of disability. Disability occurs when an injured plan member is wholly prevented from rendering useful and efficient service as a firefighter and is likely to remain so in the opinion of the board of trustees, after the member has been examined by a duly qualified doctor, selected by the board. Local law plans may have enacted disability benefits that exceed the minimum requirements.

Existing 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 statute 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 was not related to the person's employment.

Section 175.231, F.S., provides a similar presumption for firefighters in any municipality, special fire control district, chapter plan, local law municipality, local law special fire control district, or local law plan under ch. 175, F.S., whose death or disability is the result of tuberculosis, heart disease, or hypertension. Section 185.34, F.S., provides a similar presumption for municipal police officers' pension plans.

Section 112.181, F.S., provides a presumption applicable to any emergency rescue or public safety worker, including a firefighter, that such employee qualifies for in the line of duty disability or death benefits if such disability or death is due to hepatitis, meningococcal meningitis, or tuberculosis.

Absent one of the existing presumptions, the FRS member has the burden of proof when claiming in the line of duty disability or death benefits. The employee must show by competent evidence that the death or disability occurred in the line of duty in order to receive the higher

²⁵ Until July 1, 2001, any member who joined the FRS on or after July 1, 1980, was required to complete 10 years of creditable service to qualify for disability benefits for a disability that was not job-related. Under current law, the 10-year service requirement has been reduced to 8 years.

benefits.²⁶ If the employee or the employee's survivors cannot meet the burden of proof, the employee or the employee's survivors are entitled only to the lesser benefits available under regular death or disability benefits.

Death Benefits Available for FRS Members

The FRS currently provides death benefits for surviving spouses and/or eligible dependents of active members. Under s. 121.091(7), F.S., death benefits may be paid for an active member of the FRS Pension Plan who dies before retirement due to an injury or illness (including tuberculosis, heart disease, or hypertension). If the injury or illness arises out of and in the actual performance of duty required by the job, the member's surviving spouse and/or eligible dependent(s) are entitled to in-line-of-duty death benefits. There are important differences in the laws applicable to death benefits, depending on whether the death is found to be due to an injury or illness "suffered in the line of duty."

From the first day on the job, an FRS Pension Plan member is eligible for in-line-of-duty death benefits that will pay a minimum monthly benefit to a survivor equal to half the member's last monthly salary. If the deceased member would have been entitled to a higher retirement benefit based on service credit, the higher benefit would be payable to his/her spouse or eligible dependent(s). The survivor benefit for Special Risk Class members killed in the line of duty is 100 percent of the member's base pay at the time of death if the member's death occurs on or after July 1, 2013. Unless a legal presumption applies such as those provided under s. 112.18, F.S., the eligible beneficiary must show by competent evidence that the death occurred in the line of duty to qualify to receive the higher in-line-of-duty death benefits.

Local Government Pension Plans

Chapters 175 and 185, F.S., provide funding mechanisms for pension plans of municipal firefighters and police officers, respectively. Both chapters provide a uniform retirement system for firefighters and police officers and set standards for operating 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. To be considered totally and permanently disabled, charter plan employees must only be found disabled from rendering useful and efficient service as a firefighter or police officer.²⁷ Under local law plans, the standards may vary for determining eligibility for disability retirement, death benefits, and the benefits paid, although all plans must abide by minimum standards established under ss. 175.351 and 185.35, F.S., respectively.

III. Effect of Proposed Changes:

Section 1 amends s. 112.1815, F.S., to revise compensability standards and benefits for first responders. The section provides that if a mental or nervous injury results in disability or death, payments of indemnity benefits or death benefits may be due even if no physical injury occurred. Under current law, the indemnity benefits are not due unless a physical injury arising out of the

²⁶ Sections 121.091(4)(c) and (7)(d), F.S.

²⁷ Sections 175.191 and 185.18, F.S.

injury accompanies the mental or nervous injury. Further, current law provides that only medical benefits are payable for a mental or nervous injury unaccompanied by a physical injury.

The bill provides that a mental or nervous injury occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence. Under current law, evidentiary standard is clear and convincing evidence. A preponderance of evidence is evidence that is of greater weight or more convincing than the evidence offered in opposition to it.²⁸ Clear and convincing evidence is more compelling and persuasive than a preponderance of the evidence; it “is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.”²⁹

Section 2 provides the bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Lowering the compensability standards relating to mental or nervous injuries is expected to increase the number of compensable claims for first responders. The bill provides that if a mental or nervous injury results in disability or death, payment of indemnity or death benefits may be due even if no physical injury occurred. As a result, first responders with a mental or nervous injury without an unaccompanying physical injury could receive indemnity benefits.

The fiscal impact on private employers is indeterminate. No NCCI pricing was available.

²⁸ Blacks Law Dictionary 5th Edition, *Preponderance of Evidence*, pg. 1064 (1979)

²⁹ Florida Supreme Court, *Florida Standard Jury Instructions in Civil Cases*, see pg. 170 (April 10, 2017).

http://www.floridasupremecourt.org/civ_jury_instructions/EntireDocument/SJI%20Civil%2004%2012%2017.pdf (Last accessed April 14, 2017).

C. Government Sector Impact:

The fiscal impact is indeterminate. State and local governments may incur higher claim costs for workers' compensation benefits of first responders.

According to the Division of Risk Management of the Department of Financial Services (DFS),³⁰ since the passage of s. 112.1815, F.S., available records indicate that only one state employee has received medical benefits relating to a work-related mental condition without a physical injury since s. 112.1815, F.S., was enacted in 2007.

Assuming the frequency does not significantly increase, and using an average Florida indemnity cost of \$15,378 for all claims as calculated by NCCI, DFS indicates there is a potential for small increases in claims costs. A state employee that is unable to return to work due to the extent of his or her mental injuries could result in a much higher cost depending on his or her age and salary.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 112.1815 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³⁰ Department of Financial Services, *Legislative Analysis of SB 1088* (Feb. 27, 2017) (on file with Senate Banking and Insurance Committee).