Domestic Security Committee

Wednesday, January 25, 2006
1:00 PM
12 House Office Building

Rep. Sandy Adams
Chair

Allan G. Bense
Speaker

Sandra "Sandy" Adams
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Domestic Security Committee

Start Date and Time:	Wednesday, January 25, 2006 01:00 pm
End Date and Time:	Wednesday, January 25, 2006 03:00 pm
Location:	12 HOB
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 141 Workers' Compensation for First Responders by Adams

Presentation:
The Florida Department of Law Enforcement - Seaport Security

NOTICE FINALIZED on 01/13/2006 09:41 by LOVE.JOHN

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 141 Workers' Compensation For First Responders
SPONSOR(S): Adams and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) State Administration Appropriations Committee	11 Y, 0 N	Rayman	Belcher
2) Domestic Security Committee		Newton	Newton
3) Insurance Committee			
4) Fiscal Council			
5)			

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 141 addresses some of the nine primary areas of concern presented to the workgroup.

The National Council on Compensation Insurance (NCCI) estimates that costs for first responder classes would increase 6.2% to 6.7% ($13.6M to 14.0M) if this proposal were enacted in its current form. Individual self-insureds do not report data to NCCI and are not included in NCCI's estimate. As a result, additional costs are expected from individual self-insureds that employ first responders or that do not participate in the Social Security program. This includes a number of major governmental agencies across the state.

The mandate provision appears to apply because the bill requires counties or municipalities to expend funds; therefore, requiring a 2/3 vote of the membership of each house. The bill includes a statement of important state interest.

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. The fiscal impact is the additional costs that would be incurred by the Risk Management Trust Fund in handling these types of claims for all state employees, in the form of medical and indemnity (compensation) payments that will be realized on a statewide basis for the "first responder" workers compensation classes. Risk Management estimates the payment of losses for first responders in FY 2006-07 at $50,000 from the State Risk Management Trust Fund within the Department of Financial Services.

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.[1] 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 upon making or not making the recommended changes. The workgroup held three meetings to gather testimony from interested parties and stakeholders about workers' compensation issues affecting first responders. Oral testimony was heard at each meeting from interested parties, and written testimony was also received by the workgroup. A written report was issued on February 3, 2004 covering the testimony heard at the workgroup meetings and the issues raised by the stakeholders.

Based on the oral and written testimony received during the workgroup meetings from stakeholders, the workgroup identified nine primary areas of concern for first responders created by the 2003 changes to worker's compensation.

Permanent Total Supplemental Benefits

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

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

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

Another area of concern involved the change made to the standard of proof for occupational disease, repetitive exposure, and exposure to toxic substances claims.[2] The standard of proof is the level of proof necessary for the injured worker/claimant to prevail. The 2003 revision changed the standard of proof for occupational disease, repetitive exposure, and exposure to toxic substance claims to clear-and-convincing evidence rather than the preponderance-of-evidence standard of proof required before the change

The firefighters contended, in part, at the workgroup meetings a heightened burden of proof for first responders to prove exposure to toxic substances is unwarranted because the dangerousness of certain substances has already been determined. The State Fire 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.[3] By promulgating the Florida Substance List, the firefighters contend the State Fire Marshal's office has recognized the hazardous nature of the materials contained on the List and that these materials pose a particular hazard to firefighters exposed to the substances fires in a workplace or in a house.

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[1] Senate Bill 50A (chapter 2003-412, LOF)
[2] s. 440.02(1), F.S.; s. 440.09(1), F.S.
[3] Rule 69A-62.004, F.A.C.

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 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 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.[4] 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 psychiatric injuries imposed by s. 440.15(3) (c), F.S. Prior to the 2003 revision, there was no limit on the permanent impairment rating for a psychiatric injury. The third issue was the limit on payment of temporary indemnity benefits for psychiatric injuries to 6 months after maximum medical improvement (MMI) is obtained for the injured worker's physical injuries.[5]

The bill does 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.

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[4] s. 440.34(1), F.S.
[5] s. 440.093(3), F.S.

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.[6] This program compensates law enforcement, firefighters, emergency medical personnel, and other public safety personnel for medical benefits, death benefits, and lost wages due to an adverse reaction to a smallpox vaccination. In order to be compensated under the program, the first responder must volunteer and be selected to serve as a member of a smallpox emergency response plan prior to an outbreak of smallpox. The program also provides medical, death, and lost-wage benefits to family members or others in contact with the vaccinated first responder who sustains a medical injury from exposure to the smallpox virus through physical contact with the vaccinated first responder. Any payments under the program are secondary to payments made or due from health insurance, workers' compensation, or any other entity. The program is administered by the U.S. Department of Health and Human Services and is subject to statutory filing deadlines.

The bill 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. Creates s. 112.1815, F.S.; defines first responders; provides for the compensability of toxic substance exposure if preponderance of evidence establishes exposure by the first responder; makes any medical complication incurred by a first responder as a result of a small pox vaccinations compensable; requires clear, convincing evidence of a mental, nervous injury involving a first responder, in order to be compensable; allows medical payments to first responders in the case of a mental/nervous injury unaccompanied by a physical injury, and indemnity payments in such cases if accompanied by a physical injury; removes limits on temporary total and permanent impairment benefits; requires sufficient causation and exposure to a substance to establish compensability; provides for the continuation, after age 62 of permanent total supplement for first responders not in employment that participates in social security program; removes limitations on attorney fees for cases involving toxic substances or occupational disease and provides criteria; defines occupational disease.

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

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

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

	(FY 06-07) Amount / FTE	(FY 07-08) Amount / FTE
1. Revenues:		
Transfer from State Agencies To State Risk Management Trust Fund	$ 50,000	$100,000
2. Expenditures:		
Recurring State Risk Management Trust Fund Payment of Losses	$ 50,000	$100,000

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill will impact counties and any entity that employs first responders. See the FISCAL COMMENTS section, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See the FISCAL COMMENTS section, below.

D. FISCAL COMMENTS:

The Department of Financial Services (DFS) indicates the 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" and could use state volunteers as first responders; therefore, the bill will have an impact on the state's workers' compensation insurance program. The fiscal impact is the additional costs that would be incurred by the Risk Management Trust Fund in handling these types of claims for all state employees, in the form of medical and indemnity (compensation) payments that will be realized on a statewide basis for the "first responder" workers compensation classes. Claim development for these claims is approximately four years. 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 year four and thereafter the additional cost will be $210,000 per year. The increased cost will primarily be passed to State agencies with law enforcement employees. The Office of Insurance Regulation (OIR) has stated that the legislation will have no regulatory or fiscal impact for the OIR.

NCCI estimates that costs for first responder classes would increase 6.2% to 6.7% ($13.6M to 14.0M) if this proposal were enacted in its current form. Individual self-insureds do not report data to NCCI and are not included in NCCI's estimate. As a result, additional costs are expected from individual self-insureds that employ first responders or that do not participate in the Social Security program. This includes a number of major governmental agencies across the state.[7]

According to the Department of Management Services, it is possible that 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 costs occur, they would be funded through contribution rate increases as recommended in future valuations of the Florida Retirement System.

[7] National Council on Compensation Insurance, Inc., *ANALYSIS OF AMENDMENT TO FLORIDA HB 141 FOR FIRST RESPONDERS*, 12/5/05.

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; therefore, requiring a 2/3 vote of the membership of each house. The bill includes a statement of important state interest.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

1 A bill to be entitled
2 An act relating to workers' compensation for first
3 responders; creating s. 112.1815, F.S.; providing a
4 definition of the term "first responder"; providing a
5 standard of proof for first responders with an injury or
6 disease caused by exposure to a toxic substance; providing
7 that any adverse result or complication relating to
8 smallpox vaccinations is an injury by accident arising out
9 of employment for first responders; providing a standard
10 of proof for first responders in cases involving
11 occupational disease; providing for the continuation of
12 permanent total supplemental benefits after the age of 62
13 for certain first responders; providing a method for
14 determining attorney's fees for first responders in cases
15 involving exposure to toxic substances or occupational
16 diseases; providing a definition of the term "occupational
17 disease"; providing that the act fulfills an important
18 state interest; providing an effective date.
19
20 Be It Enacted by the Legislature of the State of Florida:
21
22 Section 1. Section 112.1815, Florida Statutes, is created
23 to read:
24 112.1815 Firefighters, paramedics, emergency medical
25 technicians and law enforcement officers; special provisions for
26 employment-related accidents and injuries.--
27 (1) The term "first responder" as used in this section
28 means a law enforcement officer as defined in s. 943.10, a

29 firefighter as defined in s. 633.30, and an emergency medical
30 technician or paramedic as defined in s. 401.23 employed by
31 state or local government. A volunteer engaged by state or local
32 government is also considered a first responder for purposes of
33 this section.
34 (2)(a) For the purpose of determining benefits of this
35 section relating to employment-related accidents and injuries of
36 first responders, the following shall apply:
37 1. An injury or disease caused by the exposure to a toxic
38 substance is not an injury by accident arising out of employment
39 unless there is a preponderance of the evidence establishing
40 that exposure to the specific substance involved, at the levels
41 to which the first responder was exposed, can cause the injury
42 or disease sustained by the employee.
43 2. Any adverse result or complication caused by a smallpox
44 vaccination of a first responder is deemed to be an injury by
45 accident arising out of work performed in the course and scope
46 of employment.
47 3. A mental or nervous injury involving a first responder
48 and occurring as a manifestation of a compensable injury must be
49 demonstrated by clear and convincing evidence. For a mental or
50 nervous injury involving a first responder, payment of medical
51 benefits under chapter 440 shall be made even if the first
52 responder's mental or nervous injury is unaccompanied by a
53 physical injury. However, payment of indemnity as provided in s.
54 440.15 may not be made unless a physical injury accompanies the
55 mental or nervous injury. Benefits for a first responder are not
56 subject to any limitation on temporary benefits under s. 440.093

57 or any limitation on permanent impairment benefits under s.
58 440.15(3)(c).
59 (b) In cases involving occupational disease, both
60 causation and sufficient exposure to a specific harmful
61 substance shown to be present in the workplace to support
62 causation shall be proven by a preponderance of the evidence.
63 (3) Permanent total supplemental benefits received by a
64 first responder whose employer does not participate in the
65 social security program shall not terminate after the first
66 responder attains the age of 62.
67 (4) The finder of fact and law is not bound by any
68 statutory provision regarding attorney's fees relating to the
69 provision of indemnity or medical benefits for employment-
70 related accidents or injuries involving exposure to a toxic
71 substance or occupational disease but must consider the
72 following factors when awarding an attorney's fee:
73 (a) The time and labor required, the novelty and
74 difficulty of the questions involved, and the skill required to
75 perform the legal service properly.
76 (b) The fee customarily charged in the locality for
77 similar legal services.
78 (c) The amount involved in the controversy and the
79 benefits payable to the claimant.
80 (d) The time limitations imposed by the claimant or the
81 circumstances.
82 (e) The experience, reputation, and ability of the
83 attorney or attorneys performing services.
84 (f) The contingency or certainty of a fee.

85 (5) For the purposes of this section, the term
86 "occupational disease" means only a disease that is due to
87 causes and conditions that are characteristic of and peculiar to
88 a particular trade, occupation, process, or employment and
89 excludes all ordinary diseases of life to which the general
90 public is exposed, unless the incidence of the disease is
91 substantially higher in the particular trade, occupation,
92 process, or employment than for the general public.
93 Section 2. The Legislature finds that this act fulfills an
94 important state interest.
95 Section 3. This act shall take effect upon becoming a law.