

## National Disability Insurance Scheme of Queensland – Implications for Workers' Compensation Insurers

### Introduction

The National Disability Insurance Scheme (NDIS) commenced on 1 July 2016.

The *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016* is presently before the Queensland Parliament.

Once enacted, workers' compensation Insurers will be required to pay treatment, care and support compensation to injured workers who have sustained a serious personal injury (**SPI**).

### What is an SPI?

To be eligible to be compensated for treatment, care and support the worker must have sustained an SPI, which is:

- Serious spinal cord injury;
- Serious brain injury;
- Total amputation of one limb, or multiple limb amputations;
- Severe burns;
- Blindness;
- Respiratory loss.

### Assessment of whether a worker sustained an SPI

Whether the worker's degree of disability meets the eligibility criteria involves assessments utilising various tools used in North America to assess disability following catastrophic injuries and events.

Therefore insurers will be required to identify and brief appropriate experts who are capable of utilising those assessment tools.

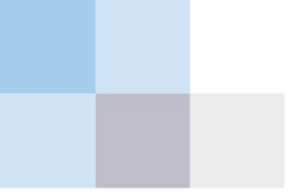
### Workers who are not eligible

Workers are ineligible to pursue compensation for an SPI where the injury occurred:

- During a recess;
- During a journey to and from work;
- Due to the worker's serious and wilful misconduct.

### What is treatment, care and support?

The treatment, care and support needs of a worker with an SPI can include:

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- Medical treatment;
  - Hospitalisation;
  - Dental treatment;
  - Rehabilitation;
  - Ambulance transportation;
  - Respite care;
  - Attendant to care and support services;
  - Aids and appliances, other than ordinary personal or household items;
  - Prosthesis;
  - Education or vocational training;
  - Home, transport or workplace modifications.

### **What are insurers required to do?**

If a worker applies to be assessed for treatment, care and support the insurer must:

- Decide whether the worker has sustained an SPI;
- Decide the necessary and reasonable treatment, care and support needs for the worker;
- Prepare a support plan which reflects the insurer's decision as to the worker's necessary and reasonable care and support.

However, an insurer may decide to appoint the NIIS (Qld) agency to perform its obligations.

### **Interaction with damages claims**

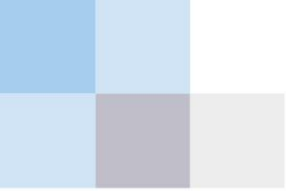
Workers with an SPI who pursue a damages claim can elect to claim treatment, care and support damages.

If an injured worker does not elect to seek damages for treatment, care and support, then the insurer must continue to pay treatment, care and support compensation even though entitlement to other forms of compensation will cease upon the commencement of the damages claim.

Even if a worker elects to pursue treatment, care and support damages, the treatment, care and support damages cannot be awarded if:

- The claimant's damages are reduced by 50% or more for the worker's contributory negligence;
- The court exercises its discretion to decline to sanction the settlement where a worker is under a legal incapacity;
- An insurer successfully applies to exclude treatment, care or support damages from the award. For example, this may be appropriate if the worker's legal costs would overwhelm the benefit of including the treatment, care and support in the damages award.

Although it is yet to be seen, it is possible that the introduction of treatment, care and support for SPI's in Queensland may have the paradoxical effect of discouraging certain damages claims. Often in an award of damages for catastrophic injuries, care is the most



significant component of the award. Also, the work required by claimants' legal representatives to prove a claim for care is very significant. Therefore if claimants' legal representatives are unable to pursue those claims it may result in lower fees and so potentially less interest in taking on a matter on a "no win, no fee" basis.

### **If treatment, care and support damages are awarded, is the settlement full and final?**

Where treatment, care and support damages have been awarded, a worker may reapply for treatment, care and support compensation if after 5 years it transpires that the treatment, care and support damages awarded were inadequate for the worker's needs.

### **Conclusion**

Although the amendments to the *Workers' Compensation and Rehabilitation Act 2003* have yet to pass, the amendments will have retrospective effect for injuries sustained from 1 July 2016.

Therefore, insurers will need to be prepared to "hit the ground running".

To prepare, insurers should consider:

- Updating their statutory and common law claims manuals to ensure compliance with the self insurance licences with the Regulator;
- Identify appropriate service providers who can provide treatment, care and support services;
- Identify appropriate experts who can make the assessments required to establish if an injured worker has sustained an SPI;
- Whether to enter into an arrangement with the NIIS (Qld) agent to perform the insurer's obligations.

Insurers will need to be mindful when damages are sought for treatment, care and support that in certain cases it would be appropriate to apply to the Court to exclude the award of such damages. This is particularly the case for injured workers who may have legal capacity to manage their own affairs, but may not have the discipline to manage their funds or who may be vulnerable to exploitation by others.

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