

## Pike River Coal Reparation

**Pike River Coal has been ordered to pay combined reparation of \$3.41 million to the families of the 29 men who tragically lost their lives in the 2011 explosion, and to the two survivors. Yet Allie Cunninghame and Frazer Barton of Anderson Lloyd Lawyers explain that the company receivers would be in breach of their legal obligations if they allowed for any payment to be made while Pike River Coal still owes money to its creditors.**

Two weeks ago Pike River Coal appeared for sentencing following the company's conviction on nine charges under the *Health and Safety in Employment Act*, as a result of the deaths of 29 men in November 2011. Undoubtedly, this is one of New Zealand's most tragic losses of life at a workplace.

Judge Jane Farish ordered the company to pay combined reparation of \$3.41m to the families of each of the men who lost their lives, and to the two survivors. She commented that the award was being made in spite of the company's parlous financial state, in the hope that the directors or shareholders might contribute.

The public has reacted with concern to news that reparation might never be met. Comparisons have been made with compensation paid by the Government following the Cave Creek tragedy and with the multimillion dollar compensation awarded by American courts after the tragedy at West Virginia's Black Creek mine in 2010.

When a person is injured or killed in a workplace accident in New Zealand and a conviction eventuates, compensation to the victim is known as "reparation" and is governed by the principles in the *Sentencing Act*. In arriving at an appropriate figure for reparation, a judge will consider similar cases. In previous decisions involving a fatality a sum of \$60,000 to \$100,000 has generally been awarded. One problem judges face is the impossibility of putting a dollar figure on a life. A review of sentencing decisions will turn up references to this difficulty and to the fact that no amount of money can ever relieve a family's suffering in such circumstances.

Reparation is payable by the person or company convicted of the offence. The Court will look into the offender's financial circumstances and take these into account when considering their ability to pay. Sometimes, particularly if an individual is charged, there may be family members or friends who choose to assist in the payment of reparation, but this can never be forced upon them.

The *Sentencing Act* does not allow for reparation to be sought from other parties which include, in the case of a company, its directors and shareholders. If a company is insured, then it may make a claim under its insurance policy but whether cover is granted is entirely between the company and its insurer. The Court can't order a company's insurer to pay reparation. The *Sentencing Act* also specifically allows for a defendant's financial situation to be taken into account when fixing financial penalties. In Health and Safety prosecutions fines and reparation orders can be quite significant. It is a sad reality for victims, however, that while companies may be willing to pay, they are often simply unable to do so. This happened in the Icepack Coolstores case, for example, when an explosion killed one firefighter and seriously injured seven others. In that case \$575,000 was sought for the firefighters and their families, but the court was able to award only \$110,000 because the companies concerned were in such a poor financial position following the disaster.

A company is a separate legal 'person' from its directors and shareholders. The company and its directors owe a duty to the shareholders to maximise the company's profit for the benefit of its shareholders. The shareholders are not responsible for the acts of the company. Directors can, in some circumstances, be held personally liable for actions taken by the company. In the case of Health and Safety prosecutions, Section 56(1) of the *Health and Safety in Employment Act* allows for the prosecution of directors if their actions have resulted in a breach of the Act. If such a prosecution had been initiated in the case of Pike River Coal, and convictions had resulted, then the directors could be personally liable for the payment of reparation. However, this has not happened here.

Even if the directors did seek assistance from their insurers in order to pay reparations, it is likely the insurers would be entitled to decline. A Directors' and Insurers' Liability Policy is likely to only respond if the policy holder

is charged and ordered to pay reparation, and the insurers would be entitled to refuse to contribute on this basis.

Pike River Coal is in receivership. If a company's creditor has secured its debt, then that creditor may appoint a receiver to enforce that security. The receiver is then legally obliged to pay the secured creditor in preference to all other creditors. Despite the comments made by Judge Farish, the receivers of Pike River Coal would be in breach of their legal obligations if they allowed for any reparation payment to be made when there is still money owed to the secured creditors. The secured creditor in this case is New Zealand Oil and Gas (NZOG). NZOG is also the company's shareholder, because it advanced money to Pike River Coal.

Finally, in relation to comments that have been made about the Government stepping in and assisting the families, it is worth noting that the Cave Creek disaster involved a Government department, which would have been liable to pay reparation had the court ordered it. The Government has no legal relationship to Pike River Coal and the court can't require it to pay reparation following the company's conviction.

Establishing whether the Government or the former Department of Labour has any liability due to any negligence or oversight by mine inspectors would require a further civil court claim.

Prepared by Allie Cunninghame and Frazer Barton.