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CENTER FOR JUSTICE
& DEMOCRACY
NEWS

IN THIS ISSUE: FOCUS ON WORKERS

Workers' Compensation: Assault on Workers' Rights

Dear Friend,

As we focus this issue of *Impact* on workers, it is with great sadness that we tell you about the passing this month of one of labor's great champions, Tony Mazzocchi.

Tony was a proud member of CJ&D's Board of Advisors. He was an awe-inspiring leader and his presence on our Board will be terribly missed. We have done our best to honor Tony with a short tribute on page 2.

In addition to workers' compensation and worker safety issues addressed in this newsletter, escalating health insurance premiums, rising auto insurance costs and many other insurance issues are hot-button topics for workers around the country.

When we built our Board of Advisors in 1999, we received tremendous inspiration from Tony Mazzocchi to address all of these issues for workers'. We hope to do what we can to continue his legacy, finding ways to work with the labor movement to protect workers rights and worker safety while making insurance affordable and available for all.

Thank you,

Joanne Doroshow
Executive Director

Compensating the injured is a critical function of the civil courts. But many businesses favor taking such cases out of the court system and having non-judicial administrative bodies decide, often pointing to this country's century-old workers' compensation system as the model to follow.

But while the workers' compensation system may be a model for businesses and insurance companies trying to save a buck off the backs of the injured, for workers, this system repre-

sents a callous and devastating assault on their rights.

Under workers' compensation laws, employees injured or killed on the job are forced to give up their right to go to court against employers and their constitutional right to jury trial. Compensation is determined by an administrative board and set by statute. No compensation is allowed for pain and suffering. This process is generally a worker's exclusive remedy against an employer. And as state lawmakers

have steadily chipped away at workers' comp benefit levels and definitions of workplace injuries over the years, increasing numbers of workers, particularly those with permanently disabling injuries, are finding themselves barely able to survive.

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The Civil Justice System Works for Workers

According to the National Safety Council, more than 5,000 workers lose their lives and nearly four million suffer disabling injuries on the job each year in America. Evidence shows that employers often discourage workers from reporting work-related injuries or illnesses in order to limit workers' comp claims and premiums and to escape regulatory scrutiny.

But when a third party is involved, like a company that manufactures a piece of defective machinery, work-

ers do have a remedy in court— and an opportunity to try to improve workplace safety as well. “For better or worse, most injured workers are thrown into the compensation system,” says Roger Cook, executive director of the Western New York Council on Occupational Safety and Health. “But when a third party is responsible for the injury, lawsuits allow the injured worker to hold that third party accountable. In those cases, lawsuits are the only way workers can get justice.”

Companies that are hit with large verdicts or settlements often act immediately to change hazardous workplace conditions (*See box on page 3*). Sometimes lawsuits are the only means for government agencies to learn about dangerous products and unsafe practices, which ultimately can prompt them to implement stronger regulations or call for the removal of the hazardous product from the workplace.



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In Pursuit of Justice . . . In Memorium - Tony Mazzocchi

Tony Mazzocchi, who passed away earlier this month, was a man whose influence on the lives of working men and women is impossible to overstate.

Most recently, Tony was national organizer for the Labor Party, which he founded to force important issues, like the need for single-payer health insurance, into the national spotlight. His slogan was: "The bosses have two parties. We need one of our own."

Tony was also a key pioneer in the occupational safety movement. As the *New York Times* recently wrote, "In 1970, when President Richard M. Nixon signed the Occupational Safety and Health Act, Mr. Mazzocchi

was credited with being a principal force behind the legislation."

In the 1970's, Tony was the union leader who worked with Karen Silkwood, the Kerr-McGee nuclear worker whose story later became immortalized in the Hollywood film. It was Tony who arranged for Silkwood to meet David Burnham, then a *New York Times* reporter, with evidence of falsified safety records at the plant. She died in a car accident while driving to meet him.

Tony also exposed the forced sterilization of women working for the American Cyanamid corporation. For this work, *Ms.* magazine cited him in 1982 as one of the "40 Male Heroes of the decade."

Tony Mazzocchi served as International Executive Board member, Legislative Director, Health and Safety Director, Vice-President and Secretary-Treasurer of the former Oil, Chemical and Atomic Workers International Union (OCAW), which is now the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE). As a union leader, he negotiated many firsts, including the first dental insurance program ever in private industry.

Tony was an inspiring member of CJ&D's Board of Advisors. We will greatly miss him. For more information on how to help the Labor Party continue its mission, contact them at P.O. Box 53177, Washington, DC 20009
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Mandatory Binding Arbitration in Employment Contracts

When disputes are resolved without trial and without a public record, wrongdoers can prolong misconduct and suppress for years information about dangerous products and practices.

Herein lies one of the many problems with mandatory binding arbitration of employment disputes. As a condition of being hired, workers often must sign contracts "agreeing" to binding arbitration of all employment-related disputes, which bars them from access to the courthouse. Other times, mandatory binding arbitration clauses are buried in the fine print of an employee handbook. As a result, most

employees don't come to realize they have no right to jury trial until after they've been injured.

Though promising to be a fair process for workers, mandatory binding arbitration is far from it. Arbitrator's fees, which are often split between the employer and employee, can range between \$200 and thousands of dollars per hour, making arbitration cost-prohibitive for many workers. Arbitrators, who are not required to have any legal training, may be biased, former industry executives or even under contract with the employer against whom the claim is filed. The discovery process, whereby parties obtain information from

one another, is limited, and rules of evidence do not apply. Many arbitration clauses force workers to arbitrate claims while allowing their employers to go to court over employment-related issues. The proceedings are not public, and arbitrators issue no written legal opinions, so no legal pre-cedent or rules for future conduct can be established. And there is virtually no right to appeal.

Given what's at stake, employees should have the option of entering into arbitration agreements after disputes arise and after they are made fully aware not only of the costs and procedures involved but also of the rights and remedies that are

being surrendered. There should also be a national standard governing the arbitration process, which is currently controlled by employers. These and other reforms would allow injured workers to hold employers accountable for the harm they cause.



How Lawsuits Protect Workers

Examples of cases where workers or their families have been able to sue and have won improvements to existing safety standards by filing civil actions include:

- A 21-year-old mechanic was crushed by a tractor after it flipped over backwards while he was trying to pull-start the machine. This lawsuit and similar cases caused the manufacturer to withdraw tractors without rollover protection from the U.S. market.
- A 27-year-old assembly-line worker's hand was crushed by a punch press after the machine's safety device was inadvertently overridden by a button. As a result of this lawsuit, the button was redesigned to prohibit bypass of the safety device and was no longer advertised as an option for the press.
- A 27-year-old cruise ship nurse was sodomized by a co-worker in her cabin. Her lawsuit forced the first public disclosure by a cruise line of the number of purported rapes and other sexual assaults aboard its ships, leading to new industry standards.
- A 42-year-old employee suffered brain damage, permanent vision loss and other life-threatening injuries after a piece of equipment blew out while he was working on a gas well. The victim gave up the entire punitive damages award in exchange for the company's agreeing to establish a new safety program.
- An employee contracted leukemia after continual exposure to high doses of electromagnetic pulse radiation in the workplace. As part of the class action settlement, the company minimized employee radiation exposure and implemented new safety programs.

Workers' Compensation continued ...

A 2001 study by the Rand Corporation's Institute for Civil Justice estimated that partially disabled workers injured in California generally have received less than 60 percent of their pre-injury income over a five-year period and less than 50 percent of pre-injury earnings over a ten-year period. And in a June 2002 report, the non-profit National Academy of Social Insurance found that for every \$100 in wages, workers' comp benefits had declined by 39% to \$1.03 in 2000, the eighth consecutive year that benefits had dropped as a percentage of wages.

Shutting the Courthouse Door

Between 1911 and 1940, state legislatures passed

workers' comp statutes in large part because, unlike today, laws in the early part of the 20th century made it almost impossible for many injured workers to obtain compensation for injuries. Legal doctrines like "contributory negligence," where a worker got nothing if he or she was the slightest bit responsible for the accident, or the "fellow-servant" rule, where again workers received no compensation if the accident was caused by another employee, were so unfair that lawmakers at the time felt they needed to provide an alternative compensation system for injured workers.

However, having ceded their right to jury trial at a time when the law would have left most of their injuries under-

compensated, workers now face serious disadvantages relative to those with access to the civil justice system. This is because "tort" law has evolved to nullify many of the archaic legal doctrines that once impeded workers' claims, now providing most injured victims with the legal tools necessary to win cases and obtain fair compensation.

Added Indignities — Proving Injuries

In most states, the burden is on the employee to prove that his or her injuries are work-related, that is, not the result of preexisting health problems, bad health habits or aging. Medical care is usually difficult to obtain as well. Twenty-two states force injured workers to choose a

doctor from an employer-approved list or the employer's insurer, while 19 other states allow "managed care" or other policies to restrict or eliminate worker choice. Injured employees must wait for insurer approval of tests, specialists, surgery or medication regardless of the severity of the injury, and if a dispute arises, the worker's only recourse is to petition for a hearing before a state workers' comp judge, which only causes further delays in treatment.

Once a claim is filed, insurance companies routinely seek the opinion of their own doctor in an evaluation called an "independent medical examination" (IME).

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Workers' Compensation continued...

In fact, these exams are never independent: they are done for the sole purpose of containing insurance company costs. This was the finding of a 1998 New York AFL-CIO report, "Unjust Treatment," which examined how insurers use IMEs to challenge workers' comp claims and reduce benefits. According to the study, workers were subjected to short exams and hostile doctors, were not allowed to have anyone witness their exams and were not given access to IME reports in advance of hearings. Several workers also described how their IME documents were altered to please insurers.

"Based upon the initial IME evaluation," said the report, "the insurance company can unilaterally, without a hearing, and with no prior notice, slash or completely cut off the wage-replacement benefits and medical treatment an injured worker is receiving. ...Consequently, many workers are forced back to work prematurely, often re-injuring themselves, aggravating their injuries or worsening the illness they contracted. Other workers are driven into a variety of taxpayer-funded programs such as social security or welfare."

Appealing an insurer's denial of medical treatment or wage-loss benefits is no easy task, sometimes taking years to resolve. The lengthy process often forces claimants to spend their own

savings and ultimately settle for a fraction of what is owed them. Many states have placed limits on workers' comp attorney fees, making it more difficult for injured workers to find a lawyer. And even if workers prevail, their benefits may be terminated if they fail to meet an insurer's demands.

Payday for the Insurers

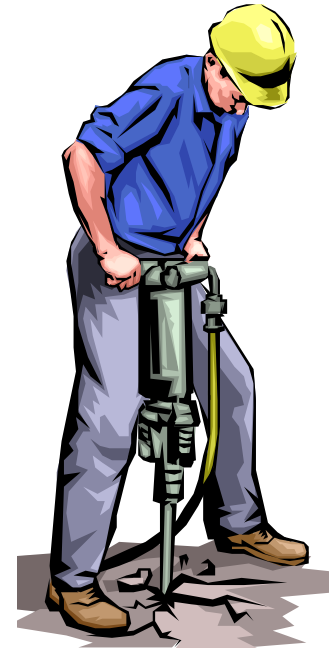
Not surprisingly, workers' compensation programs have saved employers and their insurance carriers billions of dollars. According to John Burton, Dean of the School of Management and Labor Relations at Rutgers University and Chairman of the National Commission on State Workmen's Compensation, in much of the 1990s insurer profits increased dramatically and employers' workers' comp costs dropped while benefit payments to workers decreased substantially. Burton found that in 1995 alone, insurers' took in over \$124 for every \$100 of net expenses. Similarly, the AFL-CIO discovered that in 1998 the average profit on workers' compensation insurance was 7 percent, as compared with 3.7 percent and -0.7 percent for auto insurance and homeowners' insurance, respectively. As for employer savings, the National Academy of Social Insurance reports that employer workers' comp costs had fallen by 42 percent relative to wages between 1993 and 2000.

As to insurers' complaints that worker "fraud" is hurting them financially, the data do not support these claims. "Most thoughtful people who do a lot of research in workers' comp would come to the conclusion that there is not a lot of fraud in the system," says Robert Reville of the Rand Corporation's Institute for Civil Justice. "By making a claim that there was a lot of fraud, I think the insurance carriers were benefiting at workers' expense and discouraging workers from filing claims."

Opportunities for Reform

Consumer organizations like Consumers Union have put forth certain recommendations for reform of the workers' compensation system. They say, "Congress should revive standards set by the National Commission on State Workmen's Compensation Laws, which, among other things, asked that benefit caps be raised to 100 percent of each state's average weekly wage. States should audit their workers comp systems to see whether they're too restrictive. States should also tighten deadlines for decisions and fine parties that delay, to discourage 'starve out' tactics." And labor unions like the AFL-CIO advocate that state-created workers' compensation insurers should take the place of commercial insurers, who put profits and their customers, *i.e.*, employers, ahead of injured workers.

The adoption of these and other reforms will eliminate some of the hurdles workers face when they seek compensation for injuries they've suffered.



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