

## Silkwood verdict a barrier to nuclear development in the U.S.

If nuclear power is to help the United States find the solution to its energy problems, a prerequisite will be the overturning of last May's Oklahoma federal district court verdict awarding \$10.5 million in damages from the Kerr-McGee Corporation to the estate of Karen Silkwood arising from Silkwood's alleged contamination by plutonium in 1974.

The verdict, delivered in the wake of the trumped-up hysteria over the Three Mile Island incident and hailed by environmentalists as a signal to "go like hell" against nuclear installations around the country, is most significant not for the size of the damage award, but because it establishes a legal precedent for applying the doctrine of "strict liability" to the nuclear industry. Under this doctrine, which only recently gained credibility in the U.S. courts, nuclear-industry employers will be liable for damages for any injury suffered by an employee, even if they conform to all federal safety standards, and even if an injury was due to employee carelessness. Had the doctrine been applied against the 19th century development of railroads in the United States, it is likely that the railroad system would never have been completed, because it would have proven "too dangerous."

Although the "strict liability" doctrine in the Kerr-McGee decision has only been applied at the district court level, and has yet to be tested at the appeals court or Supreme Court level, the possibility of such lower court rulings to snarl nuclear development was demonstrated several years ago. Then, the 1971 *Calvert Cliffs* decision—where the District of Columbia Circuit Court of Appeals ruled that environmental impact statements could be required at any stage of the development of a nuclear plant—was not appealed by the Atomic Energy Commission (then headed by James Schlesinger), and allowed to stand as precedent for several years until the Supreme Court effectively threw

it out in its important 1978 decision in *Consumers Power v. Aeschliman*.

Kerr-McGee is expected to appeal the Silkwood decision and, according to legal experts, its appeal is likely to challenge three rulings by the presiding judge in the Oklahoma court, Judge Frank Theis.

The first, and most critical, will be the challenge to the "strict liability" ruling. As interpreted by the *New York Times* in its May 19 edition, "if low-level radiation escapes and people outside the plant are harmed, the responsible company must pay the damages even though it met government safety standards and did its best to prevent the radiation from escaping."

"Strict liability," as a legal doctrine, is one which has a dubious background in U.S. law. It arose in the 19th century, as a British precedent, and at the time, no U.S. court would adopt the doctrine of "strict liability," on the grounds that it was too great a hindrance to industrial development. It is only in the last 25 years or so, in fact, that "strict liability" has gained a toehold in U.S. courts. If its application to the nuclear industry is upheld, it will have a crippling effect on the development of nuclear power in the nation.

In the Silkwood case, the only recourse left to the defense was to prove that Karen Silkwood purposefully contaminated herself, an assertion virtually impossible to prove.

The second contestable ruling was repeated by Judge Theis in several specific instructions. According to Judge Theis, the jury should consider the government standards for the nuclear industry as nothing more than expert opinion. This effectively deprived government standards of their rightful consideration as having the force of law, and left the jury free to adopt its own set of regulations in the area of plutonium processing: it allowed the opinion of a layman to carry equal weight with that of a nuclear expert.

It was a similar lack of regard for government regulations that prompted Supreme Court Justice William Rehnquist to chastise the lower courts for tolerating it in the 1978 decision in favor of nuclear power, *Consumers Power v. Aeschliman*.

In that case, the Supreme Court sharply condemned the obstructionist tactics of environmentalist opponents of nuclear power. Speaking for the Court, Justice Rehnquist took dead aim at judges who permitted the environmentalists to delay indefinitely the construction and operation of nuclear installations. "To say that the Court of Appeals' final reason for remanding is insubstantial is at best a gross understatement," said Rehnquist. "The reports filed and reviewed literally fill books, the proceedings took years ... To nullify that effort seven years later because one report refers to other problems ... borders on the Kafkaesque."

The effect of Judge Theis's charge to the jury goes against the Supreme Court's ruling in the *Consumers Power* case. To instruct a jury, particularly one conditioned by the hysterical press coverage of the March 27 malfunctioning of a reactor at the Three Mile Island nuclear facility, that federal safety regulations carry little special weight, set the industry back to the judicial tradition dominant before the decision on *Consumers Power* had been rendered.

The sizable award of punitive damages was the third flaw. The jury divided the damages in the following way: one half million dollars was awarded to the estate for the actual damage allegedly suffered by Silkwood, and \$10 million was awarded in punitive damages, even though damages were never proved.

Punitive damages are usually granted for wanton dereliction of responsibility and supposedly to deter similar omissions on the part of others.

However, Judge Theis failed to inform the jury that Kerr-McGee was in fact found to be in substantial compliance with licensing conditions and prevailing Department of Energy regulations. This, the defense counsel pointed out, should have precluded an award of punitive damages. Hitting a company in substantial compliance with government health and safety standards with millions of dollars in punitive damages is tantamount to a declaration of open season on the industry.

#### Reversing support for nuclear power

The jury verdict favoring the claims of the Silkwood estate came after a year of courtroom victories that upheld the development of nuclear power as the will of the nation, as expressed in legislation passed by Congress. The Supreme Court's unanimous decision in 1978

### The facts of the Silkwood case

The Karen Silkwood case has been an environmentalist cause celebre for four and one-half years. The contextual circumstances of how she was contaminated by plutonium at the Kerr-McGee Corporation's Oklahoma nuclear fuel processing facility and at her apartment—the issue in the damage suit filed by her estate against Kerr-McGee—and killed in a car crash in 1974, indicate that she was a pawn in an environmentalist chess game played against the nuclear industry.

Her investigation of the Kerr-McGee facility was conducted at the direction of the Oil, Chemical and Atomic Workers Union, a union which has worked closely with the Warburg-run Institute for Policy Studies (a top terrorist control center) on the issues of health and safety in the workplace. Indeed, the OCAW was locked in a showdown with Kerr-McGee at the time that Silkwood was killed.

Once all the environmentalist rhetoric is cleared away, the essential point raised in the Silkwood case

is, who was responsible for Karen Silkwood's contamination, and how much injury did she suffer. The conspiracy charges leveled by the plaintiffs against Kerr-McGee were a political smokescreen, designed, as reported in various "radical" publications, to help keep law enforcement authorities at arm's length in investigations of the terrorist aspects of the antinuclear movement, and having nothing to do with the actual case.

The actual damages that Karen Silkwood suffered relate only to the nine days beginning with her initial exposure to plutonium on Nov. 5, 1974, and ending with her death in an auto crash on Nov. 13. For this nine-day period in which no demonstrable physical injury occurred, the Silkwood estate was awarded \$500,000 in damages, and \$10 million in punitive damages. The size of the award is only a whisper of what can happen if the strict liability and government standards rulings made during the trial are allowed to stand.

in favor of the nation's nuclear industry indicated the low level of the Court's tolerance of environmentalist courtroom shenanigans.

Right after the *Consumer Power* decision, the court dealt another severe blow to the antinuclear lobby by reversing a federal judge and upholding the constitutionality of the Price-Anderson Act, which limits the liability of any company in the event of a nuclear accident. This trend was furthered by a federal judge in San Diego, who ruled this past March that the state of California went beyond the jurisdiction allotted to it under the U.S. Constitution by passing a series of prohibitive laws that added up to a de facto moratorium on nuclear plant construction.

### **What happened to Karen Silkwood?**

The facts of Karen Silkwood's supposed exposure to plutonium and her death remain shrouded in mystery. However, the events bear the stamp of a conspiratorial political operation.

Karen Silkwood was employed at Kerr-McGee plutonium processing facility in Cimarron, Oklahoma. During the middle of 1974, Silkwood became involved in the efforts of the Oil, Chemical and Atomic Workers union (OCAW) to expose alleged health and safety violations at the Kerr-McGee plant. The OCAW has been the spearhead for environmentalist organizing around health and safety in the plant issues.

Between Nov. 5 and 7, 1974 Silkwood was contaminated by plutonium from the Kerr-McGee facility. The Nov. 7 contamination occurred not only at her workplace but also at her apartment. The question of how she was exposed to plutonium while in her apartment was the subject of great debate, but was never conclusively proved by any party in the case.

Supposedly, the personal trauma of her exposure prompted Silkwood to arrange a meeting with national OCAW official Steve Wodka and with David Burnham, a reporter for the *New York Times*. At this meeting she was to discuss her personal experience and observations, as well as certain company documents which would serve as the basis for a well-publicized exposé of the hazards to which Kerr-McGee employees were subjected. While driving to this meeting, Silkwood was killed in an automobile accident. The company documents in question disappeared.

Almost immediately, Karen Silkwood became a folk

legend in the environmentalist movement. Over the past four and a half years, wherever the environmentalists have gathered, the name of Silkwood has been righteously invoked as a symbol of the evils of nuclear power. The suit conducted by her legatees against Kerr-McGee was shaped, in the words of one leftist scribble sheet, to "put nuclear power on trial." To that end, the enemies of nuclear power have been partially successful.

However, the Silkwood lawyers did lose on important strategic point in their case. In September 1978, Judge Theis ruled that the part of the suit charging Kerr-McGee with conspiracy to violate the rights of Silkwood and her fellow employees was improperly drawn as a class action. This attempt to prove conspiracy by the environmentalists appeared to be an attempt to keep police and other investigators from monitoring their ranks for lawbreakers and terrorists. Judge Theis's ruling in this area was a definite setback to any overt deployment of terrorist gangs against the nuclear industry. His ruling was expectedly greeted with howls of frustration from such antinuclear publications as the *Village Voice*, which claimed that if this decision was not overturned "it will be open season for an environmentalist witchhunt."

### **Industry must fight back**

To allow the Silkwood verdict to stand will erode public confidence in the nuclear industry. The extent of this erosion is a factor in the industry's pronounced tendency to allow itself to be put on the defensive by the environmentalists, not because the industry has shown a lack of achievement in the field of nuclear power. The battle to reverse the legal precedents in this case call for an aggressive campaign by the nuclear industry.

A further factor shaping the environment of the Silkwood case was the fraudulent coverage of the Three Mile Island incident. The evidence pointing to sabotage of the facility there has been exhaustively reviewed by this publication and by others. The Kerr-McGee attorneys noted the probable impact of the press coverage of the Harrisburg incident on the Silkwood verdict. But they did not present the evidence indicating the degree of falsehood and demagogery involved in that coverage and their motion on this point was denied by Judge Theis, and the case was put to the jury fewer than 50 days after Three Mile Island.

—Sanford Roberts