No. 31538 - ***State of West Virginia ex rel. Abraham Linc Corporation, Petitioner v. The Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County; and John Edens, Respondents***

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McGraw, Justice, dissenting:

As alleged in the underlying action, John Edens, an employee of Abraham Linc Corporation, suffered a catastrophic injury as a result of the actions of a co-worker. The co-worker had been working for Abraham Linc for approximately 1 year and had been performing the same duties as the other employees on the premises. Abraham Linc never included the co-worker's wages in the determination of its premiums for workers' compensation purposes. Thus, a dispute arose concerning whether Abraham Linc was in default under the Workers' Compensation Act, the resolution of which is dependent upon the factual question of whether the co-worker was an employee of Abraham Linc or an independent contractor. The accident occurred in April 2001, and, as of yet, the Workers' Compensation Commissioner has not addressed this situation other than to issue a perfunctory Certificate of Coverage at Abraham Linc's request. Contrary to the opinion of the majority, I am of the opinion that much of this dilemma can be resolved by adherence to *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998). I, therefore, respectfully dissent.

Syllabus point 2 of *Frazier* holds, in part, that "[u]nder *W.Va. Code*, 23-2-5(d) [1986], in the absence of a final ruling by the Workers' Compensation Commissioner, a trial

court may find an employer in default under the Workers' Compensation Act." Specifically, *Frazier* indicates that a Circuit Court may find an employer in default as a matter of law and, where necessary, submit questions of fact to the jury. 203 W.Va. at 660, 510 S.E.2d at 494.[1] That aspect of *Frazier*, however, is not discussed by the majority in this case, and, inasmuch as it is at odds with the majority opinion, *Frazier* is, therefore, overruled by implication.

The ultimate question of whether an employer is in default under the Workers' Compensation Act, and has lost the protections afforded by the Act from a common law action for negligence, is a matter of law which may, in limited circumstances, involve attendant questions of fact, such as whether a worker was an employee of the employer or an independent contractor. In that regard, I would clarify *Frazier* by stating that, in the absence of a final ruling by the Workers' Compensation Commissioner, a circuit court may make the legal determination of whether the employer is in default under the Act. If a genuine issue of material facts exists concerning whether a worker was an employee or

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[1]As the *Frazier* opinion states:

> We believe that, under *W.Va. Code*, 23-2-5(d) [1986], when an employer fails to file payroll reports, and in the absence of any rulings by the Commissioner concerning such failure, an employer may be held to be in default as a matter of law if no questions of material fact exist. A trial court may submit the question to a jury if the Commissioner has made no determination of an employer's default and the material facts are in dispute. 203 W.Va. at 660, 510 S.E.2d at 494.

independent contractor, that issue may be submitted to a jury to facilitate the circuit court's ultimate ruling. The utilization of such a procedure, where no action has been taken by the Commissioner, would eliminate the concern expressed by the majority that simple, unintended errors could result in the loss of an employer's immunity.

The statutory and regulatory process described in the majority opinion constitutes the Legislature's concept of a fair method for an administrative determination of whether an employer's account is delinquent or in default. That method, however, is ineffective if the Commissioner takes no action in the first instance. As the majority acknowledges, until an accident occurs, the Commissioner may not have known that employees were not being reported to the Fund. Such circumstances support the ruling in *Frazier*.

In the underlying action, Abraham Linc obtained a Certificate of Coverage from the Commissioner stating that its premium account was in good standing during the period in question. The majority opinion emphasizes the Certificate as an important, if not dispositive, factor in the ultimate determination of whether Abraham Linc was in default. Nevertheless, the Certificate contains the following limiting language:

> As of the date indicated, this account of the named insured employer is in good standing with the Division. This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policy below.

Thus, the existence of the Certificate of Coverage would not warrant the foreclosure of a legal or factual inquiry concerning the status of the Abraham Linc account. In any event, the Certificate could be considered at the Circuit Court level, under *Frazier*, along with other relevant matters concerning default.

Finally, the majority opinion incorrectly suggests that John Edens, the plaintiff in the underlying action, cannot raise the default issue because he lacks standing to contest the employment classification of his co-worker, in terms of the payment of workers' compensation premiums. I am of the opinion that such a result is contrary to public policy. To a great extent, the success of any workers' compensation system depends upon the compliance of employers in accurately reporting wages and in paying premiums into the workers' compensation fund. The result of such compliance, or noncompliance, has a wide-ranging effect - from the individual employee to the economics of the entire region. Therefore, virtually any citizen should have standing to assert that an employer is not current in its workers' compensation premiums.

Moreover, where the Commissioner has taken no action, and no action is forthcoming, it is unfair to conclude that an employee who suffered a catastrophic injury from the actions of a co-worker has no standing to assert that the employer forfeited its immunity from a common law action for negligence, especially since: (1) the employee's

standing would not have been an issue had the Commissioner taken action and found a default and (2) other employees, injured without the involvement of a co-worker, would be free, according to the majority, to pursue the default issue. Those distinctions are not found in the West Virginia Workers' Compensation Act and constitute "too tenuous a premise upon which to anchor any steady standard of law." *State ex rel. J.L.K. v. R.A.I.*, 170 W.Va. 339, 346, 294 S.E.2d 142, 149 (1982).