IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

ORIGINAL PROCEEDING IN PROHIBITION

Writ Granted

Submitted: November 18, 2003
Filed: July 1, 2004

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE MAYNARD, JUSTICE DAVIS and JUSTICE STARCHER concur and reserve the right to file concurring opinions.
JUSTICE McGRAW dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "A writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate powers." Syl. Pt. 1, *State ex rel. UMWA Int'l Union v. Maynard*, 176 W.Va. 131, 342 S.E.2d 96 (1985).

2. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code*, 53-1-1." Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).

3. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are

general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Per Curiam:

This is an original proceeding in which the Petitioner, Abraham Linc Corporation (hereinafter "Petitioner"), seeks a writ of prohibition against the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, preventing the respondent judge from conducting a trial on Count II of the Petitioner's complaint and submitting the issue of the Petitioner's workers' compensation coverage to a jury. Upon thorough review of the matter, we grant the requested writ.

I. Factual and Procedural History

The Petitioner operates a wholesale carpet business in Bridgeport, West Virginia. On April 25, 2001, Petitioner's employee, Mr. John Edens, sustained injuries when he was caught between rollers of a carpet cutting and wrapping machine. A co-worker, Mr. Don Johnson, had pressed an incorrect switch causing the rollers to spin while Mr. Edens was standing on the machine. Mr. Edens thereafter filed a personal injury action in the lower court against the Petitioner. Count One of the complaint alleged various safety hazards and asserted a deliberate intent cause of action against the Petitioner, pursuant to West Virginia Code § 23-4-2(c)(2)(ii) (1994) (Repl. Vol. 2002).[1] Count Two of the complaint asserted that

[1]We note that W.Va. Code § 23-4-2 was amended in 2003, and the language upon which Mr. Edens premises his deliberate intent allegation is now found in W.Va. Code § 23-4-2(d)(2)(ii) (2003) (Spec. Supp. 2003).

the Petitioner was in default under the West Virginia Workers' Compensation Act and had consequently forfeited the statutory immunity to a civil action for negligence. Specifically, Mr. Edens maintained that the Petitioner was in default because it had not included the wages of Mr. Johnson in the determination of premiums payable under West Virginia Code § 23-2-5(a) (1999) (Repl. Vol. 2002).[2] As a result of that alleged failure, Mr. Edens maintained that the Petitioner could be sued in a common law negligence action since the alleged default caused the Petitioner to lose its statutory immunity.[3]

The Petitioner filed a motion for summary judgment, contending that Mr. Johnson's wages did not have to be included in the computation of workers' compensation premiums since Mr. Johnson served as an independent contractor rather than an employee of the Petitioner. Further, the Petitioner asserted that it possesses a Certificate of Coverage, valid from April 1, 2001, through August 31, 2001, issued by the Workers' Compensation Commission[4] and certifying that the Petitioner's premium account was in good standing at

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[2]Premiums payable by an employer are determined as a percentage of the employer's gross wages payroll for all employees. W.Va. Code § 23-2-5(a). Although this section was amended in 2003, those amendments do not affect our decision in this appeal.

[3]A common law action against an employer is authorized under West Virginia Code § 23-2-8 (1991) (Repl. Vol. 2002) if an employer defaults in the payment of workers' compensation premiums. By procuring a finding that the Petitioner was in default, Mr. Edens would be permitted to initiate a common law negligence action against the Petitioner and would not be limited to the relief available through the statutory workers' compensation system.

[4]That Certificate of Coverage is included in the record before this Court. We (continued...)

the time of Mr. Edens' injury. In Mr. Edens' response to the Petitioner's motion for summary judgment, he asserted the Mr. Johnson's wages had to be included because he was an employee rather than an independent contractor, that failure to so include caused a default, and that the Petitioner had lost its immunity to a common law negligence action. The lower court denied the Petitioner's motion for summary judgment and ruled that the issue of default and the proper classification of Mr. Johnson as an employee or an independent contractor should proceed to a jury.[5]

II. Standard for Determining Issuance of Writ of Prohibition

Syllabus point one of *State ex rel. UMWA International Union v. Maynard*, 176 W.Va. 131, 342 S.E.2d 96 (1985), provides: "A writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its

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[4](...continued)
also note that the Workers' Compensation Division was renamed the Workers' Compensation Commission in 2003. *See* W.Va. Code § 23-1-1(c) (2003) (Spec. Supp. 2003).

[5]Subsequent to the summary judgment denial, the Petitioner filed a motion for reconsideration and an alternative motion to bifurcate pursuant to Rule 42 of the West Virginia Rules of Civil Procedure. The Petitioner requested that the trial be separated into two phases, the first regarding Mr. Edens' claim that the Petitioner had lost its immunity from a common law negligence action and the second for Mr. Edens' liability and damages claims. Those motions were also denied by the lower court. Based upon our ultimate conclusion that a jury trial on the independent contractor issue is not warranted, the bifurcation issue is no longer relevant.

legitimate powers." *See* W.Va. Code § 53-1-1 (1923) (Repl. Vol. 2000). In syllabus point two of *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977), this Court explained that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code*, 53-1-1."[6]

Syllabus point four of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), explains the manner in which a request for a writ of prohibition should be addressed, as follows:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should

[6]In *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832 (Mo. App. 1995) the Missouri court explained that "[i]ssuance of a Writ of Prohibition is generally the appropriate remedy to forestall unwarranted and useless litigation." 913 S.W.2d at 837. The court held that prohibition would lie to prevent the lower court from holding a jury trial on the issue of reasonableness of attorney fees. *See also State ex rel. Police Retirement Sys. v. Mummert*, 875 S.W.2d 553 (Mo. 1994).

> issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

III. Discussion

Mr. Edens contends that the lower court was correct in its decision that the issue of the Petitioner's workers' compensation coverage based upon an alleged erroneous classification of an independent contractor should be submitted to the jury for resolution. The Petitioner maintains, however, that the Workers' Compensation Commission's issuance of a Certificate of Coverage and the absence of any finding of delinquency or default by the Commissioner renders such submission unnecessary because there are no material facts in dispute regarding the Petitioner's workers' compensation coverage status.

The principles underlying the West Virginia Workers' Compensation system are well-established. "The Workmen's Compensation Act was designed to remove *negligently* caused industrial accidents from the common law tort system." *Mandolidis v. Elkins Indus., Inc*., 161 W.Va. 695, 700, 246 S.E.2d 907, 911 (1978), *superseded by statute as stated in Handley v. Union Carbide Corp*., 804 F.2d 265, 269 (4th Cir. 1986). "The benefits of this system accrue both to the employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to the employee, who is assured prompt

payment of benefits." *Meadows v. Lewis*, 172 W.Va. 457, 469, 307 S.E.2d 625, 638 (1983); *see also Persinger v. Peabody Coal Co.*, 196 W.Va. 707, 713, 474 S.E.2d 887, 893 (1996).[7]

A. The Statutory Procedure

West Virginia Code § 23-2-6 (1991) (Repl. Vol. 2002)[8] provides exemption from common law tort liability to contributing employers, as follows:

> Any employer subject to this chapter who shall subscribe and pay into the workers' compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and **during any period in which such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions of this chapter**. The continuation in the service of such employer shall be considered a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have: Provided, That in case of employers not required by this chapter to subscribe and pay premiums into the workers' compensation fund, the injured employee has remained in such employer's service with notice that his employer has elected to pay into the workers' compensation fund the

[7]"That philosophy has commonly been described as a *quid pro quo* on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity; in return for giving up the right to sue the employer, the employee receives swift and sure benefits." *Dominion Caisson Corp. v. Clark*, 614 A.2d 529, 532-33 (D.C. 1992) *quoting Meiggs v. Associated Builders, Inc.*, 545 S.2d 631, 634 (D.C. 1988), *cert. denied*, 490 U.S. 1116 (1989).

[8]West Virginia Code § 23-2-6 was modified slightly in 2003. These alterations do not affect this appeal.

> premiums provided by this chapter, or has elected to make direct payments as aforesaid.

W.Va. Code § 23-2-6 (emphasis supplied). As this Court succinctly stated in *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 510 S.E.2d 486 (1998), "'[w]hen an employer subscribes to and pays premiums into the Fund, and complies with all other requirements of the Act, the employer is entitled to immunity for any injury occurring to an employee and "shall not be liable to respond in damages at common law or by statute.' *W.Va.Code*, 23-2-6 [1991]." 203 W.Va. at 659, 510 S.E.2d at 493. Footnote eleven of *Frazier* explained: "This statute is also known as the 'exclusivity' provision, as it makes workers' compensation benefits the exclusive remedy for personal injuries sustained by an employee injured in the course of and resulting from his or her covered employment." *Id.* at 659 n. 11, 510 S.E.2d at 493 n. 11.

The immunity provided by § 23-2-6 is not easily forfeited. As the District Court for the Southern District of West Virginia explained in *Smith v. Monsanto Co.*, 822 F.Supp. 327 (S.D.W.Va.1992), "[u]nder the Act, an employer who is otherwise entitled to immunity under § 23-2-6 may lose immunity in only one of two ways: (1) by defaulting in payments required by the Act or otherwise failing to comply with the provisions of the Act, or (2) by deliberately intending to produce injury or death to the employee." 822 F.Supp. at 330 (citation omitted).

Specifically, West Virginia Code § 23-2-8 (1991) (Repl. Vol. 2002), provides that an employer will lose the statutory immunity of West Virginia Code § 23-2-6 if it is in default in the payment of premiums to the worker's compensation fund or fails to otherwise fully comply with the provisions of West Virginia Code §§ 23-2-5 or 23-2-9.[9] The

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[9]The full text of West Virginia Code § 23-2-8 provides as follows:

> All employers required by this chapter to subscribe to and pay premiums into the workers' compensation fund, except the state of West Virginia, the governmental agencies or departments created by it, and municipalities and political subdivisions of the state, and who do not subscribe to and pay premiums into the workers' compensation fund as required by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees' dependents under the provisions of section nine [§ 23-2-9] of this article, or having so subscribed or elected, shall be in default in the payment of same, or not having otherwise fully complied with the provisions of section five or section nine [§ 23-2-5 or § 23-2-9] of this article, shall be liable to their employees (within the meaning of this article) for all damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment and also to the personal representatives of such employees where death results from such personal injuries, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common-law defenses: The defense of the fellow-servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of someone whose duties are prescribed by statute: Provided, That such provision depriving a defendant employer of certain common-law

(continued...)

preeminent issue to be acknowledged in this case is that the statutory scheme does not mandate loss of immunity immediately upon an employer's payment delay, mistake, or error in compliance. The statutes construct a detailed process through which employer lapse is resolved. West Virginia Code § 23-2-5(b), for instance, provides that "[f]ailure of an employer . . . to maintain an adequate premium deposit, shall cause the employer's account to become delinquent." Pursuant to West Virginia Code § 23-2-5(c), subsequent to a determination that an account is delinquent, the division is required to notify the delinquent employer of its status and explain the legal consequences of a potential default. West Virginia Code § 23-2-5(d) then clarifies that only when the delinquency is not cured within a prescribed period is a default possible. That section provides that "[f]ailure by the employer, who is required to subscribe to the fund and who fails to resolve the delinquency within the prescribed period, shall place the account in default and shall deprive such default employer of the benefits and protection afforded by this chapter. . . ." West Virginia Code § 23-5-1(a) (1995) (Repl. Vol. 2002)[10] provides the authority of the Commission to hear issues within its jurisdiction, as follows:

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[9](...continued)

> defenses under the circumstances therein set forth shall not apply to an action brought against a county court [county commission], board of education, municipality, or other political subdivision of the state or against any employer not required to cover his employees under the provisions of this chapter.

[10]West Virginia Code § 23-5-1 was also modified slightly in 2003, primarily altering word choice and substituting the word "commission" for the former term, "division." The changes do not affect this appeal.

> *The workers' compensation division shall have full power and authority to hear and determine all questions within its jurisdiction*. In matters arising under articles three and four [§§ 23-3-1 et seq. and 23-4-1 et seq.] of this chapter, the division shall promptly review and investigate all claims. The parties to a claim shall file such information in support of their respective positions as they deem proper. *In addition, the division is authorized to develop such additional information that it deems to be necessary in the interests of fairness to the parties and in keeping with the fiduciary obligations owed to the fund*. With regard to any issue which is ready for a decision, the division shall explain the basis of its decisions.

W.Va. Code § 23-5-1(a) (emphasis supplied).

The West Virginia Code of State Rules further elucidates the procedures established for calculations and resolutions of delinquency and default issues, providing additional details regarding particular requirements for notice of delinquency, notice of default, and the manner in which an employer may seek reinstatement. For instance, Section 85-11-6 provides the mechanism for audits of employers where the division desires verification of the number of employees or wages paid during certain periods.[11] Section 85-11-9 provides authority for the commencement of a civil action by the division. "Default" is specifically defined by West Virginia Code of State Rules § 85-11-2.5a as follows:

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[11]West Virginia Code § 23-1-19(a) (2003) (Spec. Supp. 2003), not in effect at the time of Mr. Edens' injury, also provides civil remedies for the Workers' Compensation Commission, as follows: "Any . . . corporation . . . which willfully, by means of false statement or representation, or by concealment of any material fact, . . . obtains . . . reduced premium costs . . . shall be liable to the workers' compensation commission in an amount equal to three times the amount of such benefits, payments or allowances to which he or it is not entitled[.]"

> The failure by a subscriber or a self-insured employer which has not made a payment or filed a report due by it under the provisions of the Act and which has received a subsection 3.3. notice of delinquency but has further failed to make the payment or file the report within the time period specified by the notice.

The legislature has also provided an element of protection to employees, as follows in West Virginia Code § 23-2-5(g): "With the exception noted in subsection (h), section one of this article, no employee of an employer required by this chapter to subscribe to the workers' compensation fund shall be denied benefits provided by this chapter because the employer failed to subscribe or because the employer's account is either delinquent or in default."[12] West Virginia Code § 23-2-5(h)(1) provides: "The provisions of this section shall not deprive any individual of any cause of action which has accrued as a result of an injury or death which occurred during any period of delinquency not resolved in accordance with the provisions of this article, or subsequent failure to comply with the terms of the repayment agreement."

B. The Judicial Responsibility to Observe Statutory Procedure

[12]There is no dispute in the present case that the Petitioner made premium payments which reflected Mr. Edens' status as an employee. Mr. Edens' right to obtain workers' compensation benefits is not affected by the status of Mr. Johnson. The only possible benefit to be derived by Mr. Edens through an adjudication of the issue of Mr. Johnson's status is an ultimate finding that the Petitioner was in default at the time of Mr. Edens' injury, thereby forfeiting its immunity and defenses and subjecting itself to a common law negligence action by Mr. Edens.

This Court has consistently respected the preeminence of the statutory schemes in workers' compensation law. In *Bailes v. State Workmen's Compensation Commissioner*, 152 W.Va. 210, 161 S.E.2d 261 (1968), for example, this Court explained that "[t]he right to workmen's compensation is wholly statutory and is not in any way based on the common law. The statutes are controlling and the rights, remedies and procedure provided by them are exclusive." 152 W.Va. at 212, 161 S.E.2d at 263 (citation omitted). In *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 539 S.E.2d 478 (2000), this Court acknowledged that "'[i]t has been held repeatedly by this Court that the right to workmen's compensation benefits is based wholly on statutes, in no sense based on the common law; that such statutes are sui generis and controlling; that the rights, remedies and procedures thereby provided are exclusive[.]'" 208 W.Va. at 234, 539 S.E.2d at 494, *quoting Bounds v. State Workmen's Compensation Comm'r*, 153 W.Va. 670, 675, 172 S.E.2d 379, 382-83 (citations omitted); *see also Boyd v. Merritt*, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986) ("The right to workers' compensation benefits is wholly a creature of statute"); *Lester v. State Workmen's Comp. Comm'r*, 161 W.Va. 299, 315, 242 S.E.2d 443, 452 (1978) ("[T]he legislature has the power to modify this state's industrial insurance program as it sees fit so long as no constitutional provision is infringed"); *Ferguson v. State Workmen's Comp. Comm'r*, 152 W.Va. 366, 371, 163 S.E.2d 465, 468 (1968), *overruled on other grounds by Martin v. Workers' Comp. Div.*, 210 W.Va. 270, 557 S.E.2d 324 (2001) ("Alleged rights and remedies, not provided by the workmen's compensation statutes, can not be recognized or granted by the courts").

This Court must accede to the methodology established by the legislature and the rules and regulations designed to determine an employer's continuing entitlement to workers' compensation coverage, immunities, and defenses. This legislative construct for the workers' compensation system envisions an administrative body which bears the responsibility of determining the delinquency or default status of employers within its own system.

In footnote seven of *Erie Insurance Property and Casualty Co. v. Stage Show Pizza, JTS, Inc.*, 210 W.Va. 63, 553 S.E.2d 257 (2001), this Court acknowledged the mechanism designed by West Virginia Code § 23-2-5(d), "specif[ying] that if an employer is delinquent in its duties to the workers' compensation fund, and the employer fails to resolve that delinquency, then the Workers' Compensation Division may choose to place the employer 'in default.'" 210 W.Va. at 70 n. 7, 553 S.E.2d at 264 n. 7. This Court has also held that when an employer has been determined to be in default by the Workers' Compensation Commission, that declaration is binding upon trial courts. In syllabus point two of *Frazier*, this Court stated:

> Under *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. However, if the Commissioner has made a final ruling that an employer is in default, then the Commissioner's ruling is binding upon a trial court. The Commissioner's ruling may not be collaterally attacked in a subsequent proceeding considering the same issue, and the employer's proper remedy is to seek review of the ruling

> through the appellate process established by *W.Va.Code*, 23-2-17 [1990].

203 W.Va. at 654-55, 510 S.E.2d at 488-89. The holding in *Frazier* was ultimately premised upon the following conclusion: "We believe that the trial court in this case exceeded its legitimate powers and impinged on the jurisdiction of the Commissioner by failing to accept the Commissioner's determination that Pioneer and Top Flite were in default of their workers' compensation obligations." *Id*. at 662, 510 S.E.2d at 496. Thus, the issue of loss of immunity in *Frazier* was determined as a matter of law, based upon fact that the Workers' Compensation Commissioner had issued a notice of default that had become a final order of the Commissioner when the employer failed to seek an appeal.

In support of his position in this matter, Mr. Edens also cites *Canterbury v. Valley Bell Dairy Co.*, 142 W.Va. 154, 95 S.E.2d 73 (1956). In *Canterbury*, this Court reviewed the question of whether an employer had lost is workers' compensation immunities and defenses because the employer had failed to report as wages certain sums paid an employee by the employee's co-worker. 142 W.Va. at 155, 95 S.E.2d at 74. The employer in *Canterbury* had paid certain employees, working as helpers to its truck drivers, a very minimal wage and had paid workers' compensation premiums based only upon those wages. The drivers who were assisted by the helpers often paid the helpers an additional stipend, presumably drawn from their own wages. This additional compensation was not reported as wages for the helpers, nor was any premium paid by the employer on that supplemental

compensation. When one of the helpers was killed in a workplace accident, his personal representative brought a wrongful death action against the employer, claiming that the employer had lost it workers' compensation immunities and defenses. In the lower court, a verdict was returned and a judgment rendered based upon a determination that the immunities and defenses had been lost. This Court reversed the lower court judgment, finding that the supplemental payments by the drivers to the helpers were not wages paid by the employer. *Id*. at 159, 95 S.E.2d at 76. This Court did not, however, address the question of whether the procedure employed in the lower court for the determination of the issue of whether workers compensation coverage had been lost was proper.

The wage reporting matter at issue in *Canterbury* directly concerned the injured employee, the individual whose wages, workplace injury, and death were directly involved in the civil action reviewed by this Court. Conversely, in the case sub judice, the allegedly improper compliance with the Workers' Compensation Act does not relate directly to the injured employee, Mr. Edens, but rather to the contested status of a co-worker not involved in the underlying civil action.

In *Kosegi v. Pugliese*, 185 W.Va. 384, 407 S. E.2d 388 (1991), this Court recognized the statutory pronouncements "that an employer who is in default of its obligation to remit workers' compensation premiums to the Fund is *not* entitled to immunity from common-law liability." 185 W.Va. at 386, 407 S.E.2d at 390. In exploring that issue,

however, the *Kosegi* Court also acknowledged an intervening alteration in the statutory procedure for the potential loss of immunity which had been accomplished after the employee's death in 1982. This Court explained as follows:

> [Employer's] sole basis for contesting that they were statutorily in default for failure to remit premium payments is the 1984 amendment to W.Va. Code § 23-2-5. The provisions of W.Va. Code § 23-2-5 as in effect in 1982 required that an employer who was delinquent in the payment of workers' compensation premiums "shall be deprived of the benefits and protection afforded by this chapter . . . ." Pursuant to the 1982 statute, an employer whose failure to timely remit premiums rendered him delinquent . . . was thereby mandatorily subjected to common-law negligence.

Id. at 386-87, 407 S.E.2d at 390-91. Pursuant to the 1982 statute, the "commissioner was not required to notify an employer that its delinquency rendered it in default. . . ." *Id.* at 387, 407 S.E.2d at 391. However, the amendment of 1984 included a requirement that the commissioner must notify all delinquent employers in writing of "their failure to timely pay premiums, to timely file a payroll report, or to maintain an adequate premium deposit." *Id.* at 87, 407 S.E.2d at 391, *quoting* W.Va. Code § 23-2-5(b) (1984). The amendment also provided that failure to resolve a delinquency within a prescribed period would place the account in default. The *Kosegi* Court refused to apply the 1984 amendments retrospectively to the 1982 employee death and therefore held that the employer's failure to pay appropriate

premiums at the time of the incident rendered the employer in default and dispossessed it of its statutory immunity.[13]

Those 1984 amendments, applicable in the present case, substantially changed the process by which a delinquent employer may now be found in default, with the resultant loss of immunities and common law defenses. In the case before us, no delinquency or default of the employer has been found or declared by the Workers' Compensation Commission.

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[13]Three days after the *Kosegi* decision was filed, this Court filed *Shifflett v. McLaughlin*, 185 W.Va. 395, 407 S.E.2d 399 (1991), and held that an employer who failed to pay workers' compensation premiums for part-time employees was delinquent and was mandatorily deprived of its statutory immunity for an accident which occurred in 1983. As in *Kosegi*, the employer maintained that it could not lose immunity because no notice of delinquency was provided. 185 W.Va. at 396, 407 S.E.2d at 400. This Court again explained that the provisions in effect in 1983 permitted immediate loss of immunity upon delinquency with no requirement of notice or opportunity to resolve and held that the employer would not be entitled to retroactive application of the subsequently-enacted 1984 notice provisions. In footnote nine of *Shifflett*, this Court queried as follows:

> We question how, under the new statute requiring notice, the commissioner can give notice of delinquency to an employer who is not reporting all employees, such as were the facts in this case. The commissioner would have no way of knowing that the employees were not being reported to the Fund until perhaps an accident would occur. Then, under the new statute, the employer could claim no notice was given of the delinquency.

185 W.Va. at 399 n. 9, 407 S.E.2d at 403 n. 9. We note that the statutory and regulatory provisions regarding audits and investigative tools available to the Commission serve to minimize instances in which employer error will remain undiscovered. *See* W.Va. Code § 23-5-1(a), as discussed above.

In resolving the case before us, we find instructive the analysis utilized by the Supreme Court of Ohio in addressing the issue of entitlement to statutory immunity through a workers' compensation system. That court has recognized the obligation of the judiciary to observe statutory protocol when evaluating issues of delinquency and default. In *Bridges v. National Engineering and Contracting Co.*, 551 N.E.2d 163 (Ohio 1990), the Ohio Supreme Court held that a certificate of coverage served to demonstrate that the employer was in compliance as a matter of law, reasoning as follows in syllabus point two: "Once the Industrial Commission has certified that an employer has established industrial coverage and paid its premium, pursuant to R.C. 4123.35, the employer is a complying employer as a matter of law, and is entitled to the benefits of [the workers' compensation act]." 551 N.E.2d at 164. Further, in syllabus point three, the *Bridges* court held that "[a]n employer's failure to include a particular injured employee in a required payroll report does not deprive the employer of its statutory immunity from a civil action brought by the employee, in the absence of a final determination by the commission that the employer is a noncomplying employer who has not settled its liability to the State Insurance Fund." *Id*.

The employees in *Bridges* had argued "that certificates of premium payment are only prima facie evidence that the proper premium has been paid, and thus evidence showing an employer under-reported its payroll, as they allege [the employer] did here,

proves noncompliance. . . ." 551 N.E.2d at 169-70. The Ohio Supreme Court rejected that argument and reasoned as follows:

> While the accuracy of a premium payment by an employer is certainly dependent upon the accurate reporting of payroll by such employer, an employer who fails to fully pay its premiums does not *automatically* become a noncomplying employer subject to a common-law action by its employees. Indeed, once an employer has filed a payroll report, whether complete or not, and paid the premium thereon, a finding of noncompliance is a question of fact to be determined in the first instance by the Industrial Commission, not by a court in an original civil action.

Id. at 170. The *Bridges* court also noted that the statutory scheme included safeguards which ensure that "[a]s between the employer and the commission . . . the certificate is *not* conclusive." *Id*. All records under the Ohio system, as in the West Virginia system, are subject to audit by the commission. "Moreover, the determination of an employer's failure to comply . . . is an administrative determination." *Id.* The *Bridges* court ultimately explained that "we agree with the holding of several lower courts that, standing alone, the failure of an employer who has otherwise complied to include one or more employees on a payroll report 'is not an omission which will deprive an employer or immunity.'" *Id*. at 170-71 (citations omitted). The employer's "omission of its Bridge Project employees from its payroll reports was a matter between it and the commission. . . ." *Id.* at 171. "Whether [the employer] had a duty to report such employees' payroll is a matter to be decided, in the first instance, by the commission." *Id*.; *see also Keeler v. Schroeder*, 1992 WL 19361 (Ohio App. 1992).

Relying upon the principles enumerated in *Bridges*, the Court of Appeals of Ohio held that a certificate of payment "served to demonstrate the [employer] was a complying employer as a matter of law." *Fuhrman v. Garrison Feist Const. Co.*, 2000 WL 1838031, 4 (Ohio App. 2000). The *Fuhrman* court reasoned as follows:

> Moreover, we reject the [plaintiffs'] contention that, had they been permitted to discover and present as evidence the results of the [workers' compensation] audit, they could have rebutted [the employer's] proof of compliance, because the audit results would have served as a "final determination" of noncompliance. As the court's discussion of the audit process in *Bridges* details, an audit revealing inaccurate payroll reporting or underpayment of premiums by an employer does not alone mean that the employer is "noncomplying" for the purposes of statutory immunity. Rather, an employer becomes noncomplying for the purposes of statutory immunity only after it fails to pay, within the allowed time, the additional premium ordered as the result of the audit.

2000 WL 1838031 at *5; *see also Walter v. AlliedSignal, Inc.*, 722 N.E.2d 164, 169 (Ohio App. 1999).

IV. Conclusion

The Petitioner requests a writ of prohibition preventing the lower court from seeking jury resolution of this matter. In support of its request, the Petitioner contends that no genuine issue of material fact remains for resolution and that summary judgment on the issue of workers' compensation coverage is appropriate at this stage. We agree with the Petitioner's contentions and grant the requested relief. We base this determination upon the elaborate statutory and regulatory provisions summarized above, our duty to adhere to such

provisions, and the inescapable conclusion that even if the allegations advanced by Mr. Edens were accurate and proven before a jury, the first penalty to be suffered by the Petitioner would be a finding that it owes further premiums and that its account should be designated as delinquent. Pursuant to statute, a notice of delinquency would then be issued, and the Petitioner would be given an opportunity to cure the delinquency. If no resolution of the delinquency occurred within statutory time frames, a default would result.

Further, we observe that the certificate issued to the Petitioner covered the time period in which the accident occurred; there is no evidence of challenge, amendment, or revocation to that certificate; the statutory procedure clearly identifies the stages through which a default determination must proceed administratively; and the injured worker's own workers' compensation benefits are not jeopardized, his wages were properly reported with premiums paid thereon, and the alleged error by the Petitioner involves classification of an employee other than the injured worker in question.

Providing due regard to the legislative plan for addressing perceived delinquencies and eventual defaults in the obligations of employers to file accurate workers compensation reports and fully pay all premiums due on the wages reported, it is apparent that the legislative scheme allows a reasonable means of addressing both errors and oversights which might arise in the preparation and filing of such reports and the calculation and payment of appropriate workers' compensation premiums. The procedure specified by

the legislature allows for the correction of errors in the wage report arising from the omission of an individual employee, the misstatement of actual wages earned, or even a good faith dispute regarding the proper classification of a particular person to whom compensation might have been paid. Certainly, the legislative scheme does not envision that an error in the wage report, such as the omission of an individual employee by simple, unintended error, or the misstatement of a wage by computational or scrivener error, would immediately result in the loss of coverage, immunities, and defenses. Such error of law or fact, as in the case of adjudging an employee to be an independent contractor, would not trigger the loss of coverage, immunities, and defenses without the opportunity to litigate the issue with the Workers' Compensation Commission and to pay any delinquency upon an adverse finding. In the absence of a procedure for preliminary notification of a delinquency and eventual declaration of a default, such as the legislature has devised, even the most innocent, accidental errors could be the basis for denying workers' compensation coverage to an employer. This is not the intent of the legislative scheme.

Submission of a question to a jury is necessary only when there is a genuine issue of material fact to be decided. As Rule 56(c) of the West Virginia Rules of Civil Procedure specifies, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A material fact has been defined as one "that has the

capacity to sway the outcome of the litigation under the applicable law." *Williams v. Precision Coil, Inc.*, 194 W. Va 52, 60 n. 13, 459 S.E.2d 329, 337 n. 13.[14] "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Finding no justification for the lower court's proposed action, we conclude that there is no basis upon which this Court or the trial court may deprive the Petitioner of its immunity or defenses from suit for common law negligence and no genuine issue of material fact which might warrant submission of this matter to a jury. The writ shall be granted prohibiting litigation of the issue of the Petitioner's workers' compensation coverage in the civil action pending below and prohibiting maintenance of an action under the allegations of Count II of Mr. Edens' complaint.

Writ Granted.

[14]"When a party cannot show a material fact issue, there is nothing to submit to a jury[.]" *Lattrell v. Chrysler Corp.*, 79 S.W.3d 141, 150 (Texas App. 2002).