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WORKERS' COMPENSATION—OFFICERS AND PUBLIC EMPLOYEES: JUROR IS AN APPOINTED OFFICIAL ELIGIBLE FOR WORKERS' COMPENSATION BENEFITS

While serving as a juror for the District Court for Cass County, Janet Holmgren fell down a courthouse stairway, injuring her ankle.¹ Holmgren filed a claim for benefits with the North Dakota Workers' Compensation Bureau.² The Bureau determined that as a juror Holmgren was not an employee of the State of North Dakota and could not be eligible for compensation.³ Therefore, the Bureau dismissed Holmgren's claim.⁴ On appeal, the district court affirmed the Bureau's decision.⁵ Holmgren then appealed to the North Dakota Supreme Court, contending that "a juror is an appointed official of the state," a term included within the statu-

1. *Holmgren v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 200 (N.D. 1990). The date of Janet Holmgren's fall and resulting injury was January 4, 1988. Appellant's Brief at A2, *Holmgren v. North Dakota Workers' Compensation Bureau*, 455 N.W.2d 200 (N.D. 1990) (No. 890307) [hereinafter Appellant's Brief].

2. *Holmgren*, 455 N.W.2d at 201. In a letter to Holmgren's attorney, Mr. Al Baker, dated September 19, 1988, Assistant Attorney General Terry Adkins informed Mr. Baker that although jurors were not provided for under the state's workers' compensation coverage as of January of 1988, the Workers' Compensation Bureau had informed Mr. Adkins' office that the Bureau would "consider a juror as an employee of the county for purposes of Workers Compensation coverage." Appellant's Brief, *supra* note 1, at A2. The Bureau had assured Mr. Adkins that should Janet Holmgren file a claim for the injury she suffered as a district court juror, the Bureau would consider her insured. *Id.* Furthermore, the Bureau would consider Cass County an insured employer because the county provided workers' compensation coverage for its other employees. *Id.* Holmgren then filed her claim for workers' compensation benefits on November 18, 1988, naming Cass County as her employer. *Id.* at A2.

In a correspondence to the Cass County Court House, dated December 15, 1988, the Bureau confirmed that it was treating Janet Holmgren as an employee of Cass County during the time she served as a juror. *Id.* at A11. In a reply to the Bureau, dated February 1, 1989, the Cass County State's Attorney denied that Cass County was Holmgren's employer at the time of her injury. *Id.* at A14. The Cass County State's Attorney argued that because Holmgren had been summoned as a juror by the district court, rather than the county court, the State of North Dakota was her employer. *Id.* On February 21, 1989, the North Dakota Workers' Compensation Bureau dismissed Janet Holmgren's claim for benefits. *Id.* at A15.

3. *Holmgren*, 455 N.W.2d at 202. In its findings of fact, the North Dakota Workers' Compensation Bureau determined that Holmgren's injury occurred in the course of her duties as a juror. Appellant's Brief, *supra* note 1, at A3. However, there was no master-servant relationship between the state and Holmgren because the state lacked control over how Holmgren performed her duties as a juror. *Id.* at A4. Furthermore, the Bureau determined that, as a juror, Holmgren was not paid a wage; rather, the state merely reimbursed her for her expenses. *Id.* at A3. The Bureau's final finding of fact was that jury duty was a civic responsibility rather than an employment. *Id.* at A4. Consequently, the Bureau found that Holmgren was not an employee of the state for purposes of workers' compensation.

4. *Holmgren*, 455 N.W.2d at 201.

5. *Id.* The district court determined that "[a] reasoning mind could have reasonably determined that Holmgren was not an employee while acting as a juror in District Court. The decision of the Bureau is supported by the evidence and is in accordance with the law." Appellant's Brief, *supra* note 1, at A6.

tory definition of "employee" under North Dakota's worker's compensation law.⁶ The North Dakota Supreme Court reversed the decision of the district court and *held* that a juror is eligible for workers' compensation benefits as an appointed official and therefore an employee of the state.⁷ *Holmgren v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 200 (N.D. 1990).

When confronted with a juror injured while on jury duty, courts have analyzed in different ways whether the juror should be allowed to claim benefits under the applicable workers' compensation statute.⁸ The statutory language defining what constitutes an "employee" normally controls the analysis.⁹ Workers' compensation statutes commonly define "employee" as any person serving the state or any county under an "appointment" or "contract of hire."¹⁰ This language leads a court to examine if there exists

6. *Holmgren*, 455 N.W.2d at 202. See N.D. CENT. CODE § 65-01-02(14) (1987 & Supp. 1989). The North Dakota Century Code provides that:

'Employee' means every person engaged in a hazardous employment under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, and:

a. The term includes:

(1) All elective and appointed officials of this state and its political subdivisions, including municipal corporations and including members of the legislative assembly, all elective officials of the several counties of this state, and all elective peace officers of any city.

Id.

7. *Holmgren*, 455 N.W.2d at 205. For the North Dakota Supreme Court's scope of review from decisions of administrative agencies, see *Cody v. North Dakota Workmen's Compensation Bureau*, 413 N.W.2d 316, 318 (N.D. 1987) (supreme court does not substitute its judgment for that of the agency; nor does it make its own independent findings of fact).

8. *E.g.*, *Board of Commissioners v. Evans*, 99 Colo. 83, 60 P.2d 225 (1939) (test was whether employee was serving under an appointment or contract either express or implied); *Hicks v. Guilford County*, 267 N.C. 364, ___, 148 S.E.2d 240, 243 (1966) (test was whether the county had any control over or right to control over the manner in which juror performed duties); *Industrial Commission of Ohio v. Rogers*, 122 Ohio St. 134, ___, 171 N.E. 35, 36 (1930) (test was whether the method of selecting jurors for jury service constituted an appointment of hire); *Bolin v. Kitsap County*, 114 Wash. 2d 70, ___, 785 P.2d 805, 807 (1990) (jurors were employees of the county because of their responsibilities to the court judges, who, in turn, are officials of both state and county).

9. See *Board of Commissioners v. Evans*, 99 Colo. 83, ___, 60 P.2d 225, 226 (1936) (employee defined as any person serving under appointment or contract of hire); *Lockerman v. Prince George's County*, 281 Md. 195, ___, 377 A.2d 1177, 1181 (1977) (employee is every person serving under any contract of hire and any official or officer whether elected or appointed); *Jochen v. County of Saginaw*, 363 Mich. 648, 110 N.W.2d 780 (1961) (employee construed to mean any person under an appointment or contract of hire); *Hicks v. Guilford County*, 267 N.C. 364, ___, 148 S.E.2d 240, 242 (1966) (employee means any person serving under an appointment or contract of hire).

10. See N.D. CENT. CODE § 65-01-02(14) (1987 & Supp. 1989) (defining "employee" as "every person engaged in a hazardous employment under any appointment, contract of hire, or apprenticeship, express or implied . . ."). See also *Board of Commissioners v. Evans*, 99 Colo. 83, 60 P.2d 225 (1936) (Colorado workers' compensation statute defines employee as every person in service of state or county under appointment or contract of hire); *Jeansonne v. Parish of East Baton Rouge*, 354 So.2d 619 (La. Ct. App. 1977) (provisions of Louisiana workers' compensation law apply to every person in service to state or political subdivision under an appointment or contract of hire); *Lockerman v. Prince George's County*, 281 Md. 195, 377 A.2d 1177 (1977) (employees subject to Maryland workers'

between the juror and the county or state the traditional indications of an employer-employee relationship.¹¹ The traditional indications of an employer-employee relationship include mutual consent to enter into an agreement of servitude and the employer's control over or right to control the employee's performance of the work.¹² Of the courts which have followed this analysis, not one has found that an employee-employer relationship existed between a juror and the state or the county; accordingly, not one of them has compensated an injured juror under a state workers' compensation law.¹³

The first court to analyze the nature of the relationship between juror and the county or state was the Colorado Supreme Court in *Board of Commissioners v. Evans*.¹⁴ The state Workmen's Compensation Act defined "employee" as "[e]very person in the service of the state, or of any county . . . under . . . contract for hire, express or implied . . ."¹⁵ Focusing on the type of relationship between the juror and the county, the court found that

compensation law include persons in service of any political subdivision under any contract for hire and every official whether appointed or elected); *Jochen v. County of Saginaw*, 363 Mich. 648, 110 N.W.2d 780 (1961) (employee defined in Michigan workers' compensation statute as every person in service to state or county under appointment or contract of hire); *Hicks v. Guilford County*, 267 N.C. 364, ___, 148 S.E.2d 240, 242 (1966) (employee defined in North Carolina workers' compensation statute as "every person engaged in an employment under any appointment or contract of hire. . ."); *Industrial Commissioners v. Rogers*, 122 Ohio St. 134, 171 N.E. 35 (1930) (Ohio workers' compensation statute defines employee as any person in service to state or county under appointment or contract of hire). *But cf.* *Bolin v. Kitsap County*, 114 Wash. 2d 70, ___, 785 P.2d 805, 807 (1990) (Washington's workmen's compensation statute does not define employment as appointment or contract for hire).

11. See 81 AM. JUR. 2d, *Workmen's Compensation* § 153 (1976). Under a statute that defines employee as every person in the service of another, there must exist at the time of the injury an employment contract, express or implied, between the employer and the injured employee. *Id.*

12. See 53 AM. JUR. 2d, *Master and Servant* § 2 (1970). There are four elements at common law used to determine whether or not the relationship of master and servant (employer and employee) exists: "the selection and engagement of the servant, the payment of wages, the power of dismissal, the power of control of the servants' conduct . . ." *Id.* at 82.

13. See *Board of Commissioners v. Evans*, 99 Colo. 83, 60 P.2d 225 (1936) (juror not an employee of county because no employment contract between parties); *Lockerman v. Prince George's County*, 281 Md. 195, 377 A.2d 1177 (1977) (no employment contract existed between juror and county because juror was compelled by law to serve); *In re O'Malley's Case*, 361 Mass. 504, 281 N.E.2d 277 (1972) (juror not an employee because county lacked control or right to control manner in which juror performed duties); *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966) (no evidence that employer-employee relationship existed between county and juror).

14. 99 Colo. 83, 60 P.2d 225 (1936). In *Evans* a juror contracted pneumonia when he was sequestered overnight in a jail without a blanket. *Board of Commissioners v. Evans*, 99 Colo. 83, ___, 60 P.2d 225, 226 (1936).

15. *Evans*, 99 Colo. at ___, 60 P.2d at 226. The Colorado workmen's compensation statute construed by the *Evans* court also included as employees those serving under an appointment. *Id.*

jurors were not contracted for hire by the county.¹⁶ Rather, jurors were selected, summoned and compensated, all pursuant to statute.¹⁷ Moreover, the county did not negotiate with the juror for his services; nor had the juror applied for the employment.¹⁸ The parties never discussed when the juror would serve, how long that service would last, or the amount of compensation.¹⁹ Finally, the deliberations and verdict made by the jurors were not subject to control of the county or any other authority.²⁰ Without negotiations between the parties, an application for employment, voluntary service, and a right to control, a contractual relationship did not exist between the juror and the county; therefore, a juror was not an employee of the county and, thus, ineligible to claim workers' compensation benefits.²¹

In *Hicks v. Guilford County*,²² a juror was injured between the time the jury retired for deliberations and when the jury returned to the courtroom to render a verdict.²³ The North Carolina Workmen's Compensation Act provided that the term "employee" included "every person engaged in an employment under any appointment. . . . [A]s relating to municipal corporations and political subdivisions of the State, the term 'employee' shall include all officers and employees"²⁴ The North Carolina

16. *Id.* Before a person can be considered an employee under a workers' compensation act, an express or implied contract or employment agreement must exist between the employer and the employee. 99 C.J.S. *Workmen's Compensation* § 65, at 280 (1958).

17. *Evans*, 99 Colo. at ___, 60 P.2d at 226. The *Evans* court further noted that because a juror cannot decline jury service, jury duty was a statutory obligation rather than a bargained for employment contract. *Id.* at ___, 60 P.2d at 226-27. See also 99 C.J.S. *Workmen's Compensation* § 65, at 279 (1958) (consent of parties essential element of parties employment contract).

18. *Evans*, 99 Colo. at ___, 60 P.2d 225, 226 (1936).

19. *Id.* at ___, 60 P.2d at 226-27.

20. *Id.* In *Evans* the court stated that because the juror participates in the "gravest affairs of men," the performance of the juror's duties should not be subject to control by other authorities. *Id.* In determining whether an employer-employee relationship exists, the most important factor to consider is whether the employer has the right to control the manner in which the employee carries out his duties. 99 C.J.S. *Workmen's Compensation* § 64, at 271 (1958).

21. *Evans*, 99 Colo. at ___, 60 P.2d at 226. The *Evans* court refused to construe the statutory definition of employee to include a juror because the legislature had not done so. *Id.* See also *Seward v. County of Bernalillo*, 61 N.M. 52, 294 P.2d 625 (1961) (following *Evans*); *Jochen v. County of Saginaw*, 363 Mich. 648, ___, 110 N.W.2d 780, 782 (1961) (Carr, J., concurring) (relationship between juror and county statutory rather than contractual; thus juror not employee).

22. 267 N.C. 364, 148 S.E.2d 240 (1966).

23. *Hicks v. Guilford County*, 267 N.C. 364, ___, 148 S.E.2d 240, 241 (1966). In *Hicks* the claimant was selected as a member of the jury and sat through the proceedings. *Id.* The jury then retired for deliberations and thereafter reached a verdict. *Id.* Before the jury returned to the courtroom, claimant went to the washroom where, upon exiting, she missed a step at the door, fell and suffered injury. *Id.*

24. *Hicks*, 267 N.C. at ___, 148 S.E.2d at 244. See also N.C. GEN. STAT. § 97-2(2) (1985 &

Supreme Court found that the position of juror did not qualify as an appointed position because the county officials, when drawing names from the pool of prospective jurors, did so without regard to individual qualifications.²⁵ Because there was no appointment for hire, the court concluded that a juror was not a public official of the county, and therefore ineligible to claim benefits under the state's workers' compensation statute.²⁶

In one jurisdiction the court's focus was not on the type of relationship between a juror and the county, but rather on whether the position of juror holds and exercises a grant of the state government's sovereign power.²⁷ In *Industrial Commission of Ohio v. Rogers*,²⁸ Mary Rogers was injured while serving as a juror when she fell down a flight of stairs in the courthouse.²⁹ Rogers claimed that as a juror she was an employee of the county according to the statutory definition found in the Ohio Workmen's Compensation Act.³⁰ The statute broadly defined "employee" as anyone who serves the state or any county "under any appointment or contract for hire."³¹ But the definition of "employee" also went on to exclude county and state officials.³² Therefore, the Ohio Supreme Court considered two questions: Whether a juror serves the state or county under an appointment for hire, and, if

Supp. 1990) (state workmen's compensation statute defines "employee" as "every person engaged in an employment under any appointment or contract of hire").

25. *Hicks*, 267 N.C. at __, 148 S.E.2d at 244. In addition to finding that a juror was not appointed by the county, the *Hicks* court also determined that a contract did not exist between the juror and the county because there had been no negotiations between the juror and the county for the juror's services. *Id.* Also, the county officials lacked the right to control how the juror performed his duties. *Id.* at __, 148 S.E.2d at 243.

26. *Id.* at __, 148 S.E.2d at 244. The *Hicks* court also applied a "right to control" test. *Id.* Unlike the traditional employer-employee relationship, however, the county officials had no control over or right to control over how the jurors performed their duties. *Id.* at __, 148 S.E.2d at 243. Therefore, the court determined jurors were not employees of the county. *Id.* at __, 148 S.E.2d at 244. See also *Lockerman v. Prince George's County*, 281 Md. 195, 377 A.2d 1177 (1977). The *Lockerman* court denied benefits to a juror who was injured when she fell on her way out of the jury box. *Id.* at __, 377 A.2d at 1179. Examining the nexus between the juror and either the state or the county, the court failed to find any evidence common to an employer-employee relationship. *Id.* at __, 377 A.2d at 1184. The court reasoned that because a juror was summoned for jury duty, there was missing the common intent of both parties to create with each other legal obligations. *Id.* at __, 377 A.2d at 1182. See also *Jeansonne v. Parish of East-Baton Rouge*, 354 So.2d 619 (La. Ct. App. 1978). The *Jeansonne* court found that a juror was not an "employee" as contemplated by the state's workmen's compensation law due to a lack of consent between the parties to enter into an employment agreement. *Id.* at 620.

27. *Industrial Commission v. Rogers*, 122 Ohio St. 134, __, 171 N.E. 35, 36 (1930).

28. 122 Ohio St. 134, 171 N.E. 35 (1930).

29. *Id.* at __, 171 N.E. at 35.

30. *Id.* See OHIO REV. CODE ANN. § 4123.01(A) (Anderson 1991). The Ohio workers' compensation statute defines "employee" as "[e]very person in the service of the state, or of any county, . . . under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county. . . ." *Id.*

31. *Rogers*, 171 N.E. at 36.

32. *Id.*

so, whether the juror as an official comes within the statutory exception.³³

To determine whether a juror serves the county under an appointment of hire, the Ohio Supreme Court examined the statutory process by which jurors were selected.³⁴ The court noted that in Ohio a jury commission selects jurors by first placing into a jury wheel the names of prospective jurors.³⁵ The names are then randomly drawn from the jury wheel.³⁶ The court found that the process created a definite appointment because the jury commission, prior to depositing their names into the jury wheel, selected the prospective jurors "with reference to their judgment and qualifications as jurors, and with reference to their geographic location"³⁷ Therefore, the court found that a juror was a person in the public service of the county under an appointment of hire.³⁸

After finding that a juror was a person in the public service of the county under an appointment of hire, the court next had to determine whether a juror was also an official of the state, and thereby outside of the workers' compensation statute.³⁹ To accomplish this, the Ohio Supreme Court considered the many statutory definitions of "officer" and found that all of them had one outstanding characteristic—that the person possess and execute some portion of the state's sovereign power.⁴⁰ The court then went on to recognize that jurors are finders of fact; they hear and weigh the evidence presented at trial and ultimately enter a ver-

33. *Id.*

34. *Id.* The jury commission places the names of the potential jurors into a jury wheel to be randomly drawn as needed. *Id.*

35. *Id.* For the relevant North Dakota statute, see N.D. CENT. CODE § 27-09.1-04 (1974) (jury commission established to oversee jury selection process).

36. *Rogers* at ___, 171 N.E. at 36. See also N.D. CENT. CODE § 27-09.1-06 (1974 & Supp. 1989) (jury commission places into master jury wheel names or numbers of prospective jurors); *id.* at § 27-09.1-07 (1974 & Supp. 1989) (upon order from the court, jury commission randomly draw from the master jury wheel names of prospective jurors). See also *id.* (prospective jurors must meet certain qualifications: citizen of U.S.; ability to understand and communicate in English language; no physical or mental disabilities; must not have lost right to vote through felony conviction).

37. *Rogers* at ___, 171 N.E. at 36. The *Rogers* court reasoned that by screening jurors prior to putting their names into the jury wheel, the commission eliminated the element of chance on at least one end of the process. *Id.* The element of chance again came into play when the commission selected out of the jury wheel to form a jury, but, given the screening process, the drawing of a jurors name at this point in the process amounted to an appointment. *Id.*

38. *Rogers* at ___, 171 N.E. at 37. The court was unable to draw a distinction between the selection of a juror by the jury commission and an appointment of a juror by the jury commission. *Id.* at ___, 171 N.E. at 36. But the court also noted that the juror's appointment differed from other positions by law because a juror cannot decline the appointment. *Id.*

39. *Id.*

40. *Id.* See 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 56.20 (1986) (essential difference between official and employee is that official exercises part of the state's sovereign power).

dict.⁴¹ The verdict, however, has no legal force until the court enters it as a final judgment.⁴² It is the judgment entered by the court that determines the rights of both the state and the individual.⁴³ The function of the jury is not an exercise of sovereign power because it cannot make its verdict stand as a final judgment without a declaration by the court.⁴⁴ Therefore, as the jury does not exercise sovereign power, the juror did not fall within the "official" exception to the Ohio Workmen's Compensation Act.⁴⁵ Accordingly, the Ohio Supreme Court held that Mary Rogers, as a juror, served the county not as an official but rather under an appointment for hire, and, therefore, she was entitled to compensation under the workers' compensation law.⁴⁶

The Washington Supreme Court, in *Bolin v. Kitsap County*,⁴⁷ joined the *Rogers* court in extending workers' compensation benefits to a juror injured during jury service by holding that a juror was an employee of the county for purposes of workers' compensation.⁴⁸ The Washington workers' compensation statute first defines a "worker" to mean "every person in this state who is engaged in the employment of an employer . . ."⁴⁹ In another section, the statute gives to "employee" the same meaning as "worker," but includes "all officers of the state . . . counties . . . or political subdivisions."⁵⁰

However, unlike many other states' workers' compensation statutes, the Washington statute does not qualify the term "employment" with the phrase "appointment or contract for

41. *Rogers* at ___, 171 N.E. at 36. The *Rogers* court found the duties of the jury — hearing and weighing evidence and rendering a verdict — constituted important preliminary steps eventually resulting in a judgment entered by the court. *Id.* However, the court found that the jurors' duties were no more important than duties performed by deputy clerks and deputy sheriffs, evidenced by the fact that any of the duties, including the jurors', may be waived by a party to the action. *Id.*

42. *Id.*

43. *Rogers* at ___, 171 N.E. at 36.

44. *Id.*

45. *Id.* The Industrial Commission contended that in Ohio jurors were quasi-state officials because they performed some of the duties of the sovereign state government. *Id.* As a quasi-official, a juror would fall into the statutory exception as an "official" and would be outside of workers' compensation coverage. *Id.*

46. *Id.*

47. 114 Wash. 2d 70, 785 P.2d 805 (1990).

48. *Bolin v. Kitsap County*, 114 Wash. 2d 70, 76, 785 P.2d 805, 807-08 (1990). In *Bolin*, a juror was injured in a car accident while driving home after county jury service. *Id.* at 71, 785 P.2d at 805. In addition to finding that a juror was an employee of the county, the Washington Supreme Court also determined that the car accident occurred during the course of the juror's employment because the county was under a statutory obligation to pay juror's compensation for transportation expenses. *Id.* at 76, 785 P.2d at 807-08.

49. See WASH. REV. CODE ANN. § 51.08.180(1) (1990) (definition of "worker").

50. See WASH. REV. CODE ANN. § 51.08.185 (1990) (definition of "employee").

hire.”⁵¹ Thus, in analyzing whether a juror was an “employee,” the court did not have to examine whether there existed between the juror and the county an employer-employee relationship.⁵² Instead, the court focused on the fact that the Washington statute listed or defined only those types of employments excluded from its provisions, unlike other states’ statutes which list or define the types of employments included.⁵³ Reading the statute liberally, the court reasoned that because jury service was not among the list of employments specifically excluded from the statute’s provisions, it must therefore be included by implication.⁵⁴ Consequently, the court held that a juror was an employee under the state’s Industrial Insurance Act.⁵⁵

However, the *Bolin* court’s finding that a juror was an “employee” satisfied only the threshold question.⁵⁶ The court further had to determine whether a juror was an employee of the county.⁵⁷ Instead of focusing on the type of power exercised by the juror, as the *Rogers* court did, the *Bolin* court found jurors to be employees of the county on account of their responsibility to the presiding court.⁵⁸ The court recognized its own previous rulings which held that court judges were officials of the county because the county pays the salaries of the judges and also the salaries of the courtroom support personnel.⁵⁹ As officials of the

51. *Bolin*, 114 Wash. 2d at 74, 785 P.2d at 807. See also WASH. REV. CODE ANN. § 51.08.180(1) (1990) (definition of “worker”).

52. *Bolin*, 114 Wash. 2d at 75, 785 P.2d at 807 (discussing *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash. 2d 550, 588 P.2d 1174 (1979)). In *Novenson*, the Washington Supreme Court determined that for an employment relationship to exist the employer must have the right to control the employee’s physical conduct in the performance of his duties and the consent of the employee to this relationship. *Novenson*, 91 Wash. 2d at ___, 588 P.2d at 1176. The *Bolin* court found that *Novenson* was not controlling in this action because, as a juror, the claimant served involuntarily. *Bolin*, 114 Wash. 2d at 73, 785 P.2d at 806.

53. *Bolin*, 114 Wash. 2d at 74, 785 P.2d at 807. See also N.D. CENT. CODE § 65-01-02(14) (1987 & Supp. 1989) (North Dakota Workers’ Compensation statute listing both the employments included under its provisions and those excluded).

54. *Bolin*, 114 Wash. 2d at 75, 785 P.2d at 807. See also WASH. REV. CODE ANN. § 51.12.020 (1990). The Washington workers’ compensation statute provides that “[t]his title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” *Id.*

55. *Bolin*, 114 Wash. 2d at 75, 785 P.2d at 807.

56. *Id.*

57. *Id.* In *Bolin*, the county pointed to a previous decision, *Kildall v. King County*, in which the Washington Supreme Court held that a county was not liable for the torts committed by a bailiff upon a juror because the county exercised no control over the bailiff. *Bolin*, 114 Wash. 2d at ___, 785 P.2d at 807 (citing *Kildall v. King County*, 120 Wash. 472, 207 P. 681 (1922)). In *Bolin*, the county urged the court to follow the same logic — that the juror is not an employee of the county because the county exercises no control over the juror. *Id.*

58. *Bolin*, 114 Wash. 2d at ___, 785 P.2d at 807-08.

59. *Id.* at ___, 785 F.2d at 807.

county, court judges exercise control over jurors within their courtrooms.⁶⁰ According to the *Bolin* court, this arrangement made jurors employees of the judges, and because judges are officials of the state and the county, a juror is also an employee of the county, at least for the purpose of seeking workers' compensation.⁶¹

In *Holmgren v. North Dakota Workers Compensation Bureau*,⁶² Janet Holmgren was injured when she fell down a flight of stairs while serving as a district court juror.⁶³ The North Dakota Workers' Compensation Bureau determined that Holmgren was not an employee because jury duty was a "civic responsibility rather than an employment."⁶⁴ On appeal, the North Dakota Supreme Court reviewed the Bureau's decision to determine whether the decision was in accordance with the applicable law.⁶⁵ Furthermore, the issue presented in the action was one of first impression in North Dakota: "Whether a juror is an appointed official eligible for workers compensation benefits."⁶⁶

The North Dakota Supreme Court began its review by examining the applicable law—in this case the Worker's Compensation

60. *Id.* at ___, 785 P.2d at 807-08. The court noted that although the county pays half of a judge's salary, a judge is not a servant of the county. *Id.* (citing *Kildall v. King County*, 120 Wash. 472, 207 P. 681 (1922)).

61. *Bolin*, 114 Wash. 2d at ___, 785 P.2d at 807-08.

62. 455 N.W.2d 200 (N.D. 1990).

63. *Holmgren v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 200, 201 (N.D. 1990).

64. *Id.* at 202. Holmgren argued that "although public officials do not fit the traditional concept of 'employee,' they are, nevertheless, specifically included as employees under our workers compensation law." *Id.* Holmgren contended that a juror was analogous to a legislator in that both provide an indispensable service to their respective branches of state government. Appellant's Brief at 8, *Holmgren v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 200 (N.D. 1990) (No. 890307). Also, the compensation for both the juror and the legislator is determined by statute and based on the number of days actually served. *Id.* Within the North Dakota statutory definition of "employee," legislators are specifically listed as an example of "all elective and appointed officials of the state," but jurors are not. *Id.* However, Holmgren argued that the list of examples included in the definition could not be read as exclusive. *Id.* Rather, the list should be construed as "representative" of all elective and appointed state officials. *Id.* Because a juror and a legislator provide similar services under similar conditions, the legislative intent was also to include jurors as employees of the state for purposes of workers' compensation. *Id.* See *Lucke v. Lucke*, 300 N.W.2d 231 (N.D. 1980) (term "includes" in statutory definition indicates "enlargement rather than limitation").

65. *Holmgren*, 455 N.W.2d at 201 (on appeal, court will affirm decision of administrative agency if agency's findings of facts are supported by a preponderance of evidence and its decisions and conclusions are sustained by the findings of facts). See N.D. CENT. CODE § 28-32-19 (1974 & Supp. 1989). See also *Lawson v. North Dakota Workers' Compensation Bureau*, 409 N.W.2d 344 (N.D. 1987) (supreme court looks to decision of the agency and not to the decision of the district court when reviewing the decision of administrative agency).

66. *Holmgren*, 455 N.W.2d at 201.

Act, found in Title 65 of the North Dakota Century Code.⁶⁷ Critical to the court was the construction of the term "employee," which the Act defines as "every person engaged in a hazardous employment under any appointment, contract of hire . . . express or implied, oral or written . . ."⁶⁸ The Act also includes under the definition of "employee" "[a]ll elective and appointed officials of this state and its political subdivisions . . ."⁶⁹

The court began its analysis by examining the statutory definition of "employee," more specifically, the term "appointed official."⁷⁰ The court noted that section 65-01-02 did not include a definition of "official"; however, the statute did provide examples of classes of officials.⁷¹ The court further noted that although jurors are not specifically listed as an example of an "official," the statute does not specifically list jury service among those employments excluded either.⁷² Therefore, to show that a juror was an "employee," and thus within the coverage of Title 65, the court

67. *Id.* at 202. See N.D. CENT. CODE § 65-01 (1987) (North Dakota Workers' Compensation statute).

68. *Holmgren*, 455 N.W.2d at 201; N.D. CENT. CODE § 65-01-02(14) (1987 & Supp. 1989). For an overview of states with statutes containing language the same as or similar to section 65-01-02(14) of the North Dakota Century Code, and considering the same issue as *Holmgren*, see Board of Commissioners v. Evans, 99 Colo. 83, 60 P.2d 225 (1936) (employee is every person in service of state or county under appointment or contract of hire); *Jeansonne v. Parish of East Baton Rouge*, 354 So.2d 619 (La. Ct. App. 1977) (provisions of workers' compensation law applies to every person in service to state or political subdivision under an appointment or contract of hire); *Lockerman v. Prince George's County*, 281 Md. 195, 377 A.2d 1177 (1977) (employees subject to Workmen's Compensation Act include persons in service of any political subdivision under any contract for hire and every official whether appointed or elected); *Jochen v. County of Saginaw*, 363 Mich. 648, 110 N.W.2d 780 (1961) (employee defined as every person in service to state or county under appointment or contract of hire); *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966) (employee means every person engaged in an employment under any appointment or contract of hire); *Industrial Commission v. Rogers*, 122 Ohio St. 134, 171 N.E. 35 (1930) (employee is any person in service to state or county under appointment or contract of hire).

69. N.D. Cent. Code § 65-01-02(14)(1) (1987 & Supp. 1989). For those states with statutes containing language the same or similar to section 65-01-02(14)(1) of the North Dakota Century Code and deciding the same issue as *Holmgren*, see *Lockerman v. Prince George's County*, 281 Md. 195, 377 A.2d 1177 (1977) (employee includes every official or officer of state or political subdivision, whether elected or appointed); *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966) (employee includes all officers of state or political subdivisions); *Bolin v. Kitsap County*, 114 Wash. 2d 70, 785 P.2d 805 (1990) (employee includes all officers of the state, counties, or political subdivisions).

70. *Holmgren*, 455 N.W.2d at 202.

71. *Id.* See N.D. CENT. CODE § 65-01-02(14)(a)(1) (1987 & Supp. 1989) ("official" includes "[a]ll elective and appointed officials of this state and its political subdivisions, including municipal corporations and including the members of the legislative assembly, all elective officials of the several counties of this state, and all elective peace officers of any city").

72. *Holmgren*, 455 N.W.2d at 202. See N.D. CENT. CODE § 65-01-02(14) (1987 & Supp. 1989) (North Dakota workers' compensation statute does not include as "employee" person whose employment is either casual or illegal; also excludes the employer's spouse or children presently living with employer).

had to first find that a juror was an appointed official.⁷³

To analyze whether a juror is an appointed official and therefore an employee, the court used the criteria first set out in *State v. Jorgenson*.⁷⁴ The *Jorgenson* court determined that state officials: 1) are elected or appointed to their positions; 2) receive their compensation from a public treasury; 3) perform duties which are permanent in nature; 4) have their duties set out by statute; and 5) are connected to the management or direction of state government.⁷⁵ The court then applied the *Jorgenson* test juxtaposed with the court's past practice of construing the workers' compensation law liberally to extend benefits to the injured worker, if within reason.⁷⁶

The court began its analysis with the premise that appointed officials were those individuals "designated to or selected for public office."⁷⁷ The court noted that the process by which an individual becomes a juror is fixed by statute.⁷⁸ The selection process begins when the prospective jurors are drawn from the general population and instructed to appear before the court.⁷⁹ From the available qualified jurors, a jury panel is selected and subjected to

73. *Id.* When the North Dakota Worker's Compensation Bureau determined that Holmgren was not an employee of the state while on jury duty, the Bureau necessarily determined that a juror was not an appointed official. *Id.*

74. *Jorgenson*, 25 N.D. 539, 142 N.W. 450 (1913). The *Jorgenson* court held that appointees to the State Board of Tax Commissioners were state officers so that the Board's salaries and budget expenses could be included in the general appropriations bill. *Id.* at ___, 142 N.W.2d at 456. As a test, the court adopted criteria previously used by the Colorado Supreme Court, in *Parks v. Commissioners*, 22 Colo. 86, 43 P. 542 (Colo. 1896) to show that the tax commissioners held administrative powers equal to that of other state officers. *Jorgenson* at ___, 142 N.W.2d at 456 (citing *Parks v. Commissioners of Soldiers & Sailors Home*, 22 Colo. 86, 43 P. 542 (1896)).

75. *Holmgren*, 455 N.W.2d at 202 (citing *State ex rel Birdzell v. Jorgenson*, 25 N.D. 539, 142 N.W.2d 450 (1913) (quoting *Parks v. Commissioners of Soldiers' & Sailors' Home*, 22 Colo. 86, 43 P. 542 (1896))).

76. *Holmgren*, 455 N.W.2d at 205. See *Syerson v. North Dakota Workmen's Compensation Bureau*, 406 N.W.2d 688 (N.D. 1987) (holding was consistent with the court's long tradition of extending workers' compensation benefits to all those who can fairly be brought within the scope of coverage). For an overview of the North Dakota Supreme Court's tradition of a liberal reading of Title 65, see generally *Lawson v. North Dakota Workmen's Compensation Bureau*, 409 N.W.2d 344 (N.D. 1987) (workers' compensation law should be liberally construed to favor the injured worker if possible); *Claim of Bromley*, 304 N.W.2d 412 (N.D. 1981) (supreme court will interpret workers' compensation law liberally); *Morel v. Thompson*, 225 N.W.2d 584 (N.D. 1975) (workers' compensation statute is to be construed liberally and reasonably).

77. *Holmgren*, 455 N.W.2d at 202 (citing *State ex rel. Poole v. Peake*, 18 N.D. 101, ___, 120 N.W. 47, 49 (1909) (broad reading of term "appointments" implies not only designation to an office or a service, but also the privileges which come with the appointment)).

78. *Id.* *Peake* at ___, 120 N.W. at 49.

79. *Id.* at 202-03. See N.D. CENT. CODE § 27-09.1-05 (1987) (jury commission for each county compiles master list of all lists of voters in the county); *id.* at § 27-09.1-06 (jury commission maintains a master jury wheel and places into it the names or numbers of prospective jurors); *id.* at § 27-09.1-07 (upon order of court, jury commission shall randomly draw from master wheel names or numbers of prospective jurors).

voir dire.⁸⁰ Those jurors chosen to serve must then swear an oath administered by the court.⁸¹ Consequently, by a broad reading of the applicable statutes, the court found that the selection of a juror to jury service is commensurate to an appointment to an official position.⁸²

With the second part of the *Jorgenson* test, the court turned its attention to the source of the jurors' compensation.⁸³ Section 27-09.1-14 of the North Dakota Century Code provides that for their services jurors receive from the state or the county mileage and a compensation of twenty-five dollars.⁸⁴ Since it is the state which pays the jurors, and the source of the compensation is the public funds, the second prong of the test was satisfied.⁸⁵

The *Jorgenson* criteria also required that the duties of the position be of a permanent and continuous nature.⁸⁶ Both the North Dakota and United States Constitutions guarantee the right of trial by jury, thus insuring the continuity of the juror's position, notwithstanding that an individual juror may serve for only a brief period.⁸⁷ Also, section 27-09.1-15 of the North Dakota Century Code provides that a juror's services are required by the state throughout the proceedings until its completion, thereby giving the duties some indication of stability.⁸⁸ As a result, the court decided that the duties of a juror, like those of a public official, are

80. *Id.* See N.D. CENT. CODE § 28-14-03 (1987) (when action comes to trial, clerk draws from jury box ballots naming the jurors, proceeding until jury panel is assembled or ballots are used up). See also *id.* at § 28-14-06 (listing of grounds for taking challenges for cause); *id.* at § 29-17-03 (clerk prepares the jury box in a criminal trial); *id.* at § 29-17-05 (manner of drawing the jury in a criminal trial); *id.* at § 29-17-33 (challenges for cause in criminal cases defined and classified); *id.* at § 29-17-46 (peremptory challenges in criminal cases).

81. See N.D. CENT. CODE § 28-14-08 (1974) (juror oath in a civil case); *id.* at § 29-17-12 (number of jurors in a criminal trial and method of swearing oath).

82. *Holmgren*, 455 N.W.2d at 205-06.

83. *Id.* at 203 (citing *Jorgenson*, 25 N.D. 539, ___, 142 N.W. 450, 456 (1913)).

84. See N.D. CENT. CODE § 27-09.1-14 (1974 & Supp. 1989) (state pays mileage and compensation for jurors at district court sessions, while county pays the jurors compensation and mileage at county court sessions). See also 67 C.J.S. *Officers* § 8 (1978) (source of compensation relevant in determining whether position is employment or office).

85. *Holmgren*, 455 N.W.2d at 202.

86. *Id.* at 203 (citing *Jorgenson*, 25 N.D. 539, ___, 142 N.W. 450, 456 (1913)). See *Wargo v. Industrial Comm'n*, 58 Ill. 2d 234, 317 N.E.2d 519 (1974) (position of judge entailed duties of a continuous nature, without regard to person actually holding it). See also 67 C.J.S. *Officers* § 8 (1978) (inherent in the word "public office" is the idea that the duties performed by the holder be of a permanent character, not transitory, and that duties and office will long survive the current holder).

87. U.S. CONST. amend. VI. (the accused in a criminal trial enjoys right to speedy trial by impartial jury); U.S. CONST. amend. VII. (right of trial by jury is preserved in civil proceedings); N.D. CONST. art. I, § 12 (1980) (in criminal prosecutions, accused has right to speedy and public trial). See *Griggs v. Harding County*, 3 N.W.2d 485 (S.D. 1942) (statute created office of county highway superintendent imposing duties and powers which were continuing and permanent in nature).

88. *Holmgren*, 455 N.W.2d at 203.

also of a permanent character.⁸⁹

Part four of the criteria set out in *Jorgenson* required that the duties of the public office be set out by statute.⁹⁰ The court recognized that the position of juror finds its source in both the federal and state constitutions, and statutes further define the function and duties of the juror.⁹¹ Based on these observations, the court found the fourth part of the *Jorgenson* test easily satisfied, given that the North Dakota Constitution created the position of juror and the North Dakota Century Code defined its duties.⁹²

The fifth part of the *Jorgenson* test requires that a state officer's duties must be connected in some way to the direction or management of government; more specifically, a state officer must exercise some portion of the state's sovereign power.⁹³ Sovereign power consists of either "enacting, executing or administering the law."⁹⁴ North Dakota Century Code section 1-01-03(7) provides that one way the state may exercise its sovereign power may be through the decisions of the courts in enforcing the common law.⁹⁵ As an integral part of the judicial process, the jury shares with the court the grant of sovereign power, although the balance of that power favors the court.⁹⁶ Recognized as the sole fact finder, the jury, with its verdict, establishes the rights of the parties

89. *Id.*

90. *Id.* (applying *State v. Jorgenson*, 25 N.D. 539, ___, 142 N.W. 450, 456 (1913)). See also 67 C.J.S. *Officers* § 9 (1978) (an office is the result of a constitutional or statutory directive, or by a grant of power bestowed upon a political subdivision by the legislature).

91. See U.S. CONST. amend. VI, VII (federal constitutional right to jury trial); N.D. CONST. art. I, § 13 (1974) (state constitutional right to a jury trial). For the duties of the juror see N.D. CENT. CODE § 29-17-12 (1974 & Supp. 1989) (jurors must swear oath to make true deliverance between state and defendant and to give true verdict according to evidence presented them); *id.* at § 28-14-08 (jurors in civil cases must swear oath to do the same); *id.* at § 29-21-28 (jurors in criminal case under duty not to discuss matters of the case; nor can they form or express opinion until case is submitted to them); *id.* at § 28-14-16 (same applies for jurors in civil cases).

92. *Holmgren*, 455 N.W.2d at 203.

93. *Id.* at 204. See also *State v. Jorgenson*, 25 N.D. 539, ___, 142 N.W. 450, 456 (1913). The sovereign power exercised by the state officer is defined and limited by statute. *Id.* The state officers' duties must involve the operations of both the state and the general public. *Id.* (quoting 36 CYCLOPEDIA OF LAW AND PROCEDURE 852 (1910)). See also 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 56.20 at 9-270 (1986). Professor Larson also distinguishes an official from an employee by the former's exercising of some portion of the sovereign power. *Id.* See also 67 C.J.S. *Officers* § 8 (1978) (employment distinguished from office by a grant of portion of state's sovereign power, exercised virtually free of outside control).

94. See *State ex rel v. King*, 395 So.2d 6 (Ala. 1981). In *King*, the Alabama Supreme Court found inherent in the term "public official" the authority to exercise some portion of the state's sovereign power, either by "enacting, executing or administering the laws." *Id.* at 7. Because a captain in a fire department did not exercise any of these duties, the court held that the position was not one of state officer. *Id.* at 8.

95. N.D. Cent. Code § 1-01-03(7) (1987).

96. *Holmgren*, 455 N.W.2d at 204.

in relation to each other and to the state.⁹⁷ Consequently, as an indispensable part of the judicial process, a jury, like the judge, carries out its grant of sovereign power through the administration of justice.⁹⁸

Having satisfied the fifth and final prong of the test for a public official as set out in *Jorgenson*, the court next examined what effect, if any, two North Dakota Attorney General opinions had upon the criteria.⁹⁹ The opinions set out the difference between "employees" and "officials" of the state in the context of eligibility for membership in the state's Employees Retirement System.¹⁰⁰ The opinions supplemented the *Jorgenson* criteria by adding to it the concepts, "importance, dignity and independence."¹⁰¹ Because the expansion of the *Jorgenson* criteria is consistent with the law in other jurisdictions, the North Dakota court adopted the guidelines to be used to determine public officer status.¹⁰² The court then concluded that because the right to a jury trial is funda-

97. See *Erickson v. Schwann*, 453 N.W.2d 765 (N.D. 1990) (court stated it would not invade jury's expertise in weighing evidence and assessing credibility of witnesses). *But cf.*, *Industrial Commission of Ohio v. Rogers*, 122 Ohio St. 134, 171 N.E. 35 (1930) (though jurors find facts and render verdict, the finality of a verdict is dependent upon entry by the court).

98. *Holmgren*, 455 N.W.2d at 204.

99. See N.D. Op. Att'y Gen. 304 (March 8, 1966) (reiterating *Jorgenson* as the criteria for determining whether employment or office); N.D. Op. Att'y Gen. 301, 302 (June 13, 1966) (*Jorgenson* criteria for determining whether position is employment or office, but adding "importance, dignity, and independence").

100. N.D. Op. Att'y Gen. 304 (March 8, 1966); N.D. Op. Att'y Gen. 301 (June 13, 1966).

101. N.D. Op. Att'y Gen. 301, 302 (June 13, 1966). The June 13 opinion set out the test for determining whether or not the position is that of an officer or employment as follows:

1. Official designation by the Legislature;
2. Delegation and possession of sovereign power;
3. Tenure and permanency of duties;
4. Creation and designation of powers and duties by law;
5. Oath or bond; and
6. Importance, dignity and independence.

Id.

See also 67 C.J.S. *Officers* § 10 (1978) (what distinguishes officer from employee is the "greater importance, dignity, and independence of the position . . . and the fact that the officer exercises part of the state's power virtually unencumbered by a superior authority). See also 1C A. LARSON, *WORKMEN'S COMPENSATION LAW*, § 56.20 at 9-270 (1985). Professor Larson distinguishes an official from an employee by both the official's exercising a portion of sovereign power and the "importance, dignity and independence of his position."

Id. While admitting that both tests suffer from an unavoidable vagueness, Professor Larson adopts as more fundamental and workable the "importance, dignity and independence" test. *Id.*

102. *Holmgren*, 455 N.W.2d at 204. See also *Meiland v. Cody*, 359 Mich. 78, 110 N.W.2d 336 (1960) (because officer required to take oath and put up bond, the position is distinguished from "employee" in the position of officer's greater importance, dignity, and independence); *Vander Linden v. Crews*, 205 N.W.2d 686 (Iowa 1973) (position of Secretary of Pharmacy Examiners "office" because duties must be performed independent of outside or superior control other than the law itself); *Steece v. State Dept. of Agriculture*, 504 So.2d 984 (La. Ct. App. 1987) (one factor court must consider to determine whether person is "public officer" or "employee" is whether position carries high degree of dignity and independence).

mental to the American legal system and the preferred method of fact-finding in criminal cases, the contribution of the juror to the sovereign function of administering justice is both important and filled with dignity.¹⁰³

However, a more difficult question for the court was whether a juror exercised the same kind of autonomy maintained by a public officer when discharging his duties.¹⁰⁴ The court noted that the jury does not mete out justice in an unrestrained manner; rather, the law, through the court, provides the boundary within which the jurors must operate.¹⁰⁵ That the holder of the position is held accountable to a superior does not mean the position is one of employment rather than an office and should not be the controlling factor.¹⁰⁶ As the position of juror is created and defined by law, it is the law that controls the performance of the same.¹⁰⁷ However, like the public officer, also created by and defined by law, the fact that the jurors' performance is determined by the law fails to remove from them the power to independently weigh, examine and act upon the evidence.¹⁰⁸

To flesh out this contention, the supreme court acknowledged that because jurors ultimately retain the sole authority to deliberate and decide the issues, they are an independent entity within the legal system.¹⁰⁹ The jury is the single unit of the judicial process with the power to measure both the veracity of the witness and the preponderance of the evidence.¹¹⁰ Also, the role of the

103. See REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM IN THE FEDERAL COURTS, 26 F.R.D. 409 (1961) (noting that it is well-established that jurors occupy an important position in the administration of justice). See also *State v. Kranz*, 353 N.W.2d 748 (N.D. 1984). An important safeguard against the "overzealous prosecutor" and the "biased, or eccentric judge" is the fundamental right to a jury trial by one's peers. *State v. Kranz*, 353 N.W.2d 748, 751 (N.D. 1984) quoting *Duncan v. Louisiana*, 391 U.S. 145, 149, 156 (1968).

104. *Holmgren*, 455 N.W.2d at 204-05.

105. See N.D. Op. Att'y Gen. 301 (June 13, 1966). The powers and duties of the Securities Commissioner demonstrates that he is an officer of the state, and the fact that the Commissioner is held accountable to a superior does not change him from an officer to an employee. *Id.* at 303. See also 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 56.20 at 9-271 (1985). In his treatise, Professor Larson explains that to distinguish an official from an employee, the independence of the position is an important circumstance to consider, but it should not be the controlling criteria. *Id.* It is characteristic of an official to carry out his duties with a certain degree of autonomy, whereas the employer maintains the right to control every feature of the employer's work. *Id.* However, very few government officials do not answer to some higher authority. *Id.*

106. 67 C.J.S. *Officers* § 10 (1978).

107. *Holmgren*, 455 N.W.2d at 205.

108. *Id.*

109. *Id.*

110. See *Construction Assocs., Inc. v. Fargo Water Equipment Co.*, 446 N.W.2d 238 (N.D. 1989) (jury determines credibility of expert witnesses and weight given to their testimony); *Erickson v. Schwan*, 453 N.W.2d 765 (N.D. 1990) (judge will not remove from jury its duty to weigh evidence or to assess credibility of witnesses).

juror in civil cases is to decide the issues of fault, liability and damages; in a criminal trial, guilt or innocence.¹¹¹ The court also found noteworthy the practice of the courts to defer to the jury's discretion in those portions of the proceedings traditionally entrusted to them, and their reluctance to overturn a jury verdict.¹¹² Moreover, fearing damage to the effectiveness of the jury, courts will prevent unrestricted examination into the mental processes by which the jurors reached their final verdict.¹¹³ Therefore, by allowing jurors to perform their duties restrained only by the law itself, the jury verdict is preserved and protected; that degree of independence is characteristic of a public official.¹¹⁴

Consequently, the North Dakota Supreme Court found that the position of juror satisfied the *Jorgenson* test, along with the additional "importance, dignity and independence test."¹¹⁵ Because a juror is a public official and a public official is an "employee" under Title 65, the court further held that a juror is also an "employee" under the Act and thus entitled to claim workers' compensation benefits.¹¹⁶

The result reached by the court in *Holmgren* may have been a natural expansion of the Workers' Compensation Act.¹¹⁷ The holding was consistent with the court's tradition of a broad and liberal reading of the Act.¹¹⁸ That tradition in turn is consistent with a strong policy suggesting that for the state to prosper its

111. See *Kavadas v. Lorenzen*, 448 N.W.2d 219 (N.D. 1989) (in civil cases jury awards damages, apportioning fault and assigns liability); *State v. Huber*, 361 N.W.2d 236 (N.D. 1985), cert. denied, 471 U.S. 1106 (1985) (purpose of the jury in criminal trial is to find facts and determine defendant's guilt or innocence).

112. *Holmgren*, 455 N.W.2d at 205. See also *Okken v. Okken*, 325 N.W.2d 264 (N.D. 1982) (under a motion for judgment n.o.v., trial court must give proper deference to jury's evaluation of evidence and its judgment of credibility of witnesses).

113. See *City of Bismarck v. Bauer*, 409 N.W.2d 90 (N.D. 1987) (juror not competent to testify to anything said or done during jury deliberations which might have influenced his decision); *Andrews v. O'Hearn*, 387 N.W.2d 716 (N.D. 1987) (to force jury to justify its verdict would have a chilling effect upon the free flow of discussion between jurors during deliberations).

114. *Holmgren*, 455 N.W.2d at 205.

115. *Id.*

116. *Id.*

117. See 99 C.J.S. WORKMEN'S COMPENSATION § 27 (1958) (compensation laws should be construed to extend coverage to all employments which can reasonably be brought within them).

118. See *Syverson v. North Dakota Workmen's Compensation Bureau*, 406 N.W.2d 688, 690 (N.D. 1987) (holding was consistent with the court's long tradition of extending workers' compensation benefits to all those who can fairly be brought within the scope of coverage); *Lawson v. North Dakota Workmen's Compensation Bureau*, 409 N.W.2d 344, 347 (N.D. 1987) (because intent of Title 65 is to protect injured workers, its provisions should be liberally construed in workers' favor); *Claim of Bromley*, 304 N.W.2d 412, 415 (1981) (provisions of Workmen's Compensation Act are to be construed liberally to benefit all who can be fairly brought within them).

work force must prosper.¹¹⁹ For the work force to prosper workers must be compensated for work-related injuries.¹²⁰ Accordingly, to further public policy, a juror becomes an appointed public official of the state, thus an employee of the state, and is now eligible to receive benefits under the Act for a work-related injury.¹²¹

Furthermore, the *Holmgren* court employed an analysis especially well suited to the outcome, a test structured so as to set out specific elements, but couched in broad terms so as not to unnecessarily limit its application.¹²² Additionally, under the *Jorgenson* criteria each prong of the test is beneficial in distinguishing an office from an employment or an officer from an employee, but no single factor is controlling.¹²³ The opposite is also true: The failure to establish all five parts of the criteria does not necessarily prevent the finding of an office.¹²⁴ With the *Jorgenson* criteria the court provided itself with the kind of discretion necessary to keep expanding the coverage of the Act as the various employment situations present themselves.¹²⁵

But the *Jorgenson* analysis perhaps provided the court with too much discretion, now raising the question of how will the test be applied the next time and with what result.¹²⁶ This very issue was presented by Justice Vande Walle in his dissent in *Holmgren*.¹²⁷ Justice Vande Walle noted that the majority, in its analy-

119. See N.D. CENT. CODE § 65-01-01 (Supp. 1989) (providing that public policy demands that employees receive compensation for their work-related injuries).

120. *Id.*

121. *Holmgren*, 455 N.W.2d at 205.

122. *Id.* at 203 (citing *State ex rel Birdzell v. Jorgenson*, 25 N.D. 539, ___, 142 N.W. 450, 456 (1913) (officers are elected or appointed; are compensated through public treasury; duties are of a continuing nature; officer exercises state's sovereign power; duties related to direction of state government) (quoting *Parks v. Commissioners of Soldiers' & Sailors' Home*, 22 Colo. 86, 43 P. 542 (1896))).

123. *Holmgren*, 455 N.W.2d at 205 (quoting 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 56.20 (1986) (in distinguishing office from employment, test of "independence" helpful but not controlling)).

124. *E.g.*, 67 C.J.S. *Officers* § 8 (1978) (not necessary that all characteristics of office or officer be present to make one an officer).

125. *Holmgren*, 455 N.W.2d at 205.

126. *Id.* at 206 (Vande Walle, J., dissenting).

127. *Id.* In his dissent in *Holmgren*, Justice Vande Walle noted that the majority cited to *Bolin v. Kitsap County*, but did not rely upon it. *Id.* (citing *Bolin v. Kitsap County*, 114 Wash. 2d 70, 785 P.2d 805 (1990) (finding a juror to be an employee of the county)). Justice Vande Walle also noted that only one other court besides the *Bolin* court had extended benefits to jurors, *Industrial Comm'n of Ohio v. Rogers*, but the rationale used by the Ohio court had been rejected by all other jurisdictions. *Id.* (citing *Industrial Commission of Ohio v. Rogers*, 122 Ohio St. 134, 171 N.E. 35 (1930)). According to Justice Vande Walle, the *Bolin* court would reach the opposite result were it to apply North Dakota law. *Id.* As the *Bolin* court noted in its opinion, the Washington statute is distinguished from those of other jurisdictions because it lists only those employments excluded, whereas the North Dakota statute lists both included and excluded employments. *Id.* By including both excluded and included employments, the North Dakota Workers' Compensation Act limited the court's

sis, failed to address the notion that public officials, whether appointed or elected, assume their office voluntarily, whereas jurors are compelled by law to perform their services.¹²⁸ So noted by other jurisdictions was the lack of the right of control over the manner in which the jurors exercised their duties and the lack of mutual consent between the jurors and the county or state, elements essential to establish an employer-employee relationship—whether the state defined “employee” to include an appointment or a contract for hire.¹²⁹ The dissent’s primary contention was that without consent there was no contract, and without a contract there was no employment.¹³⁰

The dissent, however, did recognize that because the state compels it, jury service is considered a civic responsibility, and therefore the juror should be compensated if injured while on jury duty.¹³¹ But the law by which a juror may receive benefits should not be one of judicial legislation.¹³² Rather, the task should fall to the lawmakers to provide a specific statute including jurors within the coverage of the Act, such as the Legislature did in 1985 when it passed into law section 65-06.2-03, making available Workers’ Compensation coverage to prison inmates and those providing court-ordered work.¹³³ Since a juror is analogous to an inmate in that neither serves voluntarily, it should be appropriate for the legislature to provide so by a specific statute.¹³⁴

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tradition of liberal construction principles to instances where employees have been clearly identified. *Id.* Justice Vande Walle brought attention to the fact that only a few of the court decisions in the area of Title 65 concerned the statutory definition of employee. *Id.* at 206-07 (Vande Walle, J., dissenting).

128. *Holmgren*, 455 N.W.2d at 206 (Vande Walle, J., dissenting). See N.D. CENT. CODE § 27-09.1-01 (1974) (intent of legislature that “all qualified citizens have the opportunity . . . to be considered for jury service . . . and an obligation to serve . . . when summoned for that purpose”). See *id.* at § 27-09.1-16 (Supp. 1989) (penalties for failure to appear for jury duty).

129. See *Board of Comm’rs of Eagle County v. Evans*, 99 Colo. 83, 60 P.2d 225 (1936) (employee under appointment or contract of hire); *Lockerman v. Prince George’s County*, 281 Md. 195, 377 A.2d 1177 (1977) (employee under contract of hire or appointed); *Jochen v. Saginaw County*, 363 Mich. 648, 110 N.W.2d 780 (1961) (employee under appointment or contract of hire); *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966) (employee under appointment or contract of hire).

130. *Holmgren*, 455 N.W.2d at 206 (Vande Walle, J., dissenting).

131. *Id.*

132. See *id.* at 206. Justice Vande Walle noted that if the court were forced to participate in judicial legislation it should do so in a general manner. *Id.* At the very least this would avoid a repetition of what Justice Vande Walle referred to as the “tortured analysis of the term ‘public official.’” *Id.*

133. See N.D. CENT. CODE § 65-06.2-03 (Supp. 1989). The North Dakota Century Code provides that “[a]ny county or city, by resolution of the governing body, may elect to cover its inmates with workers’ compensation benefits in accordance with this chapter.” *Id.*

134. *Holmgren*, 455 N.W.2d at 207 n.1 (Vande Walle, J., dissenting). See also Note, *A Time For Recognition: Extending Workmen’s Compensation Coverage to Inmates*, 61

N.D.L. REV. 403 (1985). The author notes that most workmen's compensation statutes require, as a prerequisite for coverage that an employment relationship must exist, with a "contract for hire" being a necessary element of such a relationship. *Id.* at 406 n.19 (citing 1C A. LARSON, WORKMEN'S COMPENSATION LAW § 47.10 (1980)). However, because an inmate enters the relationship with the state or political subdivision involuntarily and does not consent to the work he performs, the inmate is incapable of entering into a true "contract for hire," and therefore has traditionally been barred from compensation for work-related injuries. *Id.* at 406-07. To remedy this inequity and for other public policy reasons, the North Dakota legislature enacted § 65-06.2-03, giving political subdivisions the option to provide inmates with workers' compensation benefits. *Id.* at 424-25.

