9-23-2019

Schoeffel v. Thorne Reaserch, INC Appellant's Brief Dckt. 47101

Electronically Filed
9/23/2019 12:59 PM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

CONNIE SCHOEFFEL,

Claimant/Appellant,

vs.

THORNE RESEARCH, INC.

Employer/Appellant,

and

IDAHO DEPARTMENT OF LABOR

Respondent/Appellee

SUPREME COURT DOCKET NO. 47101-2019

Industrial Commission No. 4201013407-2019

APPELLANTS CONNIE SCHOEFFEL AND THORNE RESEARCH, INC.'S OPENING BRIEF

Appeal from the Idaho Industrial Commission

Chairman Thomas P. Baskin presiding

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

In this case the employer, Thorne Research, Inc., and the employee, Connie Schoeffel, entered into a written agreement whereby Schoeffel agreed to work for Thorne up until Thorne closed out its business in Idaho. Thorne agreed to pay Schoeffel additional amounts over and above her wages in consideration for, among other things, her relinquishment of the right to seek other employment until the close of Thorne's business. Both parties agreed that the additional payments were not for severance of Schoeffel's employment. The Department of Labor concluded that the payments were for severance of her employment and the Idaho Industrial Commission agreed. The issue on appeal is whether the payments to the employee were severance payments under Idaho Code Section 72-1367(4), or whether they were not.

B. STATEMENT OF FACTS

Thorne Research, Inc. ("Thorne") operated a nutritional supplements manufacturing facility which also served as its worldwide headquarters, in Dover, Idaho, for over three decades. Thorne employed 270 people at the facility.

Thorne's Transition

In 2016, Thorne announced that it planned to move its headquarters from Idaho to South Carolina. R. Ex. p. 28, ¶ 4; Ex. p. 31, ¶ 4. Although a number of jobs would transfer to the new location, some jobs would be eliminated. No employment positions would remain at the current plant in Idaho.

Because Thorne was building a new facility in South Carolina that would not be operational to produce any Thorne products until June of 2018, it was critically important that Thorne was able to continue to maintain manufacturing in their Dover facility while the new facility was coming online in South Carolina. Tr. p. 23, L. 13-18. To manage the two year transition and meet this key business objective, Thorne implemented two programs – an employee relocation program for those employees who would be relocating from Idaho to South Carolina, and an employee retention program for those employees who would agree to stay with Thorne until the employee's transition date (the end of the transition period would be determined by the company). R. Ex. p. 29, ¶ 5; Tr. p. 23, L. 4-25, p. 24, L. 1, 15-23.

The employee retention program offered incentives to employees to stay with the company, even though the employees were aware that they would certainly be unemployed at some date certain. Tr. p. 23:18-21. The agreements with those employees to remain with Thorne enabled the company to continue manufacturing product at a crucial time – at the only facility available for manufacturing from 2016 to 2018 (the Idaho plant). *Id*.

The employee retention program was described in detail to Thorne's employees beginning in December of 2016. *See* R. Ex. p. 35. The Employee Retention Program Summary document was circulated to employees the week after the December 2016 announcement was made about the company's move to South Carolina. Tr. p. 31, L. 4-18. In addition, the company began having seminars for employees who were choosing to participate in the employee relocation program, and for employees who were choosing to participate in the employee retention program. *Id*. The

company also had a representative from the Department of Labor come to Thorne's Idaho headquarters to explain to employees the process of filing for unemployment. *Id*. at p. 36, L. 3-11.

The retention program was designed to encourage employees to remain with Thorne in Idaho through its transition and Idaho shut-down – even with dwindling staff and a certainty of no further job prospects with Thorne. R. Ex. p. 29, ¶ 5.

Schoeffel's Employment, Bargained-for Compensation, & Lay Off

Ms. Connie Schoeffel ("Schoeffel") worked at Thorne's manufacturing plant and headquarters from 2012 until September 2018. She worked as a kitchen manager. In this position, she provided meals to the employees at the plant. R. *Id*.; Tr. p. 28, L. 16-20.

When Thorne announced its intention to move to South Carolina, Schoeffel had to decide whether to move with the company or not. Schoeffel elected to participate in Thorne's employee retention program, and the terms of her agreement with her employer were reduced to a three-page written contract. *See* R. Ex. p. 32, ¶ 45, p. 37-39. Contrary to the Idaho Industrial Commission's factual findings and the Appeals Examiner's findings of fact, the Employee Retention Program Summary document distributed in 2016 was not part of the contract. *See id*.; R. p. 6, ¶¶ 4, 6. The contract terms are contained only within the four corners of Schoeffel's three-page agreement. *See*, Tr. p. 30, L. 23-25; p. 31, L. 1-18; R. Ex. p. 29 ¶¶ 5-6, p. 31 ¶ 5, and p. 37-39.

Under the terms of Schoeffel's contract with Thorne, she received bargained-for compensation which was not severance pay or wages, and was not a payment made simply because her employment was ending. *See* R. Ex. p. 29-30, ¶¶ 7-8; Ex. p. 32 ¶¶ 5-6; *see also* Tr. p. 23, L. 2-5 (Thorne General Counsel Kim Pearson testified, "It was never conveyed as a severance

payment. It was never conveyed as a retention bonus…the agreement speaks for itself. It refers to – multiple times – as bargained-for compensation.").

The contract provided for payments to Schoeffel which were conditioned upon four promises Schoeffel made, or rights Schoeffel gave up in exchange: (1) to give up her right to terminate her employment at any time, and to give up the right to secure other employment before the transition date specified by Thorne, (2) to keep Thorne's proprietary business information, manufacturing processes, formulations, customer lists, and trade secrets confidential, (3) to refrain from disparaging Thorne in the community or online, and (4) to give up any employment-related claims she may have had against Thorne. Any payment to Schoeffel was expressly conditioned upon her agreement to (and satisfaction of) each of the four conditions. *See* R. Ex. p. 38 ¶ 6; *see also* ¶¶ 1-4; Tr. p. 29, L. 13 to p. 30, L. 4; Tr. p. 34, L. 20 to p. 35, L. 11.

As General Counsel for Thorne Research, Kim Pearson testified at the Appeals Examiner Hearing,

> [Payment] was made for agreeing to the obligations of paragraphs 1-4 [of the contract]. She was giving up something that legally she did not have to do. Those were the obligations of paragraphs 1-4. [Thorne] was giving up something [Thorne] didn't have to do…these are obligations outside of the employee/employer relationship in terms of wages and consideration of prior services.
>
> …
>
> Severance is in consideration of prior services. This was not severance as this money was not paid to [Ms. Schoeffel] in consideration of her prior services as our kitchen manager.
>
> …
>
> It was paid for agreeing to stay until her transition date, for not disparaging Thorne on any – for example – social media, for agreeing to maintain confidentiality and for her releasing any human

> resources related claim, whether federal or state, that she might have against Thorne up until the day of her termination."

Tr. p. 36, L. 12-25, p. 37, L. 1-6, 9-16.

Schoeffel was informed by Thorne that the payments she was to receive were not severance payments or wages, and were not reportable for purposes of unemployment benefits. R. Ex. p. 32, ¶ 6; Ex. p. 29-30, ¶ 7; Tr. p. 42, L. 6-25.

C. PROCEDURAL FACTS

Employment History and Application for Benefits

Thorne decided to eliminate Schoeffel's position, and the company terminated her employment. September 28, 2018 was her last day of employment. R. Ex. p. 31, ¶ 3; Ex. p. 28-29, ¶¶3-4; Ex. p. 41, ¶5; Ex. p. 43-44. She applied for unemployment benefits on October 1, 2018, and received a weekly benefit amount of $414 per week, for four weeks. R. Ex. p. 3, 27, 32. On November 16, 2018, the Idaho Department of Labor issued an Income Determination and Overpayment Determination, which found that pursuant to Idaho Code Sections 72-1312 and 72-1367(4), Schoeffel was overpaid and was not entitled to benefits. R. Ex. p 24-27.

Protest of Overpayment Determination and Repayment Determination

Schoeffel timely filed her protest on November 28, 2018. R. Ex. p. 15-22. Following a hearing on January 17, 2019, the Appeals Examiner issued its initial decision on January 25, 2019 granting benefits to Schoeffel. R. p. 5-6, 15-19. The Appeals Examiner found that Schoeffel's case was similar to the factual scenario described in *Parker vs. Underwriters Laboratories, Inc.*,

140 Idaho 521, 96 P.3d 618 (2004), and held that Schoeffel's compensation was not reportable income for unemployment benefits purposes. R. p. 17.

The Department filed a Request for Reconsideration on January 28, 2019, which it did not serve on Schoeffel, her counsel, or Thorne. R. p. 92-93, 2-3. The reconsideration request stated that because Schoeffel was receiving a monthly payment, and such payment was a result of a "transition," that the transition was for termination of employment. R. p. 93. The request noted that over 100 other employees did not receive the "incentive," (presumably referring to those employees who opted for the relocation program) and thus, the payment is necessarily predicated on severance. *Id*. The Request for Reconsideration also argued that the 2005 amendment to I.C. § 72-1367(4) ensured that such compensation as found in *Parker*, was to be deemed wages. R. p. 88, 93.

Four days later, the Appeals Examiner reversed her decision and issued a Revised Decision February 1, 2019, denying benefits. R. p. 85-91. The Revised Decision held that Schoeffel relied upon information outside of the Department when filing for benefits. R. p. 88-89. There was no consideration of the actual contract document. *See* R. p. 5-6, 15-17, 88-89. Instead, the Appeals Examiner found that I.C. § 72-1367(4) applied, and *Parker vs. Underwriters Laboratories* did not. R. p. 88. The Appeals Examiner held that compensation received "through this Employee Retention Plan Summary and Release of Claims Agreement," is wages reportable for benefits. *id*.

Appeal to the Idaho Industrial Commission

Ms. Schoeffel timely filed her Notice of Appeal to the Idaho Industrial Commission on February 13, 2019. R. p. 75-79. Appeal briefs were timely filed, and on April 20, 2019, the

Commission issued its decision to deny benefits. R. p. 94-103. The Commission held that although there were "some similarities" between the *Parker* case and Schoeffel's case, that *Parker* did not apply because the *Parker* decision concerned a different statute than the statute at issue in Schoeffel's denial of benefits. R. p. 97-99. The Commission focused on the timing of the payments to hold that because Schoeffel did not receive payments until she severed from her employer, and she received none of the compensation at issue while working, that such payments were severance. R. p. 100. The Commission also held that because severance pay shall be deemed wages, even if a release of claims is signed – and a release of claims was signed by Schoeffel – that her payment therefore must be severance. *Id.*

Timely Notice of Appeal was filed, and this matter is before this Court for a determination regarding the interpretation of the provisions of the Idaho Employment Security Law, and of the Thorne/Schoeffel contract. R. p. 80-84.

II. ISSUES PRESENTED ON APPEAL

1. Whether an employee's bargained-for compensation from her employer, separate from her wages and related only to considerations over and above performance of work, may be characterized as severance pay.

2. Whether the Idaho Industrial Commission erred in upholding the Idaho Department of Labor's failure to consider evidence that the contract payment was not severance.

3. Whether the plain language of an employee/employer contract controls in deciding the nature of such contractual payments.

III. STANDARD OF REVIEW

This is an appeal from the Idaho Industrial Commission's decision upholding the determination that Schoeffel's bargained-for sum from her employer was reportable severance pay, and that her unemployment benefits should be repaid.

The Idaho Supreme Court exercises free review over the Commission's legal conclusions. IDAHO CONST. ART. V, § 9; *Spruell v. Allied Meadows Corp.,* 117 Idaho 277, 278, 787 P.2d 263, 264 (1990). This Court may remand a decision which is not supported by substantial, competent evidence. *Id.* Substantial and competent evidence consists of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Parker v. Underwriters Laboratories, Inc.,* 140 Idaho 517, 520, 96 P.3d 618, 621 (2004).

Similarly, the interpretation and legal effect of a contract are questions of law over which this Court exercises free review. *See Parker* at140 Idaho 521, 96 P.3d at 622.

The Idaho Supreme Court is the ultimate arbiter of any statute which was been relied upon or interpreted by the Idaho Industrial Commission. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000), *J.R. Simplot Co., Inc. vs. Idaho State Tax Com'n*, 120 Idaho 849, 820 P.2d 1206 (1991).

Because the Idaho Industrial Commission upheld the legal conclusions that Schoeffel's payments were severance, rather than as described within the plain language of Schoeffel's contract with her employer, this Court should exercise free review to decide the nature of the payments. This Court should also exercise free review of the interpretation and analysis of Idaho Code § 72-1367(4).

IV. DISCUSSION

Because Schoeffel's contract payments were in return for her promises and forbearances (and were therefore not severance), the payments are not reportable income for unemployment benefit purposes under Idaho law. Schoeffel should be entitled to keep the $1656.00 in benefits she received in the fall of 2018.

The Industrial Commission erred in upholding the decision by the Idaho Department of Labor finding that the contract payments were severance. The decision misinterprets the Idaho Employment Security Law, ignores or entirely disregards the record (in particular the plain language of the employer/employee contract), and misapplies the relevant Idaho precedent of *Parker v. Underwriters Laboratories, Inc*.

For these reasons, as further described herein, Appellant employee Connie Schoeffel and Appellant employer Thorne Research, Inc. ask that this Court reverse and remand to the Idaho Industrial Commission for a finding that Ms. Schoeffel's payments were bargained-for consideration, not severance.

A. SCHOEFFEL'S BARGAINED-FOR COMPENSATION CANNOT BE FAIRLY CHARACTERIZED AS SEVERANCE PAY UNDER IDAHO LAW.

In its analysis of Idaho Code Section 72-1367(4), the Idaho Industrial Commission has upheld the incorrect decision that Schoeffel's contract payment was severance pay. This conclusion ignores Idaho law, which requires an examination of the primary purpose of the contract between the parties to determine the nature of contractual payments. Here, the essential consideration for Schoeffel's contract payment was foregoing her right to look for other employment until her employer's new manufacturing plant was operational. For Thorne, the

employee retention program was designed to encourage those employees who were not moving to South Carolina, to remain with the company through the transition to the new plant, or until the company no longer needed their services. R. Ex. p. 29, ¶ 5; Ex. p. 31, ¶ 4. On the other hand, Schoeffel received additional monies for giving up her right to terminate the employment relationship when it might have been more advantageous to her.

The Commission erred in concluding the payments were for severance of the employment relationship and therefore part of Schoeffel's wages.

1. Schoeffel's Compensation Was a Sum Paid for Contract Performance.

Schoeffel's payments were a sum certain, paid upon performance of a contract, and were due to her employment continuing rather than ending. As such, the payments cannot be fairly characterized as severance.

Idaho law requires that where a contractual payment exists, the contract must be analyzed. In the 2004 case of *Parker v. Underwriters*, the Idaho Supreme Court addressed the question of whether payments received pursuant to an agreement with an employer fell outside the definition of reportable "severance pay." The Court held that because the primary purpose of Parker's contract with her employer was not related to severance, the contractual payments were therefore not severance. 140 Idaho 517, 521-22, 96 P.3d 618, 622-23.

The Court looked to the mutual intent of the parties at the time the contract in the *Parker* case was made. It was clear from the plain language of the documents Parker signed, that although the amount she received was based partly upon her base salary and length of past service (which are consistent with severance), the payment itself was in exchange for something else. The Parker

payment was in exchange for a separate consideration not related to her employment, but an entirely independent act.

The Court held that Parker's consideration for her employer/employee agreement was a release of claims, not services relating to employment. *Id*. at 522, 96 P.3d at 623. Accordingly, because the payments were for the release, rather than compensation for past service or protection from economic hardship, the Court reversed the Commission and held that payments were not reportable severance pay. *Id*.

Here, Schoeffel's contract conditioned Schoeffel's non-wage payment on four considerations. First, for Schoeffel's agreement to *remain a full-time employee until a date determined by Thorne* (i.e. for Schoeffel to give up her at-will employment status and forego any right to obtain new employment despite her position being imminently eliminated). As this Court is aware, Idaho is an at-will employment state, meaning unless an employee is hired pursuant to a contract which specifies the duration, conditions, or limits to employment, continued employment is at the will of either party. Either the employer *or* the employee may terminate the relationship at any time for any reason without incurring liability. *Jenkins v. Boise Cascade Corp*., 141 Idaho 233, 240, 108 P.3d 380, 387 (2005); *Sorensen v. Comm Tek, Inc*., 118 Idaho 664, 666, 799 P.2d 70, 72 (1990). This right to terminate her employment for another opportunity is what Schoeffel gave up when she signed the contract. She agreed to stay on so long as Thorne wanted her services.

Second, payment was conditioned upon Schoeffel's agreement to maintain confidentiality of Thorne's proprietary business information. Third, payment was conditioned upon Schoeffel's

agreement to not disparage Thorne. Fourth, payment was conditioned upon Schoeffel's release of any employment claim she may have had against Thorne.

These payments differed from traditional notions of severance in that they were forward-looking and designed to lock in a trusted employee for the necessary time period to transition the company's primary manufacturing plant to a new location. There was an absolute business objective for Thorne, and the series of payments were delivered once the employee performed. *See* R. Ex. p. 35; p. 30 ¶ 8. These contracts were offered to employees at a time Thorne was leaving Idaho and taking a number of jobs with it. It was a transitional time period where non-disparagement could be a real risk to company morale and image. Similarly, it was a time when the theft or sharing of confidential information was at a heightened risk. Clearly, both Thorne and Schoeffel had an interest in making the bargain, and both received valuable consideration over and above the employment relationship between them. Schoeffel's payment was for her compliance – compliance which could not be completed, for example, if Schoeffel were to find another job half way through Thorne's transition to a new plant. *See id.*

The Commission's conclusion that the contract payments were additional wages for work performed was in error. Assume the contract called for Schoeffel to can several crates of huckleberry preserves for Thorne's executives over and above her regular work duties in exchange for additional payments. Hopefully, nobody would consider the additional payments as reportable compensation for unemployment insurance purposes, but the Commission's decision makes it unclear.

2. Idaho Code Section 72-1367(4) Does Not Apply Where There Is No Severance Payment.

The Idaho Employment Security Law was passed for humanitarian purposes: to protect employees from "the economic ills arising out of unemployment," and it provides benefits to those unemployed through no fault of their own. *In re Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950). As this Court has repeatedly held, the Employment Security Law was enacted to alleviate the hardships of involuntary unemployment and will be construed liberally to effectuate that purpose. *See*, *Davenport v. State Dep't of Emp*., 103 Idaho 492, 650 P.2d 634 (1982), *Knight v. Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1065), *In re Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950). "It is clearly the intent of the legislature that benefits be granted or denied based upon matters of substance rather than mere form, and the act will be construed to effectuate that intent." *Davenport v. State Department of Employment*, 103 Idaho 492, 650 P.2d 634 (1982). As Ms. Schoeffel was terminated involuntarily when her position was eliminated, through no fault of her own, she is the precise type of claimant Idaho Employment Security Law was designed to protect.

The Act establishes conditions upon which employees who have lost their jobs may receive benefits. To qualify each week for a full benefit, without a reduction, a claimant must not receive a substantial wage or other reportable income. The Act also establishes that severance is treated as wages, and defines severance. To put it simply, if an employee receives severance, his or her unemployment benefits are reduced in the week(s) that severance pay is received. If a payment is

not reportable severance, it would not count against the weekly benefits an individual would receive.

Under the Act, severance is defined as "a payment or payments made…as a result of the severance of the employment relationship." I.C.§ 72-1367(4) (emphasis added). To date, there are no reported Idaho cases interpreting this statutory definition of severance.

Yet when a contractual payment falls outside the definition of I.C. § 72-1367(4), the contract defines the payment. So in addition to the statute, a legal analysis must occur to determine what a payment is, if it is not paid "as a result of the severance" of employment. For example, the definition of severance pay was a key component in many cases decided by this Court. Without exception, the cases have been decided on the grounds of the primary purpose of the contract, namely, the consideration for the payment determines the nature of the payment.

In 2004, the Idaho Supreme Court opined that "[t]he purpose of a severance plan is to protect employees from an economic hardship and to reward them for past service to the company." *Parker vs. Underwriters Laboratories, Inc.*, 140 Idaho 517, 520, 96 P.3d 618, 621 (2004) (citing 27 Am. Jur.2d Employment Relationship § 70 (1996)). In the same case, the Court looked to the dictionary, which defined severance as "a sum of money usually based on length of employment for which an employee is eligible upon termination." *Id.* (citing The American Heritage Dictionary Of The English Language (4th ed.2000)). In 2005, as part of a number of amendments (the primary of which was a shift in the maximum weekly benefit calculations to be indexed to tax rates), the statutory definition of severance was enacted. *See* 2005 Idaho Sess. Laws, Vol. 1, Ch. 5, p. 5-32.

After the 2005 amendment, albeit outside of the Employment Security Law context, this Court has continued to rule on the question of whether certain payments are severance or not. In *Hammer v. City of Sun Valley*, the 2016 Supreme Court noted that even "[t]he use of the term 'severance payment' does not necessarily mean that it is compensation for past services." 414 P.3d 1178, 1182, 163 Idaho 439, 443 (2016) (citing *Parker v. Underwriters*, 140 Idaho 517, 96 P.3d 618 (2004)). Rather, a payment is characterized by looking to the primary purpose of the contract for the payment. *See id.* (citing *Parker* at 522, 96 P.3d at 623).

Similarly, in *Huber v. Lightforce USA*, this Court noted that "[u]nder *Parker*, severance pay is a distinct form of compensation in that it is intended to compensate an employee for past service and protect an employee from economic hardship." 159 Idaho 833, 367 P.3d 228, 237 (2016). The *Huber* Court noted that *Parker* was decided with a focus on the terms of the agreement. *Id.* at 238. In *Huber*, the Court stated that to resolve the issue of whether or not a payment was severance (payment for services rendered during employment) or whether the payment was in consideration of compliance with a non-competition clause, the Court was required to examine the terms of the agreement to determine the intent of the parties and the consideration for the payment. *Id*., *see also Moore vs. Omnicare*, 141 Idaho 809, 118 P.3d 141 (2005) (compensation promised in an employment agreement is not wages where it is not in consideration for services rendered during employment) and *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984) (severance pay was wages because it was part of the bargained-for compensation for employment services).

Here, the payment to Schoeffel was decidedly not "as a result of the severance of employment," but was defined by her contract. The payment was not a reward for past service to the company. Nor was the payment related to work performed. The payment was also not simply a payment given because employment was severed and a release of claims was signed. Instead, the promise and the payment Schoeffel received was offered by her employer and paid upon performance of its primary purpose: to obligate Schoeffel to remain in a job with no future prospects and to give up her right to do what any rational person would do in her position; seek more permanent employment elsewhere. Thorne was able to entice Schoeffel to stay by offering compensation in exchange for Schoeffel giving up her right to seek other employment. And Thorne was able to rely on the promise of Schoeffel, and other employees like her, to ensure operation and production from Thorne's manufacturing plant in Dover, Idaho for the eighteen months it took the company to move. Accordingly, the payment was a forward-looking payment for promises made and kept, and was primarily designed to keep Schoeffel working for Thorne. And because it was not "as a result of the severance of the employment relationship," Idaho Code Section 72-1367(4) does not apply. Thus, where the payment was pursuant to an agreement reached between two contracting parties to the benefit of both of them, Idaho Code § 72-1367(4) cannot alter the language of the contract.

3. The 2005 Amendment to Idaho Code § 72-1367(4) Does Not Alter the Analysis.

In 2005, Idaho Code § 72-1367(4) was amended as part of a larger statutory change. During that process, severance was defined as a payment made "as a result of" the severance of an employment relationship. And the amendment included language providing that severance is to be

considered wages, even if a release of claims was a condition of receiving payment. I.C.§ 72-1367(4).

Still, the amended statute does not overrule *Parker vs. Underwriters Laboratories*, nor does the amended statute apply to the contract payment received by Schoeffel from her employer, as described above.

The *Parker* case did two things: first, it defined severance because severance was not defined in Idaho code or administrative rule. *See Parker* at 520, 96 P.3d at 621. Second, it looked at the contract between the employee and employer. The holding of *Parker* was based upon the analysis of the primary purpose and consideration for contract. *Id.* at 521-22, 96 P.3d at 622-23. Following the *Parker* case, the Idaho Legislature then defined severance. But it did not – and cannot – limit an individual's right to contract with her employer. The law of the *Parker* case remains the same: to determine whether a severance payment exists, the primary purpose of the payment must be considered. Once the consideration for payment is determined, whether or not the payment falls under the statutory definition of severance may be decided.

Thus, where the purpose of the payment here was to entice employees to stay – not because they were told to go – the Schoeffel payment was decidedly *not* severance. As such, the 2005 amendments to I.C. 72-1367(4) which state that severance is wages, do not alter the nature and purpose of the payment to Schoeffel. Under the amended statute, severance may be wages, but this payment still isn't severance. From her first submission in this case, Schoeffel's arguments have been based upon the current language of 72-1367(4), which includes the 2005 amendment.

Accordingly, even the statutory amendment does not alter the nature of Schoeffel's payments. She did not receive a severance.

4. The *Parker* Case Is Relevant Here Despite the Commission's Holding

Notwithstanding the Commission's holding that *Parker* does not apply to Schoeffel's case, the *Parker* case remains squarely on point here. The Commission held that because Schoeffel's case concerned Idaho Code § 72-1367, and the *Parker* case was decided based upon Idaho Code § 72-1366, that *Parker* did not apply here. R. at 98.

But both Idaho Code § 72-1366 and § 72-1367 together address a claimant's qualification for unemployment benefits. In fact, under the former (§72-1366), a claimant is required to comply with the latter (§72-1367). *See* I.C. §72-1366(3) ("[t]he claimant shall have met the…requirements…as provided in section 72-1367, Idaho Code."). So although one statute is related to personal eligibility and the other is related to monetary eligibility, there are not two separate legal standards for qualification for benefits – a claimant either qualifies or she does not.

B. THE COMMISSION ERRED IN UPHOLDING THE DEPARTMENT'S FAILURE TO CONSIDER EVIDENCE THAT THE CONTRACTUAL PAYMENT WAS NOT SEVERANCE.

The Commission and the Department are required to review and consider the entirety of the record in the appeal before it. Idaho Code Section 72-1368 governs appeal procedures for unemployment benefit claims. Under that section, an appeals examiner is to "afford[] the interested parties reasonable opportunity for a fair hearing;" and, once appealed, the Commission shall decide reviewed claims "[o]n the basis of the record of proceedings before the appeals examiner as well as additional evidence, if allowed." I.C. § 72-1368(6)-(7). All relevant evidence

in the record should be reviewed. Thus, where an employee/employer contract exists in the record, that contract must be considered.

Here, it is clear that the Commission upheld a decision based primarily upon a misinterpretation of the law, but also in reliance upon two facts to the exclusion of all others: the timing of the payments, and the fact that one part of the contract was a release of claims. In making a legal decision based only upon the timing of the payments to Schoeffel and the inapplicable language of Idaho Code § 72-1367(4), the Commission and the Department erred.

The Commission impermissibly focused almost entirely on the language of I.C. §72-1367(4) regarding a release of claims, and in the process misconstrued the statute.

The Commission held:

> Claimant did not begin receiving the payments under the Agreement until she had severed from Employer. She did not receive additional compensation while she was working in recognition of her commitment to remain until the facility closed.

R. at 100.

Yet the plain, unambiguous contract language prescribed the purpose of the payments:

> 6. As **bargained-for compensation to be paid to Schoeffel in return for** Schoeffel providing Thorne with the **release of claims** in Paragraph 1; for Schoeffel assuming the obligation of **confidentiality** in Paragraph 2; for Schoeffel **agreeing to remain a full-time employee until the date specified in Paragraph 3**; and for Schoeffel assuming the obligation of **non-disparagement** in Paragraph 4, Thorne agrees to pay Schoeffel the amount of thirty-one thousand five hundred and ninety dollars ($31,590).
> …

Ex. Page 38, ¶ 6.

And the timing of the payments was explained at the hearing: it was based upon Thorne's two-year transition timeframe for getting its new manufacturing plant up and running. The timing was a forward-looking payment made at the time of performance.

Of course, the timing of the payments cannot unilaterally prove that the payments are "a result of" severance of the employment relationship, and any argument that because one followed the other, the former must have caused the latter, is a fallacy: *post hoc, ergo propter hoc*.

Further, the record is supported by more than the plain language of the contract. At the Appeals Examiner's hearing, Thorne's counsel was directly asked whether payment was made because Schoeffel's employment was ending. The response was:

> No. It was made for her agreeing to the obligations [within the contract] of paragraphs one through four. She was giving up something that legally she did not have to do. Those were the obligations of paragraphs one through four. We were giving up something we didn't have to do, we were paying her money for doing that and we were paying her insurance for doing that…these are obligations outside of the employee-employer relationship in terms of wages…

Tr. p. 36, L. 14-20, 23-25.

A clear indication that the Department and the Commission failed to consider the four corners of the contract is that both entities described the contract itself as two documents, rather than one. Within the Appeals Examiner's findings of fact, as well as the Commission's findings, the contract was described as both the "Employee Retention Program and Release of Claims Agreement." *See* R. p. 6 ¶¶ 4, 6; 95 ¶¶ 3-4 (emphasis added). Further, the Appeals Examiner listed all four conditions of the contact yet failed to analyze or consider them, particularly the conditions regarding confidentiality and non-disparagement. The Commission ignored these two

conditions entirely, and did not include them in its findings of fact. See, R. p. 6, ¶ 4; p. 95 ¶ 3. To legally construe Paragraph 6 of the contract quoted above – which clearly states that all four conditions were mandatory – as a single condition (release of claims), is to misconstrue the contract.

As such, the Commission's decision did not consider—and legally misinterpreted—the very document that defined the payments. In this case, rather than consider the contract language, the Commission followed the Department's lead and ignored the language of the contract in the record.

C. WHERE THE PLAIN LANGUAGE OF AN EMPLOYER/EMPLOYEE CONTRACT DEFINES THE NATURE OF PAYMENT, THE CONTRACT LANGUAGE CONTROLS.

1. The Employer-Employee Contract Here Established the Nature and Terms of the Bargain

Schoeffel's contract shows the nature of the bargain between employer and employee herein was a forward-looking payment, obligating Schoeffel to give up her right to look for work, despite certain and imminent unemployment. The contract was also a bargain struck between employer and employee regarding confidentiality, non-disparagement, and required the employee to release any claims she might have against the employer.

Under *Parker vs. Underwriters*, a written agreement between contracting parties establishes the purpose of payments. *See* Sections A(1)-(3), *supra*. Furthermore, both the Commission and the Department found that the *Parker* case was factually similar to the Schoeffel situation here.

2. The Legal Principle that a Department's Statute is Entitled to Deference is Not Applicable Here.

Notwithstanding the plain language of the contract, the Commission upheld a decision where there was no weight or consideration given to the language of the contract between the employer and employee parties. The Department will argue, as it did before the Commission, that the particular result herein is simply the Department exercising its authority to read and interpret the statute, and that such interpretation is entitled to deference. R. p. 36. Yet, contrary to the Department's assertion, the Idaho Supreme Court is the ultimate arbiter of any statute which was relied upon or interpreted by the Idaho Industrial Commission. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000), *J.R. Simplot Co., Inc. vs. Idaho State Tax Com'n*, 120 Idaho 849, 820 P.2d 1206 (1991).

And as discussed herein, the language of the statute does not address the payments to Schoeffel. There is no statutory authority for the Commission to uphold, nor the Department to decide, that it has jurisdiction to determine that payments in return for a confidentiality agreement must actually be severance pay. There is no authority for the Commission to uphold, nor the Department to decide, that payment pursuant to a non-disparagement contract must be declared to be severance. Finally, of course there is no authority for the Commission to uphold, nor the Department to decide, that payments due to an agreement to remain employed for a specified period of time are severance, despite the plain language of a contract declaring them to be bargained-for compensation for just such an agreement.

A well-known rule of statutory construction is *expression unius est exclusion alterius*: where a statute specifies certain things, the designation of such things excludes all others. *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 528, 236 P.3d 1284, 1288 (2010). The language of I.C. § 72-1367(4) is clear and unambiguous. And because the statutory language as passed by the Idaho Legislature is limited to only those situations where a release of claims accompanies a payment, the Department is limited to just that language. Where the primary purpose of an agreement is for severance – or severance accompanied by a release of claims – such would be reportable income.

Accordingly, any contrary interpretation of the statute which would broaden the statute would be contrary to the express language of the statute, and an unreasonable interpretation.

V. CONCLUSION

Therefore, because Ms. Schoeffel was eligible for unemployment benefits and did not receive reportable income (severance) under the law, the matter should be remanded to the Commission to vacate the determination that Schoeffel be required to repay the entirety of her unemployment benefits.

DATED this 23rd day of September, 2019

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of September, 2019, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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