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Idaho Supreme 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.

SUPREME COURT DOCKET NO. 47101-2019

Industrial Commission No. 421013407-2019

RESPONDENT'S BRIEF (IDAHO DEPARTMENT OF LABOR)

Appeal from the Idaho Industrial Commission

Thomas P. Baskin, Chairman, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

Claimant-Appellant Connie L. Schoeffel ("Schoeffel") appeals from the Decision and Order of the Idaho Industrial Commission ("Commission") finding that six monthly payments of $5,265 she received upon separation from her employer, Thorne Research, Inc. ("Thorne Research"), were "severance pay" and thus reportable wages under the Employment Security Law, I.C. §§ 72-1301 *et seq*. The central issue on appeal is whether substantial competent evidence supports these findings by the Commission, and its decision upholding the overpayment determination of the Idaho Department of Labor ("Department" or "IDOL").

B. Course of the Proceedings

Schoeffel applied for unemployment benefits on October 1, 2018, after she was laid off by Thorne Research when it closed down its Idaho location as part of a business relocation to South Carolina. Exhibit, p.3, p.42, LL.2-5. In Schoeffel's initial application for benefits and four subsequent weekly certifications, she denied receipt of vacation, holiday, bonus, or severance pay for the reporting week. Exhibit, pp.5, 48-50.

On or about November 9, 2018, the Department learned that Schoeffel had received post-termination payments from her employer. Tr., p.9. LL.21-23. Following an investigation, the Department entered an Income Determination on November 11, 2018, finding that Schoeffel received severance pay that should have been reported. Exhibit, pp.11-12. At the same time, an Overpayment Determination was entered

for four of the weeks Schoeffel received benefits because the severance pay reduced the amount of benefits to which she was entitled. Exhibit, pp.13-14; Tr., p.49, LL.12-14, 20-23. These monetary determinations did not involve any issues of eligibility or willful misrepresentation.

Schoeffel appealed from both determinations and requested a waiver of the overpayment assessment. Exhibit, p.15.

A telephonic hearing was held on January 17, 2019. Tr., p.4, LL.21-24. After the Appeals Examiner entered a decision reversing the two determinations, R., pp.5-6, 15-19, the Department requested a reconsideration of the decision. R., pp.13-14.

On February 1, 2019, the Appeals Examiner allowed the request for reconsideration and entered a revised decision upholding the Department's determinations. R., pp.4, 7-11, 85-91.

On February 13, 2019, Schoeffel and her employer jointly appealed to the Commission from the revised decision of the Appeals Examiner. R., pp.76-79.

Following briefing of the parties, R., pp.32-37 (brief of IDOL), 38-59 (brief of Schoeffel and Thorne Research), the Commission found that the post-termination payments to Schoeffel were severance pay, and reportable, and upheld the Department's determinations. Decision and Order filed April 19, 2019, R., pp.20-29.

On May 30, 2019, Schoeffel and Thorne Research filed the instant appeal to the Idaho Supreme Court. R., pp.80-84.

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C. Statement of the Facts

Schoeffel began working for Thorne Research, a manufacturer of nutritional supplements, on October 8, 2012. She was the kitchen manager for its employee cafeteria. Exhibit, pp.43-44.

In 2016, Thorne Research announced it would be moving its headquarters and operations from Idaho to South Carolina. Tr., p. 23, LL.4-7. Thorne Research encouraged those employees who made the choice not to relocate to remain on the job in Idaho until the new facility in South Carolina was ready. Tr., p. 23, LL.6-21. Uncontradicted testimony from a witness for Appellants stated it was "critically important" for Thorne Research to maintain its Idaho manufacturing until construction of the South Carolina facility was completed in 2018. Tr., p.22, LL.6-21. To that end, it created an "Employee Retention Program" that would pay eligible employees who decided not to move to South Carolina a significant sum of money, which Schoeffel later described as a "retention bonus," Tr., p.12, LL.12-21, if the employees continued to work until a termination date determined by Thorne Research, R., p.35, and if their "on-the-job performance and behavior during the Transition Period [was] deemed satisfactory." Tr., p.12, LL.12-21.

Schoeffel decided to remain in Idaho and participate in the Employee Retention Program. She successfully worked at Thorne Research from the 2016 relocation announcement until September 28, 2018, the end of the transition period established for her by Thorne Research. Exhibit, p.16. A little over a month before that separation, Schoeffel and her employer signed a "Release of Claims Agreement."

Exhibit, p.39. On September 28, 2018, Schoeffel was involuntarily terminated due to a lay-off; then in October 2018, Thorne Research began paying Schoeffel her post-separation compensation. Exhibit, p.17. The compensation that Schoeffel had earned by remaining employed during the transition period was $31,590.00, to be paid over six months. Exhibit, p.20.

Schoeffel opened a claim for unemployment benefits on October 1, 2018. Exhibit, p.3, p.42, LL.2-5. She did not report her post-separation compensation from Thorne Research, Exhibit, pp.5, 48-50, and began receiving benefits. After learning of the compensation Schoeffel received upon separation, the Department investigated and determined that she had been overpaid benefits and assessed her with an Overpayment Determination. Exhibit, pp.13-14; Tr., p.49, LL.12-14, 20-23. These determinations let to the procedural events described above and this appeal.

II. ISSUE ON APPEAL

Does substantial competent evidence support the Commission's finding that the compensation Schoeffel received from Thorne Research after her separation from employment was "severance pay" and reportable as wages under the Employment Security Law?

III. STANDARDS OF REVIEW

This Court is "constitutionally compelled to defer to the Industrial Commission's findings of fact where supported by substantial and competent evidence." Locker v. How Soel, Inc., 151 Idaho 696, 699, 263 P.3d 750, 753 (2011), *quoting* Teffer v. Twin Falls School Dist. No. 411, 102 Idaho 439, 439, 631 P.2d 610, 610 (1981). *See also,* Idaho Const., Art. V, § 9. However, if a question of law is presented when reviewing a decision from the Industrial Commission, the Court will exercise free review. Ehrlich v. DelRay Maughan, M.D., P.L.L.C., 165 Idaho 80, 83, 438 P.3d at 777, 780 (2019).

"Substantial evidence is more than a scintilla of proof, but less than a preponderance. It is relevant evidence that a reasonable mind might accept to support a conclusion." Ehrlich, 165 Idaho at 83, 438 P.3d at 780 (2019), *quoting* Christy v. Grasmick Produce, 162 Idaho 199, 201-02, 395 P.3d 819, 821-22 (2017). In applying the substantial competent evidence standard of review, all facts and inferences are viewed in the light most favorable to the party who prevailed before the Industrial Commission. Ehrlich, 165 Idaho at 83, 438 P.3d at 777. Even where this Court might have reached different conclusions from the facts had it been the finder of fact, it will not overturn the Commission's findings if supported by substantial competent evidence. *Id.;* Christy, 162 Idaho at 201, 395 P.3d at 821.

The Department of Labor's reading and application of a statute, where reasonable, are entitled to deference. Garner v. Horkley Oil, 123 Idaho 831, 833, 853 P.2d 576, 578 (1993), "so long as it is reasonable and not contrary to the express

language of the statute." Two Jinn, Inc. v. Idaho Dep't of Ins., 154 Idaho 1, 3, 293 P.3d 150, 152 (2013).

IV. DISCUSSION

Substantial Competent Evidence Supports the Commission's Finding that the Compensation Schoeffel Received from Thorne Research After Her Separation of Employment Was "Severance Pay" and Reportable as Wages under the Employment Security Law

The Commission found that the Release of Claims Agreement signed by Schoeffel and Thorne Research provided compensation in exchange for Schoeffel remaining until the Idaho plant closed, and signing a release of all claims against Thorne Research. R., p.21. After Schoeffel worked to the end of the transition period, and separated from employment, she began receiving payments of $5,265 for six consecutive months beginning on November 15, 2018. Exhibit, p.20.

The Commission correctly focused upon the text of Idaho Code § 72-1367(4) in reviewing this case *de novo*. R., p.25. This code provision, which was amended in 2005 in response to the Idaho Supreme Court's decision in Parker v. Underwriters Laboratories, Inc., 140 Idaho 521, 96 P.3d 618 (2004), clarified the definition of "severance pay" for purposes of determining a claimant's monetary eligibility for unemployment benefits. The underlined text below was added in 2005 to Idaho Code § 72-1367(4):

> If the total wages payable to an individual for less than full-time work performed in a week claimed exceed one-half (1/2) of his weekly benefit amount, the amount of wages that exceed one-half (1/2) of the weekly benefit amount shall be deducted from the benefits payable to the claimant. For purposes of this subsection, severance pay shall be deemed wages, even if the claimant was required to sign a release of claims as a

> condition of receiving the pay from the employer. "Severance pay" means a payment or payments made to a claimant by an employer as a result of the severance of the employment relationship.

(Emphasis added.) *See* 2005 Idaho Sess. Laws, ch.5, § 15, p.29.

The amended statute now states that severance pay "shall be deemed wages." It also supplies a broad definition for severance pay: "a payment or payments made to a claimant by an employer as a result of the severance of the employment relationship." I.C. § 72-1367(4). Applying the facts of this case to the statutory definition, it is beyond cavil that Schoeffel received her compensation "as a result of the severance of the employment relationship." The Commission agreed and found that the post-separation compensation Schoeffel received for working throughout the transition period and signing the release agreement was "severance pay" under Section 72-1367(4):

> 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. Claimant waived all claims against Employer as a condition of receiving the post-employment compensation payments. As noted above, Idaho Code § 72-1367(4) explicitly provides that "severance pay shall be deemed wages, even if the claimant was required to sign a release of claims as a condition of receiving the pay from the employer." The label Employer attached to the compensation in the Agreement did not change its character for the purpose of determining Claimant's monetary eligibility for unemployment benefits. The payments Claimant received as part of the Agreement she signed with Thorne Research, Inc. are reportable "severance pay" pursuant to Idaho Code § 72-1367(4).

R., p.26.

These findings are supported by the evidence, and the Commission's legal conclusion is supported by the plain language of Section 72-1367(4), defining

payments made "as a result of the severance of the employment relationship" as "severance pay. As discussed below, the whole reason for Thorne Research's Employee Retention Program was to retain its Idaho employees during the period that it was closing down its Idaho operations and opening its South Carolina operations, and Schoeffel was not entitled to those payments until she was discharged at the end of the transition period. The fact that Thorne Research tacked on additional clauses to the release agreement to try to enable their employees to receive unemployment benefits in addition to the severance pay is immaterial.

Thorne Research's General Counsel, who drafted the Release of Claims Agreement that Schoeffel later signed, Tr., p.21. LL.19-21, p.22, LL.16-19, testified that Thorne Research announced its decision to relocate in November 2016, but the new facility they were constructing in South Carolina would not come online until June of 2018. Tr., p.23, LL.4-15. She was candid in stating that, for the employees who were not relocating:

> [I]t was critically important that we were able to maintain manufacturing in our Dover, Idaho, facility while a new facility was coming online in South Carolina. Therefore, the employee retention program was based on offering incentives to employees to stay, although they would know that they would be unemployed at some date certain.

Tr., p.22, LL.15-21.

Schoeffel discussed in her affidavit the opportunity she was given to participate in the Employee Retention Program. R., p.31. Schoeffel stated, "At the time, I had decided not to move to South Carolina with the company, but I also understood that I had to decide whether to stay at Thorne during the transition period, and not look for other work, even though I knew my job was ending." *Id.*

Schoeffel also acknowledged that she received a copy of the Employee Retention Program Summary. *Id.* The program summary clearly described to Schoeffel and other participating employees that the purpose of the program was to retain employees in Idaho until the South Carolina facilities were fully operational:

> **Purpose**
>
> The Employee Retention Program is being offered to provide compensation to those employees who, on the one hand, have chosen not to relocate to the new Thorne facility in South Carolina, but who, on the other hand, have chosen to continue their employment at Thorne Research through the end of the "Transition Period" for their respective position.

R., p.35. Schoeffel understood these purposes and told a Department employee that the payments she received from Thorne Research were a "retention bonus." Tr., p.12, LL.12-21.

The two eligibility requirements stated in the program summary given to Schoeffel were consistent with the purpose quoted above:

> **Program Eligibility**
>
> - Full-time employees, with at least six months of tenure, whose on-the-job performance and behavior during the Transition Period is deemed satisfactory.
> - Must remain a Thorne employee for the entire Transition Period designated for one's specific position.

R., p.35.

The program summary also stated that participating employees must sign a Release of Claims Agreement to be eligible, but nothing was mentioned in the summary about confidentiality or non-disparagement clauses. *Id*. That's because those clauses, and the release of claims, were of secondary importance; substantial

competent evidence demonstrates that the real purpose of the retention program was to keep employees and, to do that, it promised a significant compensation package that was payable only upon severance of the employment relationship. Further, viewing these clauses in the context of Schoeffel's employment, there was no evidence presented that Schoeffel had any actual or threatened claims against Thorne Research to be released, or that her kitchen manager position exposed her to any confidential or proprietary information.

Thorne Research's General Counsel testified that her intent in drafting the Release of Claims Agreement was to come within what she believed to be the holding of Parker v. Underwriters Laboratories, Inc., 140 Idaho 521, 96 P.3d 618 (2004), so the retention compensation would not be treated as wages for unemployment insurance purposes, thus enabling participating employees to receive unemployment insurance benefits in addition to their post-termination compensation from Thorne Research:

> My intent was to follow as closely as I could what I believed to be the – the underlying law of Parker versus Underwriters Laboratories, that for services not in consideration of any prior services rendered to Thorne by Ms. Schoeffel, but because of the obligations that she was undertaking in the agreement Thorne agreed to pay her bargained for compensation. . . . So, the purpose of the release of claims agreement was to be consistent with Parker, so we could inform the employees that because it . . . was a Parker situation and because it was bargained for compensation, then, they would be able to file a claim for unemployment benefits . . . while they would still be contemporaneously receiving their payments under their claims agreement.

Tr., p.23, L.5 – p.24, L.7.

It is undisputed that Schoeffel could not receive the compensation package offered by Thorne Research until their employment relationship was severed.

Paragraph 3 of the release agreement states that Schoeffel "agrees to remain a full-time employee at [Employer] and to satisfactorily perform the duties of Kitchen Manager until September 27, 2018." Exhibit, p.37. Schoeffel would not have received the payments unless she worked until September 27, 2018, the last day of her transition period. Schoeffel did work until that date and, according to Employer, she "was involuntarily terminated due to a layoff on September 28, 2018." Exhibit, p.16.

The Employee Retention Program Summary also excludes from the retention program "[e]mployees who remain employed by [Employer] after their Transition Period has concluded, by transferring to South Carolina, continuing as a 'remote worker,' or as a non-employee, independent contractor." Exhibit, p.35. This also supports the fact that separation from employment with Thorne Research was a *sine qua non* for receipt of the separation payments.

Because the severance of Schoeffel's employment relationship with Thorne Research on a specific date was a necessary prerequisite to, and bargained for performance that was required to occur before Thorne Research's payment obligations were triggered, it is clear that the payments were, in the language of I.C. § 72-1367(4), "made . . . as a result of the severance of the employment relationship," and therefore "severance pay" under the statute. This made them "wages" that were properly used in calculating Schoeffel's unemployment benefit amounts in accordance with § 72-1367(4).

The fact that Schoeffel signed a release of claims with Thorne Research did not transmute those wages to something else. This is made clear by § 72-1367(4), which

states that "severance pay shall be deemed wages, even if the claimant was required to sign a release of claims as a condition of receiving the pay from the employer." (Emphasis added.)

Substantial competent evidence and the plain meaning of the text of Section 72-1367(4) support the Commission's decision. Moreover, the Commission's decision is consistent with the Department's reasonable reading and application of the statute, which is entitled to deference. Garner v. Horkley Oil, 123 Idaho 831, 833, 853 P.2d 576, 578 (1993). *See also* Two Jinn, Inc. v. Idaho Dep't of Ins., 154 Idaho 1, 3, 293 P.3d 150, 152 (2013) ("An agency's interpretation of a statute that it is entrusted with administering is entitled to deference so long as it is reasonable and not contrary to the express language of the statute.").

Neither the Commission's nor the Department's readings of the statute are contrary to its express language. Appellants' assert otherwise with a strained argument based on the maxim *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of all others. They assert that because Section 72-1367(4) provides that "severance pay shall be deemed wages, even if the claimant was required to sign a release of claims" this means that in instances involving any substantive terms other than release of claims provisions, the pay is not severance pay. This reasoning is flawed for two reasons. First, Appellants are adding words to the statute by arguing in effect that severance pay shall be deemed wages "only if" claimant was required to sign a release of claims. The statute reads that severance pay shall be deemed wages "even if" given for a release of claims. There is a world of

difference between "only if" and "even if." If the Legislature had intended the reading proffered by Appellants, it would have used the words "only if."

Second, Appellants wholly ignore the last sentence of the statute, which adds a definition for "'severance pay."

Last, case law does not support Appellants' position on appeal. Their reliance upon Parker v. Underwriters Laboratories, Inc., 140 Idaho 517, 96 P.3d 618 (2004), is misplaced. The Supreme Court's decision in Parker was founded upon the fact that the Employment Security Law did not define "severance pay." As noted above, the Idaho Legislature supplied a definition after Parker was decided. In addition, as observed by the Commission, Parker involved an eligibility determination, not a monetary determination as here. More important though, the reasoning of Parker, if closely examined, supports the Commission finding here. Parker observed that:

> "Severance pay" has been defined as "[a] sum of money usually based on length of employment for which an employee is eligible upon termination."

140 Idaho at 520, 96 P.3d at 621. That is precisely what happened in this case – Schoeffel received a sum of money for working throughout the transition period and was not eligible for the money until she was laid off at the end of that period.

Appellants also ignore facts that distinguish Parker from the instant case. Parker signed her release agreement two days after being terminated. Here, the terms of the Employee Retention Program were explained to Schoeffel in 2016 long before her separation, and the release agreement was signed shortly before her separation. Schoeffel's last day of employment was September 19, 2018, Exhibit, pp.41-42, and her release agreement was signed by both parties in early August of

2018. Exhibit, p.39. The Court's holding in Parker also was based on the fact that "Parker's consideration for the agreement was not services but the release of any claim that she might have against Underwriters relating to her employment or termination." 140 Idaho at 520, 96 P.3d at 621. The same cannot be said of Schoeffel's separation payments, which were conditioned upon her performance of services until the end of the transition period.

Appellants in their brief attempt to shore up their tenuous legal arguments with a plea to the purposes of the Employment Security Law, specifically that it "protect[s] employees from 'the economic ills arising out of unemployment,' and it provides benefits to those unemployed through no fault of their own. Appellants' Brief, p. 13, *citing*, In re Gem State Academy Bakery, 70 Idaho 531, 224 P.2d 529 (1950). Those statements are true, but the Idaho Legislature has decided the policy question whether the unemployment trust fund should be used by businesses to pad their separation benefit packages to offer to employees. The Legislature did not say that receipt of severance pay would render an applicant ineligible for benefits, it said only that severance pay should be treated as wages, no differently than bonuses. The Legislature's broad definition of "severance pay" is consistent with the Employment Security Law's broad definition of "wages." *See* I.C. § 72-1328(1)(a) ("wages" include "[a]ll remuneration for personal services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash").

Appellants' reliance upon Hammer v. City of Sun Valley, 163 Idaho 439, 443,

414 P.3d 1178, 1182 (2016), and Huber v. Lightforce USA, 159 Idaho 833, 367 P.3d 228, 237 (2016), does not help their cause on appeal. These cases are not Employment Security Law cases and therefore should be distinguished on that basis. They also have no application here because the definition of severance pay in Section 72-1367(4) is not ambiguous. It does not direct that severance pay should be determined by looking for the "primary purpose" of a payment as in Hammer, or by examining the intent of the parties as was done in Huber when the Court found that twelve months' pay under a non-disclosure and non-competition agreement were "wages" under Wage Claims Act. However, even if the "primary purpose" or "intent" of the contracting parties somehow was held to trump the language of the Idaho Code, which shouldn't be the case given the clear language of the statute, it is clear from the facts of this case that Schoeffel's separation pay was intended to keep her working throughout the transition period. Had she not done that, she would have received nothing. General Counsel for Thorne Research candidly admitted in effect that the other three terms in the release agreement – release of claims, confidentiality, and non-disparagement – were added, based on her reading of Parker, to allow participating employees to collect unemployment benefits and separation benefits. Those clauses are not the "primary purpose" of the severance payments; the clauses were not "critically important," as was retaining employees until the Idaho location closed down.

Appellants also make the incredible claim that "where the plain language of an employer/employee contract defines the nature of the payment, the contract

language controls." Appellants' Brief, p.21. No authority is provided in support of such a broad assertion or law. If that were the law, then independent contractor or employee classification could be decided simply by looking at the parties' contract, not the underlying facts relating to control. This is not the law. Further, if Appellants' broad claims were the law, then coverage under the Fair Labor Standards Act could be determined simply by looking at employer-employee contracts. Again, this is not the law.

The eligibility requirements for unemployment benefits and monetary requirements are determined by the text enacted by the Idaho Legislature in the Employment Security Law, by the Department's regulations, and by the decisions of this Court in cases brought before it. Parties cannot change those rules of law simply using the phrase "bargained-for compensation" six or more times in a release agreement, or adding non-disclosure and non-disparagement clauses to a separation pay agreement with the manager of the employee cafeteria who has not been shown to have potential claims against her employer or to have been privy to any confidential or proprietary business information of Thorne Research.

V. CONCLUSION

The Department asserts that the language of Section 72-1367(4) is clear and should control, not the reasoning of cases cited by Appellants that pre-dated the 2005 amendments to the statute. This case involves pay that became due to an employee only upon her separation from employment. The real reason for the "bargained-for compensation" was employee retention, namely, the employee's services to be

provided to her employer before separation. These facts fall squarely within the definition of "severance pay" in Section 72-1367(4). The Commission's findings of fact are supported by substantial competent evidence. It is respectfully submitted that its findings and decision should be affirmed.

DATED this 3rd day of December, 2019.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By /s/ DOUG WERTH
DOUG WERTH
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd of December, 2019, I caused to be served a true and correct copy of the foregoing by the following method(s) to:

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