BRB No. 08-0574

A.S. (Widow of F.S.) Claimant-Respondent v. ADVANCED AMERICAN DIVING and SAIF CORPORATION Employer/Carrier- Petitioners	)	DATE ISSUED: 04/27/2009 DECISION and ORDER

Appeal of the Decision and Order Denying Respondent's Petition for Modification to Discontinue Death Benefits of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

George J. Wall, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order Denying Respondent's Petition for Modification to Discontinue Death Benefits (2007-LHC-0505) of Administrative Law Judge Anne Beytin Torkington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case presents a novel issue involving a widow's continued entitlement to Section 9, 33 U.S.C. §909, death benefits. Employer contends claimant has remarried and is no longer entitled to benefits under Section 9(b) of the Act, 33 U.S.C. §909(b). The facts, as found by the administrative law judge, are not in dispute. *See* Decision and Order at 4-5.

Claimant and decedent were married in September 1998. Decedent died during the course of his longshore employment in March 1999, and employer voluntarily paid death benefits pursuant to Section 9. EXs 1-2 (Comp. Order); Tr. at 21. In September 1999, claimant vacationed in Cabo San Lucas, Mexico, and met A.F. At some point, they began dating, and in 2001, they began living together in Mexico.[1] EX 14 at 14. On November 2, 2002, in Cabo San Lucas, they celebrated their relationship in a "commitment ceremony" presided over by a minister and witnessed by 50 friends and family members. They said vows, exchanged rings, and had a party, which included catered food, a photographer, and a band. *Id.* at 42-55. In November 2003, when claimant was pregnant with their first child, she applied to an Oregon court to change her last name to A.F.'s.[2] The court granted her request in December 2003 and issued a certificate in January 2004. EXs 4-5; Tr. at 6. The couple's first child was born in March 2004, and their second was born in March 2006. EX 14 at 74-75. Claimant and A.F. own property together in Cabo San Lucas and in Oregon, they own a car together, they have joint checking accounts in both Oregon and Mexico, and they generally refer to themselves as "husband and wife" to the public, but they have not filed joint tax returns with the Internal Revenue Service. EX 14 at 63-65, 69-73; Tr. at 24-25.

In light of these facts, employer filed a motion for modification in November 2006 to terminate claimant's widow's benefits on the grounds that she had remarried. EXs 12-13; Tr. at 7; *see* 33 U.S.C. §§909(b), 922. A hearing was held before the administrative law judge at which testimony was given by claimant and A.F. Expert testimony on the

[1]Claimant and A.F. are American citizens. Claimant spends approximately one-third of her time in Oregon and two-thirds in Cabo San Lucas. She considers herself a resident of Oregon: she has an Oregon driver's license, is registered to vote in Oregon, receives her mail in Oregon, attends to her major medical and banking needs in Oregon, and her children were born in Oregon. Claimant has a 365-day Mexican visa but is not permitted to work in Mexico; A.F. works in Mexico as a yacht captain. CX 5; EX 14 at 7-12; Tr. at 22-24, 30.

[2]Claimant testified that she decided to change her name so that her last name would be the same as the man she is living with and their children. EX 14 at 13; Tr. at 26.

subjects of Mexican and family law was offered at the hearing and by deposition. At the hearing, claimant testified that at the time the commitment ceremony was conducted she did not consider it a marriage ceremony and she does not consider herself married to A.F., and A.F. testified that there was nothing binding to the ceremony, that he had no obligation to care for or love claimant, and felt obligation for claimant only as a good friend. Tr. at 15; EX 15 at 162, 165. Following the hearing, the administrative law judge concluded that employer did not establish that claimant is married, and she denied the motion for modification. Employer appeals the administrative law judge's decision, and claimant responds, urging affirmance.

Employer contends claimant has remarried and is no longer entitled to benefits for F.S.'s death. It asserts that claimant became a concubine under the laws of Baja California Sur, Mexico (BCS), and that concubinage is the equivalent of marriage or of common-law marriage such that Oregon would recognize the relationship as a marriage. Moreover, employer argues that there is a strong preference favoring marriage in Oregon and that claimant's actions in creating a relationship that is indistinguishable from marriage in order to retain her benefits violates public policy by allowing her bad faith actions to result in her unjust enrichment. Claimant asserts that the laws of BCS do not apply because she is a resident of Oregon not BCS. Alternatively, she argues that even if the BCS laws apply, she is neither married nor a concubine under those laws, and she argues that she is not in a common-law marriage as neither she nor A.F. agreed to be married.

Section 22 of the Act, 33 U.S.C. §922, allows the modification of an award on the grounds that there has been a change of conditions or a mistake in the determination of a fact. Employer asserts that claimant's marital status has changed since she was awarded death benefits. Section 9(b), 33 U.S.C. §909(b) (emphasis added), provides in pertinent part:

> If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, *during widowhood*, or dependent widowerhood, with two years' compensation in one sum *upon remarriage* . . . .

Thus, the Act provides that a widow is entitled to death benefits only while she is a widow and that once she remarries, she is entitled to a one-time lump sum for the amount of two years' worth of compensation; after that, compensation to the widow ceases.[3] *American Mutual Liability Ins. Co. v. Smith*, 766 F.2d 1513, 17 BRBS 139(CRT) (11th Cir. 1985); *Da'Ville v. Movible Offshore, Inc.*, 16 BRBS 215 (1984). The Act does not define "marriage," and thus state law controls in determining whether a marriage has

[3]No children were born of the marriage between claimant and F.S.

been created.[4] *See Powell v. Rogers*, 496 F.2d 1248 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974) (in absence of statutory definition of "wife," state law applies meaning of the term); *Jordan v. Virginia Int'l Terminals*, 32 BRBS 32 (1998) (state law defines "wife"); *see also E.W. Coslett & Sons, Inc. v. Bowman*, 354 F.Supp. 330 (E.D.Pa. 1973) (state law determines the validity of the marriage); *Brooks v. General Dynamics Corp.*, 32 BRBS 114 (1998) (state law defines "*in loco parentis*"). The parties agree that Oregon law applies in determining whether claimant is married to A.F.

Under Oregon law, "[m]arriage is a civil contract entered into in person . . . and solemnized in accordance with ORS 106.150." Or. Rev. Stat. §106.010. Oregon law provides that the parties must "assent or declare in the presence of the clergyperson, county clerk or judicial officer solemnizing the marriage and in the presence of at least two witnesses, that they take each other to be husband and wife." Or. Rev. Stat. §106.150(1). Such marriages, without legal impediment, are valid, and the person presiding over the ceremony must deliver the marriage license application, license and record of marriage to the county clerk. Or. Rev. Stat. §106.150(2). Common-law marriages may not be contracted in Oregon; however, Oregon will recognize common-law, or non-ceremonial, marriages legally established in other jurisdictions. *Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir. 1964); *Johnston v. Georgia-Pacific Corp.*, 581 P.2d 108 (Ore. Ct. App. 1978).

In this case, there is no license of marriage filed with any county clerk in Oregon, and it is undisputed that claimant and A.F. did not formally marry in Oregon. The issue presented, therefore, is whether claimant and A.F. formed a marriage under the Civil Code of the State of Baja California Sur (CCBCS) that Oregon would recognize as a valid "marriage."[5]

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[4]Although there is federal law relating to marriage, it does not define marriage for these purposes. *See* Defense of Marriage Act, 1 U.S.C. §7; 28 U.S.C. §1738C.

[5]Claimant contends she is not subject to the laws of BCS because she does not spend enough consecutive days there. We reject this argument. Assuming claimant is a resident of Oregon and Oregon law applies, nonetheless, her actions in Cabo San Lucas are governed by the laws of that jurisdiction at least to the extent that Oregon would recognize the application of those laws. *See Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir. 1964) (where couple, domiciled in Oregon, entered a nonceremonial marriage in Idaho, which recognized common-law marriage, the marriage would be recognized in Oregon). Employer's expert, Professor Vargas, explained in his report that Mexico adheres to the "Principle of Limited Territorialism" which means that Mexican laws apply to all persons, acts and events that occur within Mexico. Professor Vargas translated Article 12 of the CCBCS which states that the laws of BCS apply to all

According to Professor Vargas, employer's expert on Mexican law,[6] as well as Mr. Dávalos, claimant's expert,[7] Mexico is a civil law country. Professor Vargas translated Article 150 of the CCBCS, which defines marriage in BCS, as:

> The legitimate union of a single man and a single woman, with the *explicit intention* of forming a family, through domestic and sexual cohabitation, reciprocal respect and protection, and of the eventual perpetuation of the species.

CCBCS art. 150 (emphasis added). He stated that Article 152 of the Code states: "Marriage is a solemn act that must be executed before the Civil Registry Official, with all the formalities established by Law." CCBCS art. 152. In this case, the Civil Registry Official in Cabo San Lucas issued a certificate of "no record of marriage" in BCS, CXs 8-11, and it is undisputed that claimant and A.F. did not enter into a civil marriage in Mexico.

As Professor Vargas explained, the CCBCS allows another type of legal union between a man and a woman: "concubinage." Specifically, the CCBCS provides:

> Concubinage is the union of one man and one woman, free of kinship and matrimonial impediments, with the *tacit purpose* of forming a family through domestic and sexual cohabitation, reciprocal respect and protection, and the eventual perpetuation of the species.

CCBCS art. 330 (emphasis added). Professor Vargas explained that approximately five million couples in Mexico are in concubinage relationships, that this type of relationship pre-dated the creation of "marriage," and that all 31 states of Mexico codify it in some form. EX 11; EX 23 at 6, 9-10; EX 24 at 66-67. He explained how the relationship is

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inhabitants "whether nationals or foreigners, domiciled therein or transient…." EX 19 at 6.

[6]Professor Vargas is a highly credentialed professor at the University of San Diego School of Law. He teaches Mexican law, including family law, and he has written nearly 70 law review articles, including ones on family law in Mexico and a comparative study of concubine laws. EX 11. He has written eight books on Mexican law, a Mexican treatise, and a Mexican legal dictionary. EX 23 at 4-5; EX 24 at 6. He is fluent in English, Spanish, and several other languages, and he is considered the most prolific author in the United States publishing on Mexican law. EX 24 at 5-6.

[7]Mr. Dávalos, who was born and educated in Mexico, is now a partner in the Phoenix office of an international law firm. His practice specializes in business law (corporate, real estate, construction, *etc.*). He is fluent in Spanish and English, and he has worked and taught seminars in both the United States and Mexico. CXs 1-2.

formed, the rights and obligations it creates, and how it is terminated. EXs 23-24; *see* CCBCS art. 330-340. Specifically, he explained that the parties must manifest the relationship in a continued, public, and permanent manner and that the concubinage will effectively be created after five uninterrupted years of living together, or after two years if the parties were united during an indigenous ritual or religious ritual of public character, or as of the birth of their first child, if that event precedes the others. EX 23 at 28; CCBCS art. 331. Once created, the relationship is treated, in some ways, as if the parties are true spouses in a marriage. That is, they incur economic obligations and parental duties, and they obtain survivorship rights.[8] EX 23 at 34-41; CCBCS art. 332-340. Professor Vargas stated the parties can terminate a concubinage by mutual agreement, abandonment, death, or by seeking a statement in *ex parte* proceedings. EX 23 at 40-42; CCBCS art. 339.

Mr. Dávalos agreed with many of Professor Vargas's statements; however, he believed that a concubinage was not "official" until a judicial officer declared it so, and that there was an even "lesser" union into which the parties could enter called a "free union," which is not regulated by law. CXs 7; CX 13 at 8. Professor Vargas clarified that there are only two unions in Mexico: marriage and concubinage.[9] Professor Vargas concluded that claimant and A.F. are in a concubinage relationship, which he stated is the Mexican equivalent of a common-law marriage.[10] EX 19 at 13; EX 23 at 26. He concluded that they should be considered "married" under Mexican law, as well as under Oregon law, because they are in a relationship that gives them rights and obligations indistinguishable from those obtained through marriage.

The parties also presented evidence from experts on Oregon family law: Mr. Gazzola for employer and Professor Steverson for claimant.[11] Mr. Gazzola explained

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[8]In BCS, upon a concubine's death, the survivor is entitled to inherit as if he/she were the spouse of the other. EX 23 at 17-22; EX 24 at 19-23, 25-29.

[9]Professor Vargas stated that concubinage is also known as "free union." EX 24 at 23.

[10]Mexico is a civil law jurisdiction, and, as such, does not utilize common law concepts, according to Professor Vargas. EX 19; EX 23 at 6.

[11]Mr. Gazzola is a family law attorney who practices in Oregon and southwest Washington, and he is a former chairperson of the Family Law Section of the Oregon Bar. Tr. at 38-39. Ms. Steverson is a law professor at Lewis and Clark Law School who teaches domestic relations and family law. She has presented the law review course for the area of family law for the Oregon Bar exam. Tr. at 65-66. Neither attorney has any expertise in Mexican law. Tr. at 39, 62, 66, 79.

that Oregon will recognize a marriage deemed valid in the jurisdiction in which it was formed and that, although a common-law marriage cannot be formed in Oregon, Oregon would recognize a common-law marriage if it were created in a state that recognizes such a marriage. Tr. at 40, 46; *see, e.g.*, *Marriage of Wharton*, 639 P.2d 652 (Ore. Ct. App. 1982). He testified that, if concubinage were the equivalent of marriage, Oregon would recognize it, as it is the public policy of Oregon to protect the marriage state and there is a presumption that people holding themselves out as married are married. Tr. at 47-48, 57-58, 61-62, 72; *see also* Or. Rev. Stat. §40.135(1)(u). Mr. Gazzola did not form an opinion as to whether a concubinage is the equivalent of a marriage, but he stated that claimant's domestic situation would probably satisfy the elements of a common-law marriage in a state that recognizes such marriage. Tr. at 53-54, 63. Professor Steverson, however, testified that claimant and A.F. are not married under Oregon law. She stated that there is no relationship for Oregon to recognize, based on Professor Vargas's statements that a concubinage is not a contractual relationship and her knowledge that marriage, even a common-law marriage, is a contractual relationship which requires consent of the parties. Tr. at 68-71. Professor Steverson also explained that for Oregon to recognize a relationship, it must "be a marriage," as merely being "equivalent to marriage" is insufficient. Tr. at 83.

Because employer filed the motion for modification, the administrative law judge found that it bears the burden of showing that claimant has remarried under the Act. Decision and Order at 12. The administrative law judge then considered whether concubinage constitutes marriage under Oregon law. Since Oregon recognizes common-law marriages formed in jurisdictions allowing such marriages, the administrative law judge determined that if concubinage under the law of BCS is equivalent to common-law marriage, Oregon would recognize it. She emphasized, though, that it could not be "similar to" marriage – it must be marriage.

After reviewing the evidence, the administrative law judge concluded that concubinage is not marriage in Baja California Sur; thus, it is not like common-law marriage. Although she acknowledged there are some similarities with regard to the parties' rights and obligations, she found that it does not impose the same rights and responsibilities on the couple. Decision and Order at 13. Most particularly, with regard to the termination of a concubinage, the administrative law judge found that concubinage can be ended by mutual agreement, abandonment of the common domile for more than six months, death of a party or a unilateral notice of termination by a party, whereas marriage may be terminated only by death or divorce. This difference alone, she determined, is sufficient to set concubinage apart from marriage. *Id*. The administrative law judge also looked to decisions of courts that have considered whether concubinage as established by Mexican law is the same as marriage, and noted that these courts likewise had found that it was not.

In addition, the administrative law judge found that marriage requires an intent to be married, whether it is common-law marriage or ceremonial marriage. Concubinage, the administrative law judge determined, does not require an intent to contract to marry, and thus lacks one of the essential elements of marriage. Decision and Order at 15. Finally, the administrative law judge considered the factual evidence and concluded that employer failed to show that claimant and A.F. intended to marry, in the face of claimant and A.F.'s credible testimony to the contrary, and consequently there was no adequate basis for finding that claimant and A.F. are married. *Id*. at 15, 16. The administrative law judge expressly credited the testimony of claimant and A.F. that they did not intend or consent to marry and explicitly sought to avoid marrying. *Id*. at 12, 15. The administrative law judge also noted the absence of any evidence of a certificate of marriage issued either in Oregon or BCS and the certification of "no record of marriage" issued by a BCS official. Accordingly, the administrative law judge concluded that claimant has not remarried and retains the rights to her Section 9 benefits. *Id*. at 14-15.

We affirm the administrative law judge's decision, as employer has not established that she erred in finding that claimant has not married.[12] As it is uncontested that claimant and A.F. did not marry formally in either Oregon or BCS, and cannot create a

[12]We reject our dissenting colleague's interpretation of the term "remarriage" in Section 9(b) of the Act. The cases she cites involve defining only who is a "widow" of the employee within the meaning of Section 2(16). *See, e.g., Thompson v. Lawson*, 347 U.S. 334 **(**1954). It is uncontested in this case that claimant was decedent's wife living with him at the time of his death, and thus is the "widow" of the employee. Therefore, the only basis on which her entitlement to death benefits can be terminated is her "remarriage." 33 U.S.C. §909(b). We disagree that this statutory term does not have a legal meaning, and that a marriage can, instead, be formed merely by the parties' conduct, regardless of their intent. The laws of both Oregon and Mexico state that marriage is predicated on the parties' contracting to marry. Or. Rev. Stat. §§106.010, 106.150 (2009); CCBCS art. 152. In the "widow" cases cited by our colleague, *e.g., Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964), the parties had contracted to marry, but there was some other legal impediment to the creation of a valid marriage. Moreover, we note that legislatures can determine that something less than "remarriage" will terminate a widow's benefits. For example, the Pennsylvania workers' compensation law provides that a widow is entitled to death benefits until she "remarries" or "lives with a man in a meretricious relationship and not married." 77 Pa. Stat. Ann. Tit. 11, §562. Thus, if Congress had intended that something short of actual "remarriage" should cause the termination of death benefits, it could have so provided. We must interpret the statute as it is written and in accordance with its plain language, regardless of our views as to the desirability of some other result. As claimant has not "remarried," she remains entitled to death benefits.

common-law marriage in Oregon or BCS, the administrative law judge properly concluded that they are married under Oregon law only if they formed a concubinage relationship under BCS law that would be recognized as a marriage in Oregon. No Oregon court has addressed the issue of whether concubinage, pursuant to BCS law, constitutes marriage recognizable under Oregon law. However, Oregon courts recognize marriages legally established in foreign jurisdictions, and, conversely, do not recognize as marriage those relationships which are not marriage. *See Gorman v. Gorman*, 211 Or. 550 (1957). Accordingly, only if concubinage is marriage, is there any question as to whether claimant has remarried. As claimant points out, the CCBCS does not declare that concubinage is marriage, and treats concubinage and marriage separately. Cl. Br. at 5; EX 19. Moreover, as the administrative law judge found, the rights and duties of members of the concubinage relationship are not the same as those of married spouses. Either party to the concubinage relationship can terminate the relationship without consent of the other, while marriage is terminated only by death or divorce. Decision and Order at 13; EX 19.

In addition, those courts which have considered whether concubinage is marriage similarly have concluded that it is a lesser union. In *Rosales v. Battle*, 113 Cal. App. 4th 1178 (Cal. Ct. App. 2004), a woman, living in concubinage in BCS with her children's father brought suit for wrongful death in California after her partner was killed in an automobile collision in California. Even though the appellant was granted a judgment of intestate succession in Mexico, the California court concluded that BCS concubinage is not a "marriage" because it does not confer the same rights and obligations as does a marriage.[13] Similarly, a Texas court held that a woman, recognized in Chihuahua, Mexico, as the concubine of the man with whom she was living until his death, was not the legal wife of the man, pursuant to Texas law, and could not inherit his Texas property. *Nevarez v. Bailon*, 287 S.W.2d 521 (Tex. Civ. App. 1956). The court acknowledged that a concubinage differs from a common-law marriage, which was permitted in Texas, in that it may be terminated at will, whereas marriage may be terminated only by death, divorce or annulment. Because the court concluded that concubinage is a lesser union than marriage and is not a "valid provable marriage" in Mexico, the appellant could not claim inheritance as a common-law wife in Texas.

Moreover, as the experts on Oregon law testified, both ceremonial and common-law marriages require that the parties intend to be married.[14] The administrative law

[13]This court also noted that a concubinage may be terminated at the will of the parties. *Rosales*, 113 Cal. App. 4th at 1183.

[14]The parties agree that agreement to marry is requisite for marriage in this case. Emp. Br. at 14; Cl. Br. at 6. Moreover, this is not a case in which only the formalities of marriage are lacking. Here, the administrative law judge found that claimant and A.F. credibly testified that they are not wife and husband and have never been so. Tr. at 15.

judge found credible the testimony of claimant and her partner that they did not intend to marry.[15] The administrative law judge determines the credibility of testimony, and we are bound to respect her determinations in this regard. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Consequently, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's decision denying employer's motion for modification and her order continuing claimant's Section 9 benefits. [16]

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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JUDITH S. BOGGS
Administrative Appeals Judge

Thus, we also disagree with our dissenting colleague that through their conduct claimant and A.F. formed a concubinage under Mexican law which is "marriage." Leaving aside the question of whether claimant and A.F. formed a concubinage (since they have explicitly testified -- in testimony the administrative law judge found credible -- that it was not and is not their purpose to reciprocally protect, *e.g.* support, each other), concubinage is not marriage. Claimant and A.F. stated that they did not intend to form a marriage and that their ceremony was not binding. Tr. at 15. A.F. stated that he did not have any obligation to care for claimant. EX 15 at 162, 165; Tr. at 15.

[15]Mr. Gazzola, employer's expert, stated that in all of the cases he reviewed where a court held a marriage valid without the required formalities, at least one member of the couple asserted that he or she was married. He found no cases where a third party established that a couple was married over the objections of both members of the couple. Decision and Order at 10.

[16]Employer also contends that claimant has acted in bad faith in order to obtain the unjust enrichment of additional benefits under the Act. The administrative law judge found, based on claimant's testimony, that she deliberately did not enter a legal marriage because she did not want to jeopardize her benefits. Nonetheless, this fact cannot establish a "marriage" where the legal requirements are not met.

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's decision denying employer's request for modification of the decision awarding claimant death benefits pursuant to Section 909 of the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. §909(b). The issue presented is whether the evidence has established that claimant has participated in a "remarriage" within the meaning of the Longshore and Harbor Workers' Compensation Act, thereby terminating her right to payment of a continuing death benefit as a widow. 33 U.S.C. §909(b). Section 909 provides in relevant part:

> If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> (b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage. . . .

The fatal flaw in the administrative law judge's analysis is that in determining whether claimant had remarried, and thereby forfeited her right to receive continuing death benefits pursuant to 33 U.S.C. §909, the administrative law judge considered the word "remarriage" devoid of its context in the statute. 33 U.S.C. §909(b). It is fundamental, as the Supreme Court has observed, that "a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). If the administrative law judge had considered "remarriage" in the context of Section 909(b), she would have appreciated the importance of the Supreme Court's illumination of that provision in *Thompson v. Lawson*, 347 U.S. 334 (1954). The Court held in *Thompson* that a deserted wife, who subsequently "marries" another, though no divorce is obtained from the first husband, is not a "widow" within the meaning of the Longshore Act. 33 U.S.C. §902(16).[1] The Court explained that Congress could have provided that a woman

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[1]The Court was construing Section 2(16):

> The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

33 U.S.C. §902(16) (1954). In 1972, Congress revised this provision to render it gender neutral:

is entitled to compensation as long as she continues to be deemed the lawful wife of the decedent under state law, but Congress did not choose to do so. Instead,

> [Congress] defined the requirements which every claimant for compensation must meet. Considering the purpose of this federal legislation and the manner in which Congress has expressed that purpose, the essential requirement is a conjugal nexus between the claimant and the decedent subsisting at the time of the latter's death, which, for present purposes, means that she must continue to live as the deserted wife of the latter. That nexus is wholly absent here. Julia herself, by her purported remarriage, severed the bond which was the basis of her right to claim a death benefit as Otis' statutory dependent. The very practical considerations of this Compensation Act should not be subordinated to the empty abstraction that once a wife has been deserted, she always remains a deserted wife, no matter what--the nomatter what in this case being the wife's conscious choice to terminate her prior conjugal relationship by embarking upon another permanent relationship.

Thompson, 347 U.S. at 336-337.[2] Thus, the Court held that practical considerations trump a claimant's technical legal status in determining her right to death benefits. If the administrative law judge had considered the Supreme Court's teaching in *Thompson,* she would have been able "to interpret the specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part." *U.S. v. Bonanno,* 879 F.2d 20, 24 (2d Cir. 1989) (citing 2A *Sutherland Statutory Construction* §46.05 (4th ed. 1984)). Analysis of the record in light of the relevant law leads to the inescapable conclusion that claimant's relationship with A.F. is a "remarriage" within the meaning of Section 909 of the Longshore Act.

> The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

33 U.S.C. §902(16).

[2]According to the facts stated in the Court's opinion, the claimant, while married to the decedent, went through a marriage ceremony with another man and continued to live with him for nine years, until they were divorced, although they had never been legally married. *Thompson,* 347 U.S. at 335.

THE RECORD

Claimant was a twenty-two year old real estate agent, married for less than six months, when her husband, a longshoreman, was involved in a fatal work accident on March 4, 1999. Claimant then began receiving weekly widow's benefits under the Longshore and Harbor Workers' Compensation Act in the amount of $780.95 per week, subject to the adjustments of Section 10(f) and the limitations of the Act. EX 1 at 1. 33 U.S.C. §§909, 910(f). Claimant testified that her attorney advised her that if she remarried she would lose entitlement to ongoing payment of death benefits under the Act. EX 14 at 136-137. Claimant related that she met A.F. in Cabo San Lucas in September 1999 and moved to Cabo San Lucas in 2001 to be with him. EX 14 at 140. When she began to establish a relationship with A.F., she investigated the law on marriage and determined that neither Oregon nor Mexico recognizes common law marriage. EX 14 at 137-138. She undertook this research to avoid having a legal marriage ceremony and thereby lose her benefits. EX 14 at 140; Tr. 31. She decided to have a "commitment ceremony" because it was similar to a wedding ceremony except that it lacked a license or Civil Registry filing. Tr. at 31. The "commitment ceremony" was held in Cabo San Lucas on a private beach on November 2, 2002. EX 14 at 105. Claimant wore a white dress; she and A.F. exchanged rings and vows before a Christian minister and about fifty guests, including family and friends. EX at 105-120. The ceremony was followed by a catered reception. EX 14 at 113.

Claimant also testified that she and A.F. represent themselves to the world as husband and wife. EX 14 at 135-36. Claimant stated that she had her name legally changed in Oregon when she and A.F. were expecting their first child, who was born on March 17, 2004. EX 75-76. Their second child was born on March 24, 2006. EX 14 at 75.

Claimant explained that she lives for eight or nine months of the year in Cabo with A.F. and their children; she returns to Oregon for medical appointments and to attend to banking and real estate matters. EX 14 at 70. She and A.F. jointly own their bank accounts and real estate, as well as their home which is probably worth $800,000. EX 14 at 79-80, 83, 126. They have never separated because of dissatisfaction with their relationship. EX 14 at 78.

Employer also introduced evidence of life insurance policies obtained by both claimant and A.F. on their own lives (claimant's in the amount of $750,000; A.F.'s in the amount of $1,000,000); they both described themselves as married and the beneficiary as husband or wife. EXs 10, 11.

Both parties introduced expert opinion evidence on marriage according to the law of Mexico and Oregon. On the issue of the status of concubinage in Mexican law, employer proffered the opinion of Professor Jorge A. Vargas of the University of San Diego School of Law, a summa cum laude graduate of the School of Law National

Autonomous University of Mexico, and a graduate (LL.M.) of the Yale Law School. Professor Vargas is an expert on Mexican Law, comparative law and the Mexican legal system. He has served as Legal Counsel to various agencies of the government of Mexico, and has written numerous books and law review articles on Mexican law, including "Concubines Under Mexican Law: with a Comparative Overview of Canada, France, Germany, England and Spain." 12 SW. J.L. & Trade Am. 45, 55 (2005). Professor Vargas translated and discussed the relevant provisions of the Civil Code of the State of Baja California Sur (CC/BCS). EX 19. He showed the similarity in the definitions of marriage and concubinage:

> **Article 150**. Marriage is the legitimate union of a single man and a single woman, with the explicit purpose of forming a family through domestic and sexual co-habitation, reciprocal respect and protection, and the eventual perpetuation of the species. Said marriage pursues the following goals: . . . (Omitted)
>
> **Article 330.** Concubinage is the union of one man and one woman, free of kinship and matrimonial impediments, with the tacit purpose of forming a family through domestic and sexual co-habitation, reciprocal respect and protection, and the eventual perpetuation of the species.

EX 19 at 209, 213. And Professor Vargas stated the differences in how the unions are created:

> **Article 152**. Marriage is a solemn act that must be executed before the Civil Registry Official (*Oficial del Registro Civil*), with the formalities established by the law.
>
> **Article 331**. For the concubinage to exist legally it is necessary that the manifestation of the [parties'] will be continued in a peaceful and permanent manner:
>
> **I.** During five uninterrupted years;
>
> **II.** During two years if the union was produced through an Indigenous ritual or a religious ritual of a public character; or
>
> **III.** Since the birth of the first child, if this takes place prior to any of the preceding situations.

EX 19 at 209, 213-214. Professor Vargas identified similar rights and obligations created by the two legally recognized unions:

> **Article 334**. If the concubinage is prolonged until the death of one of its members, the surviving concubine shall have the right to inherit in the same proportion and conditions as a spouse.
>
> **Article 335.** The parental functions (*Funcianes parento-filiales*) are equal in the concubinage and in the marriage, so the concubines shall arrange by mutual agreement anything pertaining to the education and attention of the children.
>
> **Article 336.** The donations between concubines shall be governed by the provisions of pre-nuptial and nuptial agreements.

EX 19 at 214. The Professor also stated that the dissolution of the concubinage gives rise to a cause of action for alimony prescribed by the same code applicable to civil marriage contracts. *Id.*

Professor Vargas discussed those facts relevant to the issue of whether claimant and A.F. have entered into a concubinage and explained his conclusion:

> I understand that [claimant] and [A.F.] started living together in San José del Cabo, BC Sur, in 2001, and continue to live together today; that [claimant] is a resident of Mexico where she resides longer periods of time than that those in the United States; that [claimant] and [A.F.] had a "commitment ceremony" where they exchanged vows and wedding rings on November 2, 2002, in Cabo San Lucas, Mexico, attended by relatives of both of them, as well as friends, that clearly fits the description of a "religious ritual of a public character," referred to in paragraph II of Article 331 of the CC/BCS; that [claimant] and [A.F.] have two children together and that they have been living in an "informal marital relationship" for longer than five years; that they "describe each other as spouse, husband or wife to strangers and friends both in Mexico and in the United States; that [claimant] and [A.F.] have joint bank accounts in both countries; that they "own property in Oregon as tenants by the entirety," indicating their choice of their preferred property marital regime; that [claimant] and [A.F.] "purchased life insurance policies, naming each as the beneficiary, and indicating in the application that they were married;" and that [claimant] "changed her last name to [A.F.'s] in December 2003."
>
> Under Mexican law, the preceding paragraph unquestionably proves to me that [claimant] and [A.F.] have been engaged for longer than five years in an "informal marital relationship in full conformance with the applicable provisions of the Civil Code of the State of Baja California Sur (Arts. 330-339) and have become subject to the array of legal consequences arising out

> of that concubinage relationship as mandated by the pertinent provisions of said Civil Code.
>
> It is my conclusion that [claimant] and [A.F.] may be considered to be "married within the meaning of Mexican law."

EX 19 at 215.

To rebut Professor Vargas's opinion, claimant offered the opinion of Carlos Dávalos, a 1997 graduate of Anahuac University in Mexico City, licensed to practice law in Mexico. CX 13 at 4. He has never been a law professor, nor authored articles in legal journals but he professes to be an expert on Mexican corporate law. Mr. Dávalos works in Phoenix, Arizona for a firm called Foreign Legal Consultants in Mexican Law. CX 13 at 16, 50-51. Although he has never worked on a case involving concubinage in Baja California Sur, he opined that claimant and A.F. were not in concubinage. CX 7 at 4. He explained that the status of concubinage does not exist until a declaration is obtained from a judge and that third parties other than children are not authorized to obtain this declaration. CX 13 at 8-10. Mr. Dávalos acknowledged that claimant and A.F., if they chose, could obtain such a declaration, but that would not make them legally married under Mexican law, CX 13 at 26, because concubinage is not equivalent to marriage, CX 13 at 33.

Both parties purported to offer expert evidence on the issue of whether Oregon would recognize the union of claimant and A.F. as a marriage. Employer proffered the testimony of Charles Gazzola, a practitioner of family law in Oregon since 1988. He has chaired the family law section of the Oregon State Bar, and he has given speeches for both the Oregon State Bar and the Oregon Law Institute. He testified that Oregon public policy supports recognizing as married those people who hold themselves out as husband and wife, and that the policy is even stronger when children are involved; one who seeks to overcome the presumption of marriage has a "very, very . . ." heavy burden. Tr. at 43, 62. He cited *Werden v. Thorpe,* 867 F.2d 557 (Or. Ct. App.), *review denied,* 873 F.2d 322 (Or. 1994)(table), in which the Oregon Court of Appeals upheld the right of a woman to inherit even though her marriage to the decedent did not satisfy all of the requirements of the Mexican Civil Code. Tr. at 60. Mr. Gazzola stated that Oregon recognizes common law marriage which are entered into in other states and that it appears that claimant and A.F. have satisfied the requirements of a common law marriage. Tr. 54. Based upon Professor Vargas's opinion that they would be considered married in Mexico, Mr. Gazzola opined that Oregon would "[c]ertainly" recognize the validity of the marriage. *Id.*

In rebuttal, claimant proffered the testimony of Professor Janet Steverson, who teaches family law at Lewis and Clark Law School. Professor Steverson was insistent that in order for Oregon to recognize a marriage, it must be a marriage, not "equivalent to" a marriage. Tr. at 83. She acknowledged that Oregon would recognize foreign

marriages which are valid under the laws of the country where the marriage was solemnized. Tr. at 86. She observed that common law marriage requires an intent to marry, which some jurisdictions hold can be inferred from conduct, but other jurisdictions require more. Tr. at 88. She continued, that if the parties say they did not intend to marry, as the parties said in this case, evidence of a contract to marry would be necessary to prove marriage. Tr. at 71. Professor Steverson opined that because, according to Professor Vargas, concubinage is not a civil contract, there is no basis for its recognition by Oregon. Tr. at 70-71. She stated that essential to a marriage is a contract or agreement to marry and that there can be no marriage without mutual agreement.

The administrative law judge held that employer had failed to prove that claimant had remarried, "even assuming she did enter a concubinage relationship." Decision and Order at 16. The administrative law judge provided two reasons for her conclusion: first, that because concubinage was not equivalent to common law marriage, concubinage was not therefore equivalent to marriage; second, that intent to contract to marry is an essential element of marriage and since claimant and A.F. specifically intended not to marry, they could not be held to have married. *Id.* at 14-16.

The administrative law judge began her analysis with the observation that Oregon recognizes common law marriages from other jurisdictions "because they create the same rights and obligations as marriages in those jurisdictions." Decision and Order at 13. She stated that concubinage is not like common law marriage because it "does not impose the same rights and responsibilities on the couple." *Id.* The administrative law judge provided no explanation for that statement. She went on to say that the most significant difference is in the termination of each relationship:

> Concubinage can be ended by mutual agreement, abandonment of the common domicile by one of the parties for more than six months, by death of one of the parties, or by either party filing a unilateral notice of termination. Marriage can only be ended through death or divorce.

Id. at 13. To support her argument the administrative law judge cited various cases, none on point, in which concubines have been denied rights and benefits.

The administrative law judge's second reason relied upon Professor Steverson's opinion that concubinage is not a contractual marriage, hence, claimant cannot be held to have remarried. Decision and Order at 14. The administrative law judge also credited Dr. Steverson's opinion that "[i]ntent to contract to marry is an essential element of marriage . . ." and because both claimant and A.F. specifically intended not to marry, they cannot be held to have married. *Id.* at 15-17.

ANALYSIS

In the instant case, the administrative law judge's determination that claimant had not remarried and therefore had not forfeited her right to continuation of death benefits pursuant to the Longshore Act was erroneous because she failed to consider "remarriage" in the context of the Act and in light of the Supreme Court's teaching in *Thompson.* As discussed *supra*, the Supreme Court held in *Thompson* that a woman who was deserted by her longshoreman husband, and thereafter lived as the wife of another man for a period of years, but was alone at the time of her husband's death, was not a "widow" as that term is employed in the Longshore Act because she had not continued to live as the deserted wife of the longshoreman. 33 U.S.C. §902(16); *Thompson,* 347 U.S. at 335. The Court explained that this conclusion is compelled by the "very practical considerations of this Compensation Act. . . ." *Id.* at 337. The only distinction between the conduct of the claimant in *Thompson* and the claimant in the instant case is that the claimant in *Thompson* lived as another man's wife prior to the death of her longshoreman-husband and claimant has lived as another man's wife after the death of her longshoreman-husband. Living as another man's wife forfeited the *Thompson* claimant's right to an award of death benefits because she had not continued to live as the deserted wife of the longshoreman. Similarly, living as another man's wife should forfeit claimant's right to continuing death benefits because she has not continued to live as the widow of the longshoreman. That is common sense. But claimant, the administrative law judge, and the majority maintain that the law is concerned solely with legal technicalities, not common sense, thereby requiring employer to pay over $40,000 per year to claimant as the widow of a longshoreman, even though for more than the past six years she has lived as the wife of another man, the father of her two children. The teaching of *Thompson* is that Congress intended that practical considerations prevail over technical legal marital status in determining entitlement to widow's benefits under the Act.

Since there has been no definitive interpretation of "remarriage" in Section 909(b) of the Longshore Act, there are two possible interpretations, either as a term of art or, a "broader and more usual concept of the word . . ." *Lawson v. Suwannee Fruit & Steamship Co.,* 336 U.S. 198, 201 (1949). In *Suwannee Fruit,* the Supreme Court concluded that Congress did not use the term "disability" as a legal term in the second injury provision of the Longshore Act, despite its explicit definition in the statute, because mechanical application of the legal definition would "destroy one of the major purposes of the second injury provision . . . ." *Id.* It appears that the administrative law judge assumed that "remarriage" must be interpreted as a legal term because courts have recognized that the meaning of "surviving spouse" in Section 909(b), and "widow" in Section 2(16), must be supplied by reference to the applicable local law. *Powell v. Rogers,* 496 F.2d 1248, 1250 (9th Cir. 1974); *Gibson v. Hughes,* 192 F. Supp. 564, 566 (S.D. N.Y. 1961); *see generally Seabord Air Line Ry. v. Kenney,* 240 U.S. 489 (1916). But the law is well-established that the legal definition of a term cannot be applied if to

do so would "defeat the primary Congressional purpose for the enactment . . . ." *Philko Aviation v. Shacket*, 462 U.S. 406, 411 (1983); *see Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949) (holding that "production" in Section 3(f) of the Fair Labor Standards Act should be interpreted in accordance with a natural reading of the language, not as defined in the statute, in order to effectuate the intent of Congress). Clearly Congress's very practical purpose in enacting Section 909 of the Longshore Act was to obligate employers to pay death benefits to claimants as long as they continued to live as widows of the longshoremen. For that reason the *Thompson* Court held that because claimant had "embark[ed] upon another permanent relationship" she had "severed the bond which was the basis of her right to claim death benefits as Otis' statutory dependent." *Thompson*, 347 U.S. at 337. Thus, it is reasonable to interpret "remarriage" as conduct indicating the claimant has ceased living as the longshoreman's widow. This is consistent with the Supreme Court's interpretation of surviving spouse as one who has continued to live as the abandoned wife of the longshoreman. This interpretation vindicates the fundamental principle of statutory construction that "All laws should receive a sensible construction." *Rector, Etc. of Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892). The administrative law judge's insistence that claimant has not remarried because she lacked the intent to contract to remarry and because concubinage is not equivalent to Mexican civil marriage, must be seen as completely wrong-headed in light of the Supreme Court's teaching in *Thompson* that technical legal marital status is not controlling. The statement of the D.C. Circuit in *Liberty Mutual Ins. Co. v. Donovan*, 218 F.2d 860, 861 (D.C. Cir. 1955) applying *Thompson* to a longshore widow's claim, is equally applicable to the case at bar: "The essential ingredient in her claim is her real status, speaking factually, in respect to the deceased, not the existing legal formalities of the relationship." Claimant's real status in the instant case is that she is no longer living as the deceased longshoreman's widow, she has, therefore, remarried within the meaning of the Longshore Act. 33 U.S.C. §909. *Thompson*, 347 U.S. 334. Application of a legal definition of remarriage could defeat Congress's practical purposes in enacting this compensation Act. As the Supreme Court observed in *Suwannee Fruit*, 336 U.S. at 201: The Longshore Act should not be read "in a mechanical fashion, . . . [so as to] create obvious incongruities in the language, and . . . [thereby] destroy one of the major purposes of the . . . provision . . . ." Hence, when "remarriage" is understood in the context of the Longshore Act as explained by the Supreme Court, it means conduct indicating claimant has "embark[ed] upon another permanent relationship" and thereby has ceased living as the deceased longshoreman's widow.[3] *Thompson*, 347 U.S. at 337. Interpretation of "remarriage" in Section 909 in

[3]It is noteworthy that the Supreme Court referred to Thompson's second relationship as "permanent" even though it terminated after nine years. On the other hand, fleeting domestic attachments have not barred a deserted wife from receiving death benefits pursuant to the Longshore Act. *See Leete v. Director, OWCP*, 790 F.2d 418, 18

accordance with this general understanding makes it clear that claimant has remarried within the meaning of the Act and, accordingly, she has forfeited her right to receive continuing payment of death benefits.

In the alternative, it is possible that "remarriage" in Section 909(b) of the Act should be understood as a legal term like "surviving spouse" or "widow." The administrative law judge interpreted it as a legal term, but she erred in interpreting it as a legal term whose meaning is provided solely by Mexican domestic relations law. She should have considered it a legal term whose meaning may also be provided by workman's compensation law. *Powell v. Rogers*, 496 F.2d 1248 (9th Cir. 1974); *Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir. 1964); *Gibson v. Hughes*, 192 F.Supp. 564 (S.D. N.Y. 1961); *contra Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 1316 n.10, 10 BRBS 852, 859 n.10 (5th Cir. 1979) (rejecting the Director's argument that the state's workers' compensation law, rather than the state's general law, should govern claimant's status as decedent's wife). The evidence is uncontradicted that under Mexican workers' compensation law claimant's entitlement to compensation and death benefits would be equal to those of a surviving spouse.[4] EX 11 at 44.

The Ninth Circuit has explained the rationale for preferring application of a state's workers' compensation law to application of a state's domestic relations law in determining marital status under the Longshore Act:

> The application of state domestic relations law, developed in other contexts, to the solution of problems under workmen's compensation statutes, produces results which at best have only a fortuitous relation to the remedial purposes of the compensation acts, and often are in direct conflict with them. When the state law does provide a definition of marital status deliberately shaped to compensation act purposes alone, there is no reason why that definition should not be applied under the federal statute in preference to one drawn from the state's general domestic relations law.

BRBS 93(CRT) (5th Cir. 1986); *Port Arthur Shipping Corp. v. Calbeck*, 287 F.2d 26 (5th Cir. 1961).

[4]As one who has been in concubinage with A.F. for more than the last five years, in the event of his death she would be treated as his spouse under Mexican workers' compensation law. The issue presented is a practical question: whether claimant's status is equal to that of a spouse under Mexican workers' compensation law. Because the issue is not whether that law accords to all concubines equality with spouses, the distinction between concubines and spouses in the law is irrelevant to this decision. It is enough that the state has determined that those in concubinage for at least five years immediately preceding the worker's death should be treated as spouses.

Albina Engine & Machine Works, 328 F.2d at 879 (emphasis added). The Ninth Circuit has observed that because California employs the putative spouse doctrine to permit such a spouse to receive workers' compensation benefits, she has properly been awarded death benefits under the Longshore Act. *Powell,* 496 F.2d at 1250 (citing *Holland America Ins. Co. v. Rogers,* 313 F.Supp. 314 (N.D. Cal. 1970)). A putative spouse is defined in California case law as: "One who believes in good faith that she is a party to a valid marriage though the marriage is invalid. (Citations omitted.)" *Id.,* 313 F.Supp. at 318. Just as a valid marriage is not a prerequisite to establish entitlement to benefits, there is no justification for requiring a valid remarriage in order to terminate benefits. Evidence of a relationship which would entitle a claimant to receive death benefits as if she were a surviving spouse should be sufficient to establish "remarriage" within the meaning of the Longshore Act. In awarding death benefits under the Longshore Act to a putative spouse, the court explained that a practical approach was necessary when dealing with problems of marital relations:

> [m]arriage is not a monolithic institution, but consists instead of separate and severable incidents. Thus where the policy of a state may preclude its courts from 'recognizing,' say, a marriage of one man to two women, it may be permissible for both women to recover property from his estate on his death as his 'wives', for recognizing a marriage for the purposes of the one incident would not violate the state's public policy as might recognition of its for other purposes.

Holland America Ins. Co., 313 F.Supp. at 320. Since the administrative law judge considered "remarriage" a legal term, she should have applied Mexican workers' compensation law to determine that claimant's status as a concubine for the past five years, which would entitle her to benefits as a surviving spouse of A.F., also established she has remarried within the meaning of the Longshore Act and thereby forfeited her right to receive continuing death benefits under the Act. The administrative law judge's reliance on Mexican civil marriage law and formal contract law to reject employer's evidence that claimant has remarried, contravenes the law of the Ninth Circuit, holding that the definition of marital status in a workers' compensation law is to be preferred over the definition in a state's domestic relations law. *Albina Engine & Machine Works, supra.* According to Mexican workers' compensation law, claimant's marital status is deemed to be that of a spouse. Because the administrative law judge violated the Ninth Circuit's teaching and construed remarriage under Mexican domestic relations law instead of Mexican worker's compensation law, she erred in holding that claimant had not remarried within the meaning of Section 909 of the Longshore Act. *Powell, supra; Albina Engine & Machine Works, supra.*

Not only did the administrative law judge err in failing to consider "remarriage" in light of Mexican workers' compensation law, she also erred in her analysis of "remarriage" in light of Mexican domestic relations law because she ignored the Supreme

Court's teaching in *Thompson* of the primacy of the very practical considerations of the Longshore Compensation Act. Those practical considerations would have required the administrative law judge to hold that concubinage is a form of marriage under Mexican civil law because that law recognizes both are unions between a man and a woman with the purpose of forming a family and perpetuating the species. EX 19 at 209, 213. The law imposes similar rights and obligations on the parties. EX 19 at 214. The administrative law judge's finding that the unions are significantly different because termination of marriage requires an order of divorce by the court, is not supported by the record because there is no evidence on the requirements to obtain a Mexican divorce.[5] More significant, I would think, is Mexican Civil Law's imposition of the same obligations for alimony on concubines as on married spouses. EX 19 at 214. The administrative law judge's determination to reject the opinion of a renowned expert on Mexican law, that concubinage is a form of marriage within the meaning of Mexican civil law, is unsupported by reason or law. *See* EX at 215. Case precedent has long recognized concubinage in Mexico as a form of marriage. *See Pettus v. Dawson,* 82 Tex. 18, 17 S.W. 714 (1891). The administrative law judge correctly cited *Ayuse-Morales v. Secretary of Health & Human Services*, 677 F.2d 146, 148 (1st Cir. 1982) for the proposition that "concubinage is not the equivalent to marriage in Puerto Rico because Puerto Rico does not treat concubines and widows equally for purposes of determining the devolution of intestate property." Decision and Order at 14. But the administrative law judge overlooked the crucial point, *i.e.,* that inheritance laws in Baja California Sur treat concubines and spouses equally. EX 19 at 214. A Baja concubine would have been awarded benefits. Furthermore, the First Circuit has observed that concubinage is a "relationship [that] exists when a man and a woman lead a common life together permanently, as in an ordinary marriage – when only the formalities are missing." *Ayuso-Morales,* 677 F.2d at 147. The court stated that "[g]iven the increasing legal recognition of the 'concubinage' relation, we suspect there is no important policy reason for depriving the appellant of a widow's federal social security benefits." *Id.* at 148. Hence, the administrative law judge erred in finding that concubinage is not a form of marriage in Mexico which would be recognized by the State of Oregon.

Finally, the administrative law judge and the majority have succumbed to the sophistry of claimant's argument that she cannot be held to have remarried because she specifically intended not to enter into a marriage with A.F. To be more precise, she did not intend to act in such a way as to cause termination of the death benefits she was receiving. She testified that she researched the law of Oregon and Mexico and ascertained that both refused to recognize common law marriage. EX 14 at 137. For that

[5]A divorce procedure is not necessarily burdensome. In Oregon, either party can obtain a divorce six months after filing, on the ground of irreconcilable differences, over the objection of the other party. *See* Or. Rev. Stat. §107.025.

reason she decided to proceed with the "commitment ceremony," which was like a marriage ceremony in all respects except for the absence of the license or civil registry filing. H.Tr. 31. In other words, claimant perceived herself as entering into a common law marriage, expecting that it could not jeopardize her continued receipt of longshore death benefits. Her intent is to have all the benefits of marriage together with the benefits of a longshoreman's widow.

The majority insists that "remarriage" in the Longshore Act must be understood as a technical legal term defined in domestic relations law, and that if Congress had intended that something short of remarriage should terminate benefits, it could have made that provision as did the Pennsylvania legislature. The absence of such a provision in the Longshore Act persuades the majority that Congress did not intend that a permanent meretricious relationship should trigger termination of death benefits to a widow. There are several flaws in the majority's argument. First, it does not acknowledge that Congress sometimes uses words as they are understood in natural language, not as legal terms. The Supreme Court has recognized this in construing the Longshore Act, *e.g.*, *Suwanee Fruit, supra.* Second, the majority insists that "remarriage" must be understood as a term whose meaning is provided by domestic relations law which violates the Ninth Circuit's direction that marital status under the Longshore Act should be determined in accordance with state workers' compensation law. *Powell*, 496 F.2d 1250; *Albina Engine & Machine Works*, 328 F.2d 879. This case illustrates the wisdom of the Ninth Circuit' direction because claimant has relied upon technicalities in domestic relations law to defeat the "very practical purposes of this Compensation Act." *Thompson*, 347 U.S. at 337. Third, the majority asserts that Congress did not intend that a permanent, meretricious relationship should terminate a widow's benefits, but the majority does not reconcile its discernment of Congressional intent with that of the Supreme Court in *Thompson*, declaring that Congress had intended to deny death benefits to the legal wife of a deceased longshoreman because she had "embark[ed] upon another permanent relationship." *Id.* Fourth, the majority's argument is circular. It was unnecessary for Congress to refer to meretricious relationships in Section 909 because Congress, unlike the majority, was not considering "remarriage" as a legal term, narrowly defined by domestic relations law. The majority's analysis of "remarriage" in Section 909 of the Act should be rejected because it violates the teaching of both the Supreme Court and the Ninth Circuit and it frustrates the intent of Congress.

In sum, I would reverse the administrative law judge's decision that claimant has not remarried within the meaning of Section 909 of the Longshore Act. The administrative law judge erred in her analysis by considering "remarriage" in Section 909 isolated from its context in the statute and in total disregard of the Supreme Court's teaching in *Thompson* on the correct understanding of "surviving spouse" and "widow" in the Act. Furthermore, she also disregarded the Ninth Circuit's teaching that a determination of marital status under the Longshore Act should be based on a state's workers' compensation law, not general domestic relations law. *Albina Engine &*

Machine Works, 328 F.2d at 879; *see Powell*, 496 F.2d at 1250. If "remarriage" is understood as a broad, general term, consistent with the Supreme Court's teaching in *Thompson*, it means "embarking upon another permanent relationship," thereby ceasing to live as a widow. *Thompson*, 347 U.S. at 337. This interpretation vindicates Congress's "very practical considerations of this Compensation Act" and the Supreme Court's teaching that these practical considerations should prevail over an "empty abstraction" like a party's expressed intent not to marry. *Id.* "Remarriage" in the Longshore Act might also be understood as a legal term whose meaning is provided by reference to state workers' compensation law. Because under Mexican compensation law, in the event of A.F.'s work-related death, claimant would be deemed a spouse for receipt of death benefits, she should also be deemed a spouse of A.F. under the Longshore Act, and thus, to have remarried. The Longshore Act must be construed in such a way to make sense and to effectuate its purpose. *Suwanee Fruit*, 336 U.S. at 201. The Supreme Court explained in *Thompson* that Congress had practical concerns in mind in providing for a surviving spouse in the Longshore Act and that a woman who "embark[ed] upon another permanent relationship" was not entitled to death benefits because she no longer lived as the deserted wife of the longshoreman. The uncontradicted evidence is that claimant and A.F. live together with their two children, holding property in common and representing themselves to the world as married. This evidence proves that claimant has ceased living as the deceased longshoreman's widow, and therefore, that she has remarried within the meaning of Section 909 of the Longshore Act. The majority's decision, affirming the administrative law judge's decision requiring employer to pay more than $40,000 a year to claimant as the widow of a longshoreman while she lives as the wife of another man, defeats the "very practical considerations of this Compensation Act . . . ." *Thompson*, 347 U.S. at 337. Accordingly, I dissent from that judgment.

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REGINA C. McGRANERY
Administrative Appeals Judge