

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of

Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Counsel for Claimant:

Oral hearing held on January 13, 2010.

Claim No. LIB-I-005

Decision No. LIB-I-014

Stuart H. Newberger, Esq.
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Crowell & Moring LLP

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986.

By Proposed Decision entered September 23, 2009, the Commission denied the claimant's physical injury claim on the ground that the claimant had failed to meet his burden of proof. Specifically, the Commission held that the claimant did not provide sufficient evidence to support a finding that he had suffered a discernible physical

injury, more significant than a superficial injury, as required under the Commission's threshold standard for physical injury claims.

By letter dated October 2, 2009, the claimant, through counsel, objected to the Commission's Proposed Decision and requested an oral hearing, which was set for January 13, 2010. On December 18, 2009, the claimant, through counsel, filed "Claimant's Notice of Objection and Request for Oral Hearing Before the Commission" ("Objection Brief"). In the Objection Brief, the claimant objected to the physical injury standard adopted by the Commission, contending that it resulted in an unfair and unjust disparity between the litigants who received payment under the LaBelle Discotheque settlement agreed to privately by the Libyan Government, and other physical injury claimants not covered by that settlement – including the present claimant – because the former did not have to meet any kind of physical injury standard to qualify for compensation. As an additional ground of objection, counsel argued that the Commission's denial of the claim is legally impermissible because it cancels a congressionally-created "U.S. litigation claim" that the claimant had against the Libyan Government, contrary to the intent of the United States and Libyan Governments in entering into the Claims Settlement Agreement ("CSA") and in violation of the claimant's due process rights under the United States Constitution. Finally, counsel argued that the stated intention and assurance by the Department of State that there would be sufficient monies under the CSA to compensate physical injury claimants at a

level similar to that in the LaBelle Discotheque settlement relieves the Commission of having to scrutinize the claims out of concern that the settlement fund could become exhausted prematurely if non-meritorious claims are awarded. Alternatively, counsel argued that the injury suffered by the claimant was in fact a physical injury of sufficient severity to qualify under the Commission's standard.

DISCUSSION

I. Appropriateness of the Physical Injury Standard Adopted by the Commission

Claimant's counsel argued at the hearing that it would be unfair for the Commission to subject the present claimant to a standard more stringent than that applied to individuals who had already received compensation from the Department of State as a result of the private LaBelle Discotheque settlement with Libya. At the oral hearing claimant's counsel presented, for the first time, a document that allegedly set forth the requirements for compensation under the LaBelle Discotheque settlement¹. Counsel argued that according to the newly-presented evidence "there was merely a 'presence' requirement" that an individual had to meet in order to qualify for compensation under the private LaBelle settlement.

Claimant's counsel further asserted at the hearing that the Department of State intended for the Commission to apply a "plain physical injury" standard, and argued

¹ Counsel also submitted for the first time at the hearing a new list of authorities in support of other arguments presented as part of claimant's objection.

that under United States law, that standard is “very broad.” However, counsel provided no evidence or authority to support the assertion that the Department of State intended that a plain physical injury standard be applied and cited no authority holding that the Commission was legally bound to apply such a broad reading of the term “physical injury,” or demonstrating that the standard the Commission has adopted is legally impermissible or improper.

The Commission is aware that the Department of State gave assurances to the Congress that physical injury claimants would be compensated at a level similar to that in the LaBelle Discotheque private settlement, namely \$3 million. However, the December Referral Letter² from the Department of State to the Commission specifically charges the Commission to adopt a standard for physical injury. The evidence and arguments presented by counsel at the oral hearing regarding the “presence requirement” do nothing to explain why the Department of State would have called upon the Commission to adopt a standard for compensability of the physical injury claims if it had intended that the Commission merely act as its agent to approve the claims for payment by the Secretary of the Treasury, based only on proof of presence at the site of the terrorist incident. As such, and notwithstanding the assertion in the newly-presented evidence regarding the LaBelle Discotheque settlement, the

² Letter dated December 11, 2008 from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission.

Commission remains convinced that the physical injury standard it adopted in *Claim of*

Personally Identifiable Information
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Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), was appropriate and proper and that the standard was within its authority and discretion to adopt.

II. Characterization of Claimant's Claim as "U.S. Litigation Claim"

Claimant's counsel, both in the Objection Brief and in the oral hearing, argued that because the claims covered by the CSA were "U.S. litigation claims," it is legally impermissible for the Commission to deny this claim because no other forum has been made available to the claimant in which to pursue it. As authority for this argument, counsel cited the well-known Supreme Court decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and the U.S. Court of Claims decision in *Juda v. United States*, 13 Cl. Ct. 667 (1987). In addition, he made reference to the general principle that, where possible, laws are to be interpreted so as to be consistent with the United States Constitution. The Commission notes that consideration of constitutional issues is outside the scope of the Department of State's referral to the Commission. However, it also notes that the respective courts in both *Dames & Moore* and *Juda* declined to rule on whether the removal of a right of action without providing an alternative forum is a due process violation. The courts reasoned that it would be premature for them to do so, because an alternative forum was available in both of those cases. In this case, the Commission provided an alternative forum, evaluated the present claim on its merits,

and found that the claimant had not met the burden of proof. Furthermore, the Commission notes that the claimant may be eligible to submit another claim to the Commission under the January Referral Letter³.

III. Sufficiency of Settlement Fund

At the hearing and in the Objection Brief, claimant's counsel also argued that the Department of State in its negotiations with Libya obtained funds sufficient to provide compensation at the level provided in the LaBelle Discotheque settlement to all of the litigants in the *Patel*⁴ case who were United States nationals. Therefore, counsel argued, this was not a situation where the Commission "must apply extraordinary cautionary measures to protect the premature extinction of the settlement fund."

The Commission, as it customarily does, requires objective evidence and applies scrutiny to ensure that all claimants are treated fairly and consistently. Furthermore, the Commission notes that the United States, by entering into the CSA, espoused the claims of *all* individuals who were United States nationals at the time of the relevant incidents and thereafter, covered under terms of the CSA. Therefore, the CSA affects not only the rights of known litigants, but also the rights of individuals who were not litigants and, therefore, were unknown to the Department of State at the time of the settlement negotiations.

³ Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission.

⁴ *Patel, et al. v. Socialist People's Libyan Arab Jamahiriya*, 06-cv-0626 (D.D.C.)

IV. Claimant's Physical Injury

In the alternative, claimant and his counsel contended that the claimant's claim meets the standard for physical injury adopted by the Commission. During the hearing, the claimant described the ordeal that he and the other passengers suffered, including the fact that while sitting on the floor he was "knocked to [his] stomach from behind and kicked or hit with the butt of a gun several times." As previously noted in the Proposed Decision, the claimant provided a letter from his former employer, Dr. Donati, an orthopedic surgeon, in which the doctor stated that he examined the claimant on September 10, 1986, and found "some discoloration in the low back region with corresponding tenderness." In addition, Dr. Donati stated that he had recommended using ice, heat and anti-inflammatories as needed and noted that the claimant "recovered uneventfully." During the oral hearing the claimant testified that he had not sought further treatment because he was able to conduct his own therapy and he could examine himself without the intervention of a doctor, based on his medical training. Claimant described the steps he took to treat his back including self-directed physical therapy, the use of heat and ice, and a self-defined modified work assignment for approximately four weeks. He stated that the modification to his work was based on an informal conversation he had with his employer that was not formally documented.

As noted in the Proposed Decision section 509.5(b) of the Commission's regulations provides:

The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. 509.5(b)(2009).

The Commission has carefully and thoroughly reviewed the entire record in this claim and remains unpersuaded, however, that the injury alleged to have been suffered by the claimant was significant enough to constitute anything more than a superficial injury. The Commission therefore affirms its holding that the claimant has not met the burden of proof in establishing that the injury on which this claim is based meets the threshold standard for physical injury.

CONCLUSION

In summary, therefore, the Commission must again conclude that it may not favorably consider this claim for compensation under the December Referral Letter. However, the Commission notes again that as a victim of the Pan Am Flight 73 terrorist incident, the claimant remains eligible to submit a claim to the Commission under the January Referral Letter.

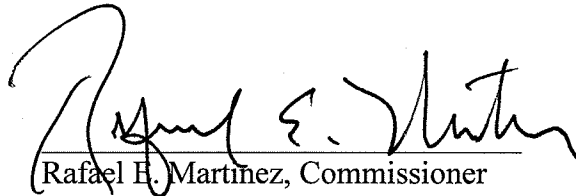
Accordingly, while the Commission sympathizes with the claimant for the ordeal that he must have endured during the terrorist incident in question, the denial set forth in the Proposed Decision in this claim is hereby affirmed.

Dated at Washington, DC, and
entered as the Final Decision
of the Commission.

FEB 18 2010



Mauricio J. Tamargo, Chairman



Rafael E. Martinez, Commissioner

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Counsel for Claimant:

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PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by the claimant during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On December 11, 2008, under a delegation of authority from the Secretary of State, the State Department Legal Adviser referred to the Commission for adjudication a category of claims of United States nationals against Libya. *Letter from the Honorable*

John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (“December Referral Letter”). The category of claims referred consists of

claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya’s agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

Related to the December Referral Letter, a number of official actions were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* (“Claims Settlement Agreement”) 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the Secretary of State certified, pursuant to the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure “fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya” December Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any

pending suit within the terms of the Claims Settlement Agreement, and directing the Secretary of State to establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this Libya Claims Program pursuant to the ICSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On June 4, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the elements of the claimant's claim, including evidence of: his United States nationality; his inclusion as a named party in the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; the dismissal of the Pending Litigation against Libya; and his physical injuries. The claimant,

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, states that he was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. He further states that his back was injured when the terrorists struck him several times in the back with the butt of a gun.

DISCUSSION

Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the December Referral Letter is limited to claims of individuals who

are: (1) United States nationals and (2) named parties in a Pending Litigation which has been dismissed. December Referral Letter, *supra*, ¶¶ 2-3.

Nationality

In the *Claim of* ^{Personally Identifiable Information} _{Redacted under 5 U.S.C. §552(b)(6)}, Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Based on the evidence submitted with this claim, the Commission determines that the claimant was a United States national at the time of the injury on which his claim is based.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must be a named party in the Pending Litigation listed in Attachment 1 to the December Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. December Referral Letter, *supra*, ¶ 3. The claimant has provided a copy of the complaint in Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, which names him as a party. Additionally, the claimant has provided a Stipulation of Dismissal as evidence of the dismissal of this Pending Litigation dated December 16, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

In summary, therefore, the Commission concludes that this claim is within the Commission's jurisdiction pursuant to the December Referral Letter and is entitled to adjudication on the merits.

Merits

Standard for Physical Injury

As stated in the December Referral Letter, to qualify for compensation, a claimant asserting a claim for physical injury must meet a threshold standard for physical injury adopted by the Commission. In order to develop such a threshold standard for compensability, the Commission has considered both its own jurisprudence and pertinent sources in international and domestic law.

After careful and thorough consideration, the Commission held in the *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) *supra*, that in order for a claim for physical injury to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation;
and
- (2) must have received medical treatment for the physical injury within a reasonable time;
and
- (3) must verify the injury by medical records.

Physical Injury

According to his Statement of Claim, claimant Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in

Karachi, Pakistan. In his sworn statement, the claimant states that while sitting on the floor he was “knocked to [his] stomach from behind and kicked or hit with the butt of a gun several times.”^{5 U.S.C. §552(b)(6)} Aff. ¶ 10. With regard to the medical treatment received the claimant states that when he returned to the United States he was “examined by the orthopedic surgeon for whom [he] worked, Dr. Denati [sic], but [he does] not believe any medical records were created from that examination.” Id. at ¶ 30. The claimant did not provide any medical records with his original submission to support his claim or otherwise to document the injury on which his claim is based. The Commission, by letter dated June 30, 2009, specifically requested that the claimant provide medical records to support his claim. In response, by letter dated August 12, 2009, claimant provided a letter from Dr. Donati dated August 3, 2009 describing his treatment of the claimant. Dr. Donati states that he examined the claimant on September 10, 1986 and found “some discoloration in the low back region with corresponding tenderness.” Letter from Dr. Richard B. Donati, M.D. (August 3, 2009). Dr. Donati recommended using ice, heat and anti-inflammatories as needed and noted that the claimant “recovered uneventfully.” Id.

Section 509.5(b) of the Commission's regulations provides:

The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. 509.5(b)(2008).

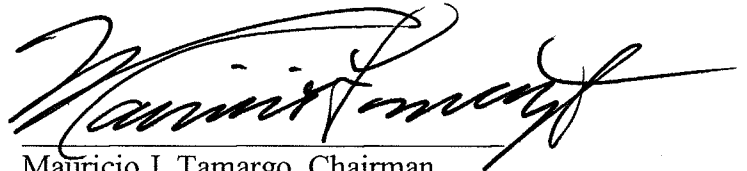
The Commission finds that the claimant has not met the burden of proof in that he has failed to provide evidence establishing that his injury was more significant than a superficial injury, as required under the Commission's physical injury standard. In light of the foregoing, the Commission is constrained to conclude that the claimant,
^{5 U.S.C. §552(b)(6)}, does not qualify for compensation under the December Referral

Letter. Accordingly, while the Commission sympathizes with the claimant for the ordeal that he must have endured during the terrorist incident in question, his claim based on a physical injury suffered as a result of that incident must be and is hereby denied.

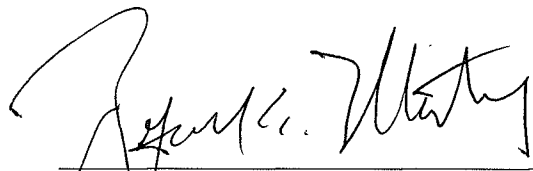
The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

Dated at Washington, DC, and entered as the Proposed Decision of the Commission.

SEP 23 2009



Mauricio J. Tamargo, Chairman



Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. 509.5 (e), (g) (2008).