

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

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's  
Libyan Arab Jamahiriya

Claim No. LIB-II-156

Decision No. LIB-II-159

Counsel for Claimant:

Elizabeth Smith, Esq.  
Motley Rice LLC

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 5 U.S.C. §552(b)(6) as a result of the bombing near Harrods Department Store in Knightsbridge, London, England on December 17, 1983.

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 January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication

six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* (“January Referral”).

The present claim is made under Category D. According to the January Referral, Category D consists of

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State’s] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State’s] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

*Id.* at ¶ 6. Attachment 1 to the January Referral lists the suits comprising the Pending Litigation.

The January Referral, as well as a December 11, 2008 Referral Letter (“December Referral”) from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999, and 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 President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals

coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

On November 18, 2009, the Commission adjudicated claimant's physical injury claim under the December Referral. In its decision, the Commission determined that claimant had suffered shrapnel wounds and spent almost two months in the hospital after the bombing. Further, the Commission concluded that these injuries met the Commission's standard for physical injury and, consequently, that the claimant was entitled to compensation in the amount of \$3 million. *Claim of* <sup>5 U.S.C. §552(b)(6)</sup> Claim No. LIB-I-002, Decision No. LIB-I-029 (2009) (entered as Final on December 24, 2009).

#### BASIS OF THE PRESENT CLAIM

On July 6, 2010, the Commission received from the claimant a completed Statement of Claim in which he asserts a claim for additional compensation under Category D of the January Referral, along with exhibits supporting the elements of the claim, including evidence of claimant's U.S. nationality, his receipt of an award under the December Referral, and the extent of his injuries. Specifically, claimant asserts that, in

addition to the “approximately 80 shrapnel wounds from the bombing[,]” his difficulty walking and inability to run, the shrapnel remaining in his body, the presence of numerous disfiguring scars, and ongoing pain and weakness (which has required extensive physical therapy that he alleges will continue indefinitely) constitute a special circumstance warranting additional compensation under Category D. In support of his claim, claimant has submitted a description of his physical injuries and the alleged permanent effects, extensive contemporaneous and recent medical records, radiological images, and numerous photographs, both contemporaneous and recent, depicting the claimant’s injuries and scarring.

## DISCUSSION

### Jurisdiction

Under subsection 4(a) of the ICSEA, the Commission’s jurisdiction under Category D is limited to the category of claims defined under the January Referral; namely, claims of individuals who: (1) are U.S. nationals; (2) received an award under the December Referral; and (3) have dismissed their respective Pending Litigation cases against Libya. January Referral, *supra*, ¶ 6.

### *Nationality*

The Commission determined in its decision on claimant’s physical injury claim under the December Referral that the claim was owned by a U.S. national from the time of the incident continuously through the effective date of the Claims Settlement Agreement. That determination applies to satisfy the nationality requirement here.

*Award Under the December Referral*

To fall within the category of claims referred to the Commission, the claimant must have received an award under the December Referral. As noted above, the Commission awarded the claimant \$3 million based on his physical injury claim under the December Referral. Accordingly, the Commission finds that the claimant has satisfied this element of his Category D claim.

*Dismissal of the Pending Litigation*

The January Referral also requires that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. January Referral, *supra*, ¶ 6. The Commission determined, in its decision on claimant's physical injury claim under the December Referral, that the Pending Litigation in question, *McDonald v. Socialist People's Libyan Arab Jamahiriya*, Case No. 06-cv-729, filed in the United States District Court for the District of Columbia, had been dismissed through an Order of Dismissal issued on October 28, 2009. That determination also applies here.

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

Merits

At the outset, the Commission stresses that the facts of this claim clearly establish the horrifying nature of claimant's ordeal and detail a lengthy and challenging recovery that has continued to the present day. In this proceeding, the Commission is required to focus solely on the physical injuries suffered by the claimant and to make a determination as to whether further compensation is warranted under Category D for those injuries.

Category D of the January Referral requests, in pertinent part, that the Commission determine whether “the severity of the injury is a special circumstance warranting additional compensation.” In *Claim of* <sup>5 U.S.C. §552(b)(6)</sup> Claim No. LIB-II-109, Decision No. LIB-II-112 (2011), the Commission held that only the most severe injuries would constitute a special circumstance warranting additional compensation under Category D. The Commission further held that in determining which injuries are among the most severe, it would consider the nature and extent of the injury itself, the impact that the injury has had on claimant’s ability to perform major life functions and activities—both on a temporary and on a permanent basis—and the degree to which claimant’s injury has disfigured his or her outward appearance. For each Category D claim that is before the Commission, the present claim included, claimants have been requested to provide “any and all” medical and other evidence sufficient to establish “the extent to which there is permanent scarring or disfigurement that resulted from the physical injuries suffered; and/or the extent to which the severity of the injury substantially limits one or more of the claimant’s major life activities.” These factors—permanent disfigurement and/or limitation of major life functions—are applied to the present claim as set forth below.

As to the injury itself, claimant has provided a detailed description of the terrorist incident, the severe wounds to the left side of his body, and his subsequent medical treatment. He states that he was walking on a public street near the Harrods Department Store in Knightsbridge, London, England on December 17, 1983, when a bomb blast “caused him to fly through the air and fall to the ground; he has no memory of how he landed. . . . [He] was unconscious and doesn’t remember how long he was unconscious.”

Claimant further states that first responders assisted him until he was placed on a stretcher, put in an ambulance, and taken to Westminster Hospital, "arriving in critical condition."

During a medical evaluation in 2007, claimant described the injuries he had sustained during the bombing. In particular, he recalled that he had suffered "[p]hysical injuries from shrapnel, glass, wiring, metal, dirt and other fragments that entered his body." In addition, he recalled that "after the bombing an 18 inch piece of shrapnel was sticking out of his left hip[,]" and that "[s]hrapnel tore through the left gluteus and left hamstring muscles leaving the left sciatic [sic] nerve exposed like a 'bow string.'" According to claimant, this caused a temporary (lasted about 5 days) paralysis below the waist on both left and right side." He also described how "all exposed areas of his body were burned[,]" particularly the left side of his face, which he described as "severly [sic] burned." He also recalled how "his left wrist was ripped apart and his watch band was torn off his wrist."

The contemporaneous medical records submitted with this claim confirm that, following the incident, claimant was admitted to Westminster Hospital with "[m]ultiple injuries," including "shrapnel wounds, three to his left shoulder, a large laceration to his left thigh involving muscles and lacerations to his left hand." The wound to his shoulder was described as a "Penetrating Injury to Upper L Limb" with an "Entry & Exit Wound." His left thigh wound was described as a "Through & Through 'hole'" with 80% of his hamstring muscle destroyed. Contemporaneous photographs of claimant's wounds, submitted with this claim, confirm these descriptions.

The medical records from Westminster Hospital and other contemporaneous documents contain detailed descriptions of the numerous medical procedures claimant underwent in the days and weeks following the incident. For instance, a sworn statement by one of claimant's treating physicians, dated January 27, 1984, states that he operated on the claimant on December 17, 1983, and "removed a large piece of metal from his right shoulder region and other pieces from the left lower limb." Hospital records indicate that his left thigh wound was "[p]acked with gauze" and multiple wounds were debrided. Doctors also sutured the injury to his left hand. Four days later, two wounds to his left shoulder were "cleaned + sutured" and the "wound behind [his] knee [was] debrided + packed[.]" The medical records also indicate that on December 28, the "dead muscle" was excised from claimant's leg wound, which was then "partially clos[ed,]" additional shrapnel was removed from his left shoulder and both thighs, and a drain was removed from his left hip. In addition, on January 24, 1984, claimant underwent a skin graft, using tissue from his right thigh to cover the wound on his left leg.

In addition to the procedures described above, claimant's wounds were regularly cleansed and the dressings regularly changed, and he underwent several x-ray examinations; he also experienced persistent pain in his left foot. By February 4, 1984, claimant was "[m]obilising gently with crutches, or up in wheelchair as desired." Two days later, on February 6, he was "now able to take weight on the L foot." Claimant was finally discharged from Westminster Hospital on February 10, 1984, having been hospitalized for a total of fifty-five days. He was seen at least twice again at Westminster Hospital in the weeks following his release, including a visit on April 30 when an x-ray



examination revealed, among other things, that there remained a “small piece [of] shrapnel [in claimant’s] L thigh.”

Claimant’s counsel states in the submitted “Description of Injuries” that the claimant “had to undergo physical and occupational therapy in order to regain the use of his left hand, leg, and foot.” As evidence of this, the claimant has submitted a June 2010 “Evaluation Narrative” from Inner Health in Ft. Collins, Colorado evidencing twenty-nine physical therapy sessions from April 30, 2007 to June 25, 2010. Notes pertaining to claimant’s initial visit on April 30, 2007 indicate that he has a “pain pattern” showing that “when over working, [his] L toe starts to drag [and his] L knee and hip start to ache[,]” and that his “joints [are] out of alignment.” The notes also indicate that many of claimant’s leg muscles were “extremely tight with tension and pain,” and that the “right leg’s tension and tightness pattern is due to over compensating and overworking for the less functioning muscles of the left leg.” The evaluation further details claimant’s decreased range of motion in his hips and ribs, as well as pain and tightness in his lower back, left shoulder, and left arm. To address this, it was recommended, among other things, that he continue with acupuncture treatment, which he commenced in February 2010. Claimant has submitted records from this period of treatment, which note claimant’s initial complaint of, *inter alia*, “ongoing left side pain in arm that was sharp and burning in addition to numbness, and tingling in his left foot.”

Other recent medical records show that on March 3, 2010, claimant had surgery at the Orthopaedic Center of the Rockies to remove shrapnel still remaining in his body; specifically, a 5mm fragment in his left shoulder, and a 2 cm fragment in his left elbow that was “slightly disintegrated.” The claimant has included copies of x-rays showing the

location of these shrapnel fragments, as well as a post-surgical photograph of the shrapnel. Further, the claimant has submitted numerous photographs which show the deep disfiguring scars that remain on his left leg, hip, shoulder, and arm.

Claimant's counsel notes that claimant could not go back to work until six months after the bombing, and for another six months could only work a "limited work schedule." He states that claimant's injuries had a "devastating effect" on his career as an exploration geologist because he could no longer take remote field work assignments. Claimant's counsel goes on to explain that the claimant can walk with difficulty, but can no longer run or play tennis, and that he continues his physical therapy "to deal with the pain and functional difficulties he experiences with his left leg, wrist, arm, and shoulder." Claimant's counsel states that claimant "still has shrapnel in his head and cheek that he can see and feel." In addition, claimant's physical therapist stated, in June 2010, that claimant "will always have areas of nerve pain" and "will always need therapy with increased pain and tension patterns."

Considering the totality of the evidence submitted, the Commission finds that claimant's injuries have had a sufficiently significant impact on his ability to perform major life functions so as to qualify him for additional compensation. The detailed and extensive medical records provided with this claim demonstrate that for the past twenty-nine years, claimant has suffered from a permanent walking impairment; impaired range of motion on the left side of his body; and chronic weakness and pain in his left leg, shoulder, and arm that will necessitate ongoing physical therapy. In addition, the claimant has several large, disfiguring scars as a result of his injuries. Under these circumstances, the Commission concludes that the severity of claimant's injuries in this

claim rise to the level of a special circumstance warranting additional compensation under Category D. Accordingly, claimant 5 U.S.C. §552(b)(6) is entitled to compensation as set forth below.

### COMPENSATION

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation. As the Commission has previously stated in this program, assessing the value of intangible, non-economic damages is particularly difficult and cannot be done using a precise, mathematical formula.<sup>1</sup> It is, *a fortiori*, similarly difficult to assess the *relative* value of such claims, as is contemplated under Category D of the January Referral. Moreover, the Commission is unaware of any precedent under international law where fixed sum awards have been enhanced for a subset of claimants who suffered particularly egregious harm, such as severe physical injury, vis-à-vis other claimants.

The negotiating history of the Claims Settlement Agreement offers little guidance as to the expected value of eligible Category D claims. In this respect, the *Letter from John D. Negroponte, Deputy Secretary of State, to the Honorable Mitch McConnell, United States Senate 2* (July 28, 2008), which preceded passage of the LCRA, states only that any additional money obtained during negotiations would be intended for, among other things, “further recoveries for death and physical injury victims . . . where special circumstances warrant, for example, if the injuries are especially severe . . . .” For its part, the January Referral itself recommends only that “the Commission award up to but

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<sup>1</sup> *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-002, Decision No. LIB-II-002, at 4-5 (Final Decision) (citing *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-002, Decision No. LIB-II-002, at 9-10 (2009) (Proposed Decision)); see also 2 Dan B. Dobbs, *Dobbs' Law of Remedies* ¶ 8.3(6) (2nd ed. 1993); I Marjorie M. Whiteman, *Damages in International Law* 777-78 (1937)).

no more than an additional \$7 million per claim (offering the possibility that some injury cases will be compensated at the \$10 million level of the wrongful death claims processed by the Department of State).” January Referral, *supra*, ¶ 6.

For the sake of comparison only, on the domestic level, one federal court has grappled with the question of enhanced pain and suffering awards for physical injuries resulting from acts of international terrorism. A leading case in this regard is *Peterson v. Islamic Republic of Iran (Peterson II)*, 515 F. Supp. 2d 25 (D.D.C. 2007), where the U.S. District Court for the District of Columbia established a framework whereby persons suffering “substantial injuries in terrorist attacks” were entitled to an award of \$5 million as a “baseline assumption.”<sup>2</sup> *Estate of Bland v. Islamic Republic of Iran*, No. 05-cv-2124 (RCL), 2011 WL 6396527, at \*2 (D.D.C. Dec. 21, 2011) (citing *Peterson II*, 515 F. Supp. 2d at 54). Applying this framework, the court, in subsequent cases, departed upward from this assumption in “more severe instances of physical or psychological pain . . .” *Id.* (citing *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 84 (D.D.C. 2010)). The court departed downward in instances where the plaintiff’s injuries were less severe. *Id.* Thus, in one case where the plaintiff had awoken from a bomb blast to discover “his skin hanging from his body; severe hole-like wounds passing through his chest; pieces of metal, concrete, and glass embedded in his body; and his leg split open[,]” and where he suffered burns to 90% of his body, the court departed upward to \$7.5 million. *Valore*, 700 F. Supp. 2d 52. On the other hand, in a case where the plaintiffs suffered from

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<sup>2</sup> Injuries entitling the plaintiff to the baseline award of \$5 million included “compound fractures, severe flesh wounds, and wounds and scars from shrapnel, as well as ‘lasting and severe psychological pain.’” *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 77 (D.D.C. 2010) (citing *Peterson II*, 515 F. Supp. 2d at 54).

hearing loss, PTSD, and/or minor cuts and bruises, the court departed downward to \$2 million. *See Davis v. Islamic Republic of Iran*, 2012 WL 1059700 (D.D.C. 2012).

In light of the discussion above, the Commission holds that, in determining the appropriate level of compensation for claimants who satisfy the threshold requirements for Category D claims, it will consider, in addition to the recommendation contained in the January Referral for Category D, such factors as the severity of the initial injury, the number of days claimant was hospitalized as a result of his or her physical injuries (including all relevant periods of hospitalization in the years since the incident), the number and type of any subsequent surgical procedures, the degree of permanent impairment, taking into account any disability ratings, if available, and the nature and extent of disfigurement to the claimant's outward appearance.

Assessing these factors, the Commission first notes that claimant's initial injuries are unquestionably among the most grievous, if not the most grievous, suffered by any claimant in this claims program. His lengthy hospitalization and the numerous surgical procedures to repair his wounds are clear evidence of a difficult and painful recovery that did not end with his discharge from Westminster Hospital. As detailed above, claimant was hospitalized for a total of fifty-five days immediately following the incident. During this time, he underwent several surgeries to debride and suture his wounds—which had to be cleansed and redressed regularly—and to remove shrapnel that was embedded in his body. In addition, he underwent a skin graft from his right thigh to his left leg, and was only able to walk in February 1984 (albeit with the aid of crutches)—several weeks after the attack. Shrapnel still remained in his body after his initial hospitalization, and as recently as March 2010, he underwent additional surgery to remove shrapnel fragments

from his left elbow and shoulder. Further, claimant has suffered from chronic nerve pain and weakness throughout the left side of his body, and has difficulty walking and moving. He is also missing 80% of his left hamstring muscle, which has placed his hips out of alignment. As a result of these injuries, he has required ongoing physical therapy, which his therapist recommends he continue, although, as noted above, it has been stated that he will always experience nerve pain. Finally, he has been left with numerous scars that have permanently disfigured the left side of his body, particularly his left leg.

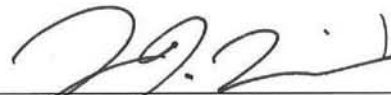
In light of these facts, and in consideration of the factors listed above, the Commission holds that \$4,000,000.00 is an appropriate amount of compensation in this claim. The Commission further holds that, as with awards for physical injury made under the December Referral, compensable claims under Category D are not entitled to interest as part of the awards granted therein. Accordingly, the Commission determines that the claimant, <sup>5</sup> U.S.C. §552(b)(6), is entitled herein to an award of \$4,000,000.00 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

The Commission therefore enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSEA. 22 U.S.C. §§ 1626-1627 (2006).

AWARD

Claimant 5 U.S.C. §552(b)(6) is entitled to an award in the amount of Four Million Dollars (\$4,000,000.00).

Dated at Washington, DC, May 16, 2012  
and entered as the Proposed Decision  
of the Commission.

  
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Timothy J. Feighery, Chairman

  
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Rafael E. Martinez, Commissioner

  
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Anuj C. Desai, 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) (2011).