

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-169

Decision No. LIB-II-107

Counsel for Claimant:

Charles S. Sims, Esq.  
Proskauer Rose LLP

Oral hearing held on February 24, 2012.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is for additional compensation based on the alleged severity of physical injuries suffered by <sup>5 U.S.C. §552(b)(6)</sup> as a result of the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986. This claim was submitted under Category D of the January 15, 2009 *Letter 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"). By Proposed Decision entered November 17, 2011 the Commission denied this claim, concluding that the severity of the injury did not rise to the level of a special circumstance warranting additional compensation under Category D.

On December 22, 2011, the claimant filed a "Notice of Objection" requesting an oral hearing. By letter dated December 27, 2011 the Commission requested that claimant submit any additional evidence that he wished it to consider in support of his objection. By letter dated January 30, 2012, the Commission further requested that the claimant provide any final determinations, including, in particular, disability ratings and/or disfigurement ratings, issued by any authority, based on the physical injuries that he suffered as a result of the hijacking of Pan Am Flight 73; and any evidence to establish and substantiate the duration of hospitalization required as a result of claimant's physical injuries. However, no further evidence was submitted in response.

#### DISCUSSION

As noted in the Commission's Proposed Decision Category D of the January Referral 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.

January Referral at ¶ 6.

In his Notice of Objection stated that the Commission 1) applied an erroneous standard in adjudicating his claim; 2) erroneously evaluated his injuries in comparison to injuries suffered by other victims of the hijacking; 3) erroneously focused on the present-day physical effects of his injuries and improperly discounted the severity of the injuries at the time they occurred; 4) erroneously concluded that the present-day

physical effects of his injuries are not significant; 5) erroneously concluded that the permanent scarring resulting from his injuries is not significant; and 6) erroneously failed to consider the severe and permanent emotional and psychological effects of the hijacking and injuries on him.

At the oral hearing, however, claimant's counsel did not dispute the standard adopted by the Commission under Category D. Instead, counsel argued that the totality of the facts and circumstances in this claim are sufficient to meet the standard adopted by the Commission. In support of this assertion, counsel stated that Category D of the January Referral does not refer to special physical injuries, but rather "special circumstances in connection with physical injury." Counsel further argued that while claimant's injury is not the most severe of the injuries in this program, claimant nonetheless meets the standard for compensation based on additional factors such as his age at the time of the incident, the death of his mother in his presence as a result of the attack, and his loss of all pre-hijacking memory.

The claimant, in his testimony at the hearing, described the ordeal that he and the other passengers endured, including the facts surrounding his escape from the aircraft, treatment of his injuries and the lasting effects of the attack on his life. Claimant testified that his "recollection is that there are very specific things that I was not as comfortable doing—riding a bike, playing anything that involved a bat, baseball, tennis, anything like that—I could not do for a little while because it hurt." Claimant further testified that "I would describe [the injury] as regular hyper sensitivity compared to the rest of my other fingers which means that if there is a friction like sand paper or carpet or things like that, it is more sensitive." Additionally, claimant testified

regarding the effect his inability to remember anything prior to the attack has had on his life. Specifically, claimant testified that "I have no memory before that day...so I have no memory of my mom." Claimant's sister, <sup>5 U.S.C. §552(b)(6)</sup> also a claimant before the Commission, testified that the claimant was in the hospital for at least one week and that immediately after the incident claimant's finger was "very bloody." Claimant's first cousin, <sup>5 U.S.C. §552(b)(6)</sup> who also testified at the hearing, stated that claimant was in the hospital for "at least 7 to 10 days." He also testified to the extent of psychological harm suffered by claimant as a result of the incident.

#### *Analysis*

As noted above, counsel argued during the hearing that Category D of the January Referral does not refer to special physical injuries, but rather "special circumstances in connection with physical injury." Viewed in this light, counsel asserted, the totality of the facts and circumstances in this claim are sufficient to meet the standard adopted by the Commission: specifically, counsel contended that while claimant's injury is not the most severe of the injuries in this program, claimant nonetheless meets the standard for compensation based on additional factors such as his age at the time of the incident, the death of his mother in his presence as a result of the attack, and his loss of all pre-hijacking memory.

The Commission does not agree with counsel's interpretation of Category D of the January Referral. The language of Category D is, on its face, more limited. It requires a determination that "the severity of the injury is a special circumstance warranting additional compensation." In previous decisions, the Commission has made it clear that the "injury" referenced in this clause is the physical injury that was the

subject of compensation under the First Referral, as the first clause of Category D makes clear. *See Claim of* <sup>5 U.S.C. §552(b)(6)</sup> Claim No. LIB-II-109, Decision No. LIB-II-112 (2012) (“the injury’ referred to under this Category is the injury for which an award was issued by the Commission under the December Referral.”). Moreover, there is no differentiation of language between Category D and the First Referral to suggest that the State Department intended that a relative assessment should be made of the circumstances surrounding in the injury to determine compensability for purposes of Category D.

In the current claim, the Commission determined that the compensable injury under the December Referral was the shrapnel wound to the claimant’s second and fourth fingers of his right hand and a laceration resulting in a scar at the top of his scalp, not the emotional injury resulting from the hijacking for which he also claimed compensation. Moreover, the Commission notes its prior holdings that compensation under the December Referral is limited to claims for physical, not psychological, injury. *See, e.g., Claim of* <sup>5 U.S.C. §552(b)(6)</sup> , Claim No. LIB-I-033, Decision No. LIB-I-046 (2011); *Claim of* <sup>5 U.S.C. §552(b)(6)</sup> , Claim No. LIB-I-041, Decision No. LIB-I-030 (2010).<sup>\*</sup> For all of these reasons, the Commission determines that the psychological harm that the claimant may have suffered as a result of the attack is not a factor to be considered in its determination under Category D.

Turning to the physical injuries suffered by the claimant, the Commission concluded in the Proposed Decision that only the most severe injuries will constitute a

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<sup>\*</sup> On this point, the Commission notes that to the extent that claimant’s psychological injuries relate to the death of his mother, he was previously compensated for such losses by the Department of State as part of the wrongful death claim of the Estate of <sup>5 U.S.C. §552(b)(6)</sup>

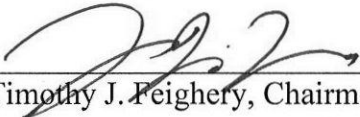
special circumstance warranting additional compensation under Category D. As noted above, claimant, in his Notice of Objection, asserted that this conclusion was erroneous; however, at the oral hearing, claimant's counsel specifically did not challenge the Commission's standard. On the other hand, claimant's counsel acknowledged that the physical injuries suffered by claimant are not among the most severe injuries in this program, although both Ms. <sup>5 U.S.C. §552(b)(6)</sup> and Mr. <sup>5 U.S.C. §552(b)(6)</sup> testified at the oral hearing that the claimant required hospitalization for at least one week.

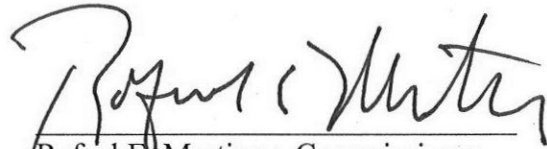
While the Commission acknowledges that the claimant may have stayed in the hospital for approximately one week, it is not persuaded that it was medically necessary that the claimant remain hospitalized as a result of the injuries which form the basis of his physical injury claim. On this point, the Commission notes that the claimant's father was hospitalized with much more severe injuries, and the record suggests that the reason for claimant's hospitalization was to permit him to remain with his father and sister. Based on this and the Commission's familiarity with the nature of all of the physical injuries awarded under the December Referral that may fall under Category D, it agrees with claimant's counsel's relative assessment of the severity of claimant's physical injuries.

For the reasons set forth above, the Commission remains unpersuaded that the severity of the injury in this claim rises to the level of a special circumstance warranting additional compensation under Category D. The Commission is deeply sympathetic to the claimant for the ordeal he endured, and the losses he suffered, during that horrific event. Nonetheless, the Commission is constrained to conclude that the denial set forth

in the Proposed Decision in this claim must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, May 17, 2012  
and entered as the Final Decision  
of the Commission.

  
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Timothy J. Feighery, Chairman

  
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Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION  
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	}	

Counsel for Claimant: Charles S. Sims, Esq.  
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PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is for additional compensation based on the alleged severity of physical injuries suffered by 5 U.S.C. §552(b)(6) as a result of the hijacking of Pan Am Flight 73 at Karachi International Airport 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 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 February 18, 2010, the Commission adjudicated claimant's physical injury claim under the December Referral. In its decision, the Commission determined that the claimant was injured as a result of being struck by shrapnel or bullets in the hand and head. The Commission concluded that the resulting injuries—consisting of lacerations to the second and fourth fingers of his right hand requiring sutures, and a laceration resulting in a scar at the top of his scalp—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</sup> U.S.C. §552(b)(6) Claim No. LIB-I-028, Decision No. LIB-I-039 (2010) (entered as Final on March 24, 2010).

#### BASIS OF THE PRESENT CLAIM

On July 7, 2010, the Commission received from 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 his claim, including evidence of his U.S. nationality, his receipt of an award under the December Referral, and the extent of his injuries. Specifically, claimant asserts that the "severity of [his] injuries, and their lasting effects, are special circumstances warranting additional compensation under Category D." The evidence submitted includes claimant's statements, medical

records indicating the treatment received by claimant for his injuries, and a photograph of claimant's right ring finger.

## DISCUSSION

### Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here 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*, ¶ 3.

### *Nationality*

The Commission determined in its decision on claimant's 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 equally 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*, ¶ 3. The Commission determined, in its decision on claimant's injury claim under the December

Referral, that the Pending Litigation in question, *Patel v. Socialist People's Libyan Arab Jamahiriya*, Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, had been dismissed under a Stipulation of Dismissal dated December 16, 2008. That determination also applies here.

In summary, 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

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 making this determination, the Commission considers the following. First, the Commission is familiar with the nature of all of the injuries that fall under Category D; as indicated above, in its adjudication of claims under the December Referral, the Commission has already examined and awarded compensation for all of the eligible Category D claims. Second, the Commission's standard for physical injury in this program sets a relatively low threshold for compensable injuries: in order to meet the Commission's standard in this program, a claimant need only establish that he or she suffered an injury that is discernable, and more significant than a superficial injury. *See Claim of 5 U.S.C. §552(b)(6)* Claim No. LIB-I-001, Decision No. LIB-I-001, at 8-9 (2009). Third, the amount of compensation awarded for compensable injuries in this program — a fixed amount of \$3 million for each compensable injury — is, in the Commission's experience, exceptionally high when compared to other claims programs, and extraordinarily high for compensable injuries that were not severe, but which nonetheless met the Commission's standard. Therefore, to the extent that a monetary

award can ever adequately compensate for a physical injury, the eligible claimants in this program have, for the most part, been adequately compensated via the Commission's awards under the December Referral.

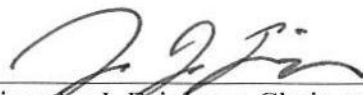
Considering the foregoing, the Commission concludes that only the most severe injuries will constitute a special circumstance warranting additional compensation under Category D. In determining which injuries are among the most severe, the Commission considers the nature and extent of the injury itself, 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. These factors are applied to the present claim as set forth below.

In support of his Category D claim for additional compensation, claimant has submitted, among other documents, a declaration and a supplemental declaration. In his declarations, claimant asserts that “[w]hen the bandages ... were removed, [his] finger was extremely raw ... [it] burned constantly ... [and] it was some time before [he] could go swimming or get [his] finger wet in the shower.” Further, he asserts that he has experienced difficulty playing sports such as baseball, because “the vibrations of the bat would sting [his] injured finger.” In addition, he experiences pain while doing ordinary tasks, and has altered his daily activities to compensate. For example, he experiences “a slight burning pain” if he “sling[s] [his] backpack over [his] shoulder or ... grab[s] the handle of a heavy suitcase....” Claimant asserts that this, and other similar examples, cause him to “stick [his] finger up and out of the way, which on occasion has led to friends and family teasing [him] (in jest) about [his] finger positioning.” With regard to claimant's disfigurement, he has submitted recent photographs of his right index finger, which reveal visible but very minor scarring on a single finger.

Considering the totality of the evidence submitted, the Commission is not persuaded either that any of the claimant's major life activities have been limited in a sufficiently significant way as a result of the injury to his finger, or that there was a sufficiently significant disfigurement to his outward appearance so as to qualify for additional compensation. In this regard, the Commission notes that while it may have taken "some time" for the claimant's injury to heal, since then there is no evidence of any ongoing treatment to identify or treat in any way the impairments he alleges resulted from the initial injury to his finger. Consequently, the Commission concludes that the severity of the injury in this claim does not rise to the level of a special circumstance warranting additional compensation under Category D.

Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, November 17, 2011  
and entered as the Proposed Decision  
of the Commission.

  
\_\_\_\_\_  
Timothy J. Feighery, 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) (2010).