

**FOREIGN CLAIMS SETTLEMENT COMMISSION  
OF THE UNITED STATES  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
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ESTATE OF ANTONIA CRUZ,	}	Claim No. LIB-III-014
DECEASED; MAGALY HOFMANN,	}	
ADMINISTRATOR	}	Decision No. LIB-III-031
	}	
Against the Great Socialist People’s	}	
Libyan Arab Jamahiriya	}	
	}	

Counsel for Claimant:	Joshua M. Ambush, Esq. Joshua M. Ambush, LLC
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FINAL DECISION

Claimant Estate objects to the Commission’s Proposed Decision denying its claim against the Great Socialist People’s Libyan Arab Jamahiriya (“Libya”). In a previous claims program, the Commission awarded Claimant Estate \$3 million based on physical injuries suffered by Antonia Cruz during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In this claim, Claimant Estate seeks additional compensation for those injuries, and in its Proposed Decision, the Commission denied the claim on the basis that Claimant Estate had not met its burden to prove that the severity of Ms. Cruz’s injuries constituted a “special circumstance” warranting additional compensation for those injuries.<sup>1</sup> On objection, Claimant Estate provides additional argument and evidence in support of its claim. It requests \$500,000 in additional compensation for Ms. Cruz’s

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<sup>1</sup> See Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission (“2013 Referral” or “November 2013 Referral”).

injuries. After careful consideration of this additional evidence and argument, we again conclude that Claimant Estate has not carried its burden to establish that the severity of Ms. Cruz's injuries warrants additional compensation. We thus affirm the denial of this claim.

## BACKGROUND

Ms. Cruz suffered physical injuries during the terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972, and in a previous program, the Commission awarded Claimant Estate \$3 million in its claim against Libya.<sup>2</sup> Claimant Estate now seeks additional compensation for those same injuries based on the claim that their severity is a special circumstance warranting additional compensation. It alleges that Ms. Cruz sustained a fracture to her upper right arm, rendering her unable to move her arm up or back or to close the fingers of her right hand. It also alleges that Ms. Cruz's arm sustained deep and disfiguring scarring and permanent weakness. In a Proposed Decision dated October 15, 2015, the Commission denied the claim on the basis that Claimant Estate had not carried its burden to prove that Ms. Cruz's injuries were sufficiently severe to constitute a special circumstance warranting additional compensation. Claim No. LIB-III-014, Decision No. LIB-III-031 (2015) (Proposed Decision).

The Proposed Decision concluded that Claimant Estate had not submitted sufficient evidence to establish that the nature and extent of the initial injuries Ms. Cruz suffered in the attack were severe enough to warrant additional compensation beyond the \$3 million already awarded. It observed that Claimant Estate had not submitted any medical records substantiating its claims. Moreover, the Commission determined that even if it were to accept all of Claimant Estate's assertions as true, Ms. Cruz's initial injuries were not

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<sup>2</sup> Claim No. LIB-II-152, Decision No. LIB-II-176 (2012).

exceptionally severe when compared with those claimants who have been awarded additional compensation in this program.

The Commission also held that Claimant Estate had not demonstrated that the impact of Ms. Cruz's injuries on her ability to perform major life functions and activities was particularly significant. Claimant Estate failed to provide a single medical record from the 27-year period between Ms. Cruz's return to Puerto Rico and her death in 1999, raising questions about the extent of any alleged permanent incapacity. Moreover, although there was some evidence that Ms. Cruz did not return to work after the attack, the evidence was equivocal as to whether this was because of her physical or her emotional injuries, the latter not being compensable in this program.<sup>3</sup> Finally, the evidence in the record did not demonstrate significant enough disfigurement to warrant additional compensation either.

On October 23, 2015, Claimant Estate filed a notice of objection and requested an oral hearing. On January 28, 2016, Claimant Estate submitted a brief in support of its objection, along with some new evidence (two additional photographs of Ms. Cruz's alleged injuries, each with an accompanying declaration from Ms. Cruz's niece, Magaly Hofmann). The Commission held an oral hearing on February 11, 2016; the hearing consisted solely of argument by Claimant Estate's counsel, and Claimant Estate presented no witnesses for examination.

#### DISCUSSION

Claimant Estate must prove that the severity of Ms. Cruz's injuries constitutes "a special circumstance warranting additional compensation," as required for claimants seeking additional compensation for physical injuries under Category D of the 2013 Referral. The Commission considers three factors in determining whether the severity of a

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<sup>3</sup> See, e.g., Claim No. LIB-III-088, Decision No. LIB-III-019, at 28-29 (2015).

victim's physical injuries is a "special circumstance warranting additional compensation" under Category D of the 2013 Referral: "[(1)] the nature and extent of the injury itself, [(2)] the impact that the injury has had on a [victim's] ability to perform major life functions and activities—both on a temporary and on a permanent basis—and [(3)] the degree to which the [victim's] injury has disfigured his or her outward appearance." Proposed Decision, *supra*, at 6 (*quoting Claim of ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020, at 6 (2015)). As noted in the Proposed Decision, we address these three factors in light of the unique context of the Commission's Libyan claims programs, under which every successful physical-injury claimant received an initial award of \$3 million. While no amount of money can adequately compensate some victims for their injuries, we recognize that \$3 million is "exceptionally high when compared to other claims programs . . . ." *See* Claim No. LIB-II-110, Decision No. LIB-II-111, at 5 (2011). For that reason, we have emphasized that "the eligible claimants in [the Libya claims] program [had], for the most part, been adequately compensated . . . ." *Id.* at 6. Starting from that premise, we have held that only the most severe injuries would constitute a special circumstance warranting additional compensation under Category D.

Claimant Estate asserts that the Proposed Decision failed to accord sufficient weight to the non-medical evidence in the record, and in particular, to contemporaneous evidence that could potentially corroborate its assertions about Ms. Cruz's injuries. It submits that the record includes substantial contemporaneous evidence which, when considered together with the newly submitted photographs and declarations, establishes the severity of the injuries alleged. The contemporaneous records that Claimant Estate cites in support of this argument are Ms. Cruz's statement in the 1973 *San Juan Star* article, the article's description of her as permanently maimed, and the payments that Ms. Cruz was

allegedly receiving at the time of her death from the National Insurance Institute of Israel. In addition, it states that the two newly submitted photographs confirm that Ms. Cruz's arm suffered from permanent weakness and sustained extensive scarring. After carefully considering Claimant Estate's argument and evidence (including the new evidence), we again conclude that Claimant Estate has failed to carry its burden of proving its claim.

*I. New Evidence*

Claimant Estate supplements the record with two photographs of Ms. Cruz and two declarations from Ms. Hofmann that provide additional information about the photographs. The first photograph shows Ms. Cruz standing arm in arm with her husband. She is wearing a long-sleeved shirt, and she is holding her hands together in front of her torso with her left hand placed over her right hand. In Ms. Hofmann's first declaration, which is dated January 15, 2016, Ms. Hofmann states that the date of the photograph, "10/82", is written on the back of the original. She additionally states that although she was not present at the time the photograph was taken, the fact that it shows Ms. Cruz's injuries makes her feel certain that it was taken after May 30, 1972 (the date of the Lod Airport attack).

According to Ms. Hofmann, the photograph shows that "the blouse sleeve housing [Ms. Cruz's] right arm . . . is deeply indented" and that the "missing flesh in [Ms. Cruz's] arm was regularly apparent, even when she wore sleeves." In addition, the declaration states that Ms. Cruz was "holding her right arm close to her body because she also suffered from weakness in the arm and so she always held her arm close to her for support."

The second photograph shows Ms. Cruz standing alone. She is wearing a short-sleeved shirt, and, as in the first photograph, she is holding her hands together in front of her torso with her left hand placed over her right hand. The photograph is undated, but

Ms. Hofmann submits in her second declaration, also dated January 15, 2016, that the fact that it showed Ms. Cruz's injuries makes her feel certain that it was taken after 1972.

Ms. Hofmann further states that she is "still able to recognize the indentations in the right blouse sleeve where [Ms. Cruz] was disfigured by bullet wounds during the Lod Airport Massacre." As with the first photograph, Ms. Hofmann maintains that Ms. Cruz "was holding her right arm close to her body because she also suffered from weakness in the arm and so she always held her arm close to her for support."

Both of Ms. Hofmann's declarations also repeat many of the statements that she had made in an earlier declaration about Ms. Cruz's injuries, including that Ms. Cruz could not do daily chores without assistance, that she had to teach herself to write again with her left hand, and that she could not wear sleeveless clothing because "she was deeply humiliated by the disfigurement caused by the scars."

## II. Analysis

Claimants seeking additional compensation for physical injuries are required to verify their injuries with medical records. *Claim of ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020, at 11 (2015). The need for such evidence in claims for additional compensation is based on the "unique context of these Libyan claims programs, under which every successful physical-injury claimant received an initial award of \$3 million,"<sup>4</sup> an amount that is "in the Commission's experience, exceptionally high when compared to other claims programs, and extraordinarily high for compensable injuries that were not severe."<sup>5</sup> Thus, in order to meet its burden to prove that the severity of an injury constitutes a special circumstance warranting additional

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<sup>4</sup> Proposed Decision, *supra*, at 7.

<sup>5</sup> Claim No. LIB-II-110, Decision No. LIB-II-111, at 5 (2011).

compensation—a threshold of injury far higher than that needed in the Commission’s other physical-injury programs—a claimant must submit medical records that establish the severity of the injury alleged.

Here, Claimant Estate has failed to submit sufficient medical evidence to carry its burden of proof. The only medical record available, the discharge summary from Tel Hashomer Hospital, suggests that Ms. Cruz’s injuries were not particularly severe: the discharge summary specifically notes that she did not sustain damage to her arteries and that her fracture was in a “good position” at the time of discharge. We have denied claims for additional compensation of other victims whose injuries were far more severe.<sup>6</sup>

More importantly, Claimant Estate has not provided any other medical records. Given how severe Ms. Cruz’s injuries are alleged to have been, we would expect there to have been some medical records during the 27-year period from Ms. Cruz’s return to Puerto Rico in 1972 until her death in 1999, or at least some evidence that she had sought additional treatment for her injuries. Claimant Estate argues that, given the passage of time since Ms. Cruz’s death, any medical records have long since been destroyed. That may well be the case. But Claimant Estate has not provided *any* evidence—even testimonial evidence—that Ms. Cruz sought medical treatment of any kind. Moreover, our regulations

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<sup>6</sup> See, e.g., Claim No. LIB-II-148, Decision No. LIB-II-185 (2012) (denying claim for additional compensation where claimant had bullet wounds to his chest, buttocks and leg; had spent eight days in the hospital after the terrorist attack; had to fly back home while lying on his abdomen and then spent another four weeks in a hospital near his home; and had medical records showing continued pain in his lower leg, thigh and back for the first few years after the attack); Claim No. LIB-II-109, Decision No. LIB-II-112 (2011) (denying claim for additional compensation where the claimant suffered bullet wounds to her right foot with entry and exit wounds, requiring ten days in the hospital and immediate surgery); Claim No. LIB-II-110, Decision No. LIB-II-111, *supra* (denying claim for additional compensation where the claimant suffered a through and through gunshot wound to the chest, requiring four days of hospitalization and a course of antibiotics, and which left a 3-inch scar on his chest).

place the burden of proof squarely on the claimant.<sup>7</sup> Claimant Estate may be correct that, as a practical matter, this burden is difficult to meet in situations like this one, where the injured victim has long been deceased. The flip side, however, is that Claimant Estate would have us effectively lower “the burden of proof in submitting evidence” when the victim has died, making it *easier* for such a claimant to prevail.<sup>8</sup> That, we will not do. Claimant Estate’s inability to provide medical evidence of the severity of Ms. Cruz’s injuries is enough to deny its claim (which, we reiterate, is for additional compensation above the \$3 million we have already awarded it).

The rest of Claimant Estate’s evidence—the Hofmann declarations, the National Insurance Institute of Israel disability payments, the newspaper article, and the photographs—cannot overcome this lack of medical evidence. First, the declarations, on which Claimant Estate heavily relies, cannot establish a permanent impairment severe enough to warrant additional compensation. Ms. Hofmann states that Ms. Cruz’s permanent injury to her right arm and hand had a significant impact on her ability to perform major life functions and activities, and in particular, tasks such as dressing, showering, brushing her hair, and writing. A single statement from an interested party<sup>9</sup> that a victim is unable to perform certain tasks is simply not enough to meet a claimant’s burden of proof to show the necessary level of impairment for additional compensation in this program. Claimant Estate argues that we should not require medical evidence to

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<sup>7</sup> See 45 C.F.R. § 509.5(b) (“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.”).

<sup>8</sup> See *id.*

<sup>9</sup> Ms. Hofmann is a beneficiary of Ms. Cruz’s estate. A declarant’s interest in the outcome of the proceedings and special relationship with the claimant are relevant factors in assessing how much weight to place on her testimony. See Claim No. IRQ-1-006, Decision No. IRQ-1-026, at 11 (2015) (*citing* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* at 312, 317 (Cambridge University Press 2006) (1953)).



establish the impact that the injury has had on a victim's ability to perform major life functions or activities. To be clear, we do not require medical evidence that specifically states that a victim could not dress or shower herself. However, when the only evidence of disability of this sort is an interested third-party's statement, we would need, at the very least, some kind of corroborating evidence, such as medical evidence of the ailment that renders the victim unable to dress or shower herself.

Moreover, not only do Ms. Hofmann's sworn statements not provide sufficient evidence of disability, they also include seemingly inconsistent statements. On the one hand, Ms. Hofmann states that Ms. Cruz's injuries were permanent and so significant that she was unable to perform daily activities such as "dressing, showering, and brushing her hair" without help and "had to teach [herself] how to write again with [her] left [hand]." On the other hand, in an affidavit originally submitted in Ms. Cruz's initial physical-injury claim, Ms. Hofmann states that it "took [Ms. Cruz] about a year to get the use of her arm back," clearly implying that she did in fact get the use of her arm back and therefore suggesting that any disability experienced by Ms. Cruz was temporary. Similarly, in an affidavit submitted in the physical-injury claim brought by the estate of Ms. Cruz's husband, Juan Cruz, Ms. Hofmann states, "When I lived with Antonia and Juan in Florida, Antonia and I had to help Juan with simple tasks like washing dishes because his right hand was useless in performing household tasks."

On their face, these statements seem inconsistent with the contentions that Ms. Cruz was unable to dress, shower, or brush her hair and had to learn how to write again with her left hand. It is of course possible that Ms. Hofmann did not mean that Ms. Cruz got the *complete* use of her arm back after a year. And it may theoretically be possible that Ms. Cruz was both well enough to assist her husband with "simple tasks like washing

dishes,” but also so impaired that she herself had significant difficulties in dressing, showering, brushing her hair, and writing. Regardless, however, Ms. Hoffman’s prior affidavits suggests that Ms. Cruz’s injuries were not sufficiently severe to be “among the most severe in this program”<sup>10</sup> or so severe as to constitute a “special circumstance warranting additional compensation.”<sup>11</sup> Thus, while these statements may not be inherently inconsistent, they highlight the fact that the evidence of permanent impairment here is sparse. Given all this, we are not inclined to give much weight to Ms. Hofmann’s allegations that Ms. Cruz was limited in her ability to use her right arm or hand.

Second, the payments that Ms. Cruz allegedly received from the National Insurance Institute of Israel do not provide much in the way of evidence supporting the Claimant Estate’s factual assertions either. Merely having evidence of some kind of permanent disability is, by itself, not sufficient to support an award of additional compensation in these Libyan claims programs.<sup>12</sup> As the Proposed Decision explained, the Israeli Institute payments do not, without more details about the underlying disability determination, provide much insight into the factors that are most important to the Commission’s analysis in this claim: the degree of Ms. Cruz’s alleged disability and the extent to which it affected her major life activities or functions.<sup>13</sup>

Third, the newspaper article does not provide sufficient evidence to meet Claimant Estate’s burden either. The mere use of the phrase “permanently maimed” in an article from 1973, only a year after the terrorist attack and 26 years before Ms. Cruz died—especially in the absence of any medical evidence—is not sufficient to meet the Claimant

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<sup>10</sup> Proposed Decision, *supra*, at 7.

<sup>11</sup> 2013 Referral, *supra* note 1, at 2.

<sup>12</sup> See Claim No. LIB-II-116, Decision No. LIB-II-166 (Proposed Decision), at 7 (2012).

<sup>13</sup> See Proposed Decision, *supra*, at 14.

Estate's burden to demonstrate that Ms. Cruz was in fact permanently impaired severely enough to warrant additional compensation.

Finally, the newly submitted photographs are similarly unavailing. The pictures simply do not show any significant impairment or disfigurement. Neither picture shows visible indentations or missing flesh anywhere on Ms. Cruz's arm. What Ms. Hofmann characterizes as an indentation in Ms. Cruz's upper arm in the first picture could just as well be a wrinkle, fold, or other manipulation of the fabric of her shirt. While Ms. Cruz is holding her arms close to her torso in both pictures, the position of her arms seems to fit naturally with the posed nature of the photograph; her arm position in the picture may not be inconsistent with Claimant Estate's theory that she had weakness in her arm, but it does not prove any such weakness.

Moreover, even if we were to infer some disfigurement from the photographs—we certainly cannot infer any impairment—this would not be enough to show injuries of a severity level warranting additional compensation over and above the \$3 million the Claimant Estate has already received. Disfigurement has been an important factor supporting an award of compensation only when the disfigurement has been significant.<sup>14</sup> These photographs, when considered with the other evidence in the record, fail to establish that Ms. Cruz experienced either an impairment or disfigurement sufficient to warrant additional compensation.

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<sup>14</sup> See Proposed Decision, *supra*, at 15 (citing Claim No. LIB-III-021, Decision No. LIB-III-016, at 17 (2015)).

CONCLUSION

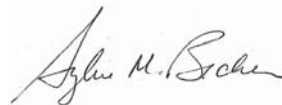
In sum, for the reasons discussed above and in the Proposed Decision, and in light of the severity of the injuries suffered by all the claimants who have sought additional compensation in these Libyan claims programs, the Commission concludes that the severity of Ms. Cruz's injuries does not rise to the level of a special circumstance warranting additional compensation. While we sympathize with all that Ms. Cruz endured, Claimant Estate was already awarded \$3 million in the second Libyan claims program. It is not entitled to additional compensation beyond that. Accordingly, 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 11, 2016  
and entered as the Final Decision  
of the Commission.



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Anuj C. Desai, Commissioner



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Sylvia M. Becker, Commissioner

**FOREIGN CLAIMS SETTLEMENT COMMISSION  
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UNITED STATES DEPARTMENT OF JUSTICE  
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_____	}	

Counsel for Claimant:	Joshua M. Ambush, Esq. Joshua M. Ambush, LLC
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**PROPOSED DECISION**

Claimant Estate brings this claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") based on physical injuries suffered by Antonia Cruz during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In that attack, Ms. Cruz was struck in the right arm by either bullets or shrapnel, and as a result, suffered a fracture to her right humerus. Under a previous program, the Commission awarded Claimant Estate \$3 million in compensation for Ms. Cruz's injuries. Claimant Estate now seeks additional compensation based on the claim that the severity of this injury is a "special circumstance warranting additional compensation." We find that Claimant Estate has failed to demonstrate that Ms. Cruz's injuries were sufficiently severe to warrant additional compensation beyond the \$3 million it has already been awarded. Therefore, the claim is denied.

## BACKGROUND AND BASIS OF CLAIM

Ms. Cruz was in the terminal at Lod Airport in Tel Aviv, Israel on May 30, 1972, when three armed terrorists began shooting automatic rifles and throwing hand grenades at passengers gathered in the baggage claim area. Claimant Estate states that, in that attack, either machine gun bullets or grenade shrapnel entered Ms. Cruz's right arm and fractured her humerus (the bone between the shoulder and elbow). After the attack, Ms. Cruz was taken to a local hospital where she underwent procedures to treat her wound and to place her right arm in a cast. She remained at the hospital for approximately five weeks before being discharged and returning home to Puerto Rico. Ms. Cruz died in 1999 at the age of 81 of causes unrelated to the attack.

Although neither Claimant Estate nor Ms. Cruz was among them, a number of the Lod Airport victims sued Libya (and others) in federal court in 2006. *See Franqui v. Syrian Arab Republic*, no. 06-cv-734 (D.D.C.). In August 2008, the United States and Libya concluded an agreement that settled numerous claims of U.S. nationals against Libya. Among the claims included in the settlement were those "aris[ing] from personal injury ... caused by ... [a] terrorist attack." *See Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* Art. I ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008; *see also* Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999 (Aug. 4, 2008). Two months later, in October 2008, the President issued an Executive Order, which, among other things, directed the Secretary of State to establish procedures for claims by U.S. nationals falling within the terms of the Claims Settlement Agreement. *See* Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008).

The Secretary of State has statutory authority to refer “a category of claims against a foreign government” to this Commission. *See* International Claims Settlement Act of 1949 (“ICSA”), 22 U.S.C. § 1623(a)(1)(C) (2012). The Secretary delegated that authority to the State Department’s Legal Adviser, who, by letters dated December 11, 2008, and January 15, 2009, referred several categories of claims to this Commission in conjunction with the Libyan Claims Settlement Agreement.

In 2010, Claimant Estate filed a claim under the January 2009 Referral, alleging that Ms. Cruz had suffered physical injuries as a result of the Lod Airport attack. By Proposed Decision entered June 20, 2012, the Commission determined that Ms. Cruz had suffered physical injuries in that attack and awarded Claimant Estate a fixed sum of \$3 million under Category E of that Referral. *See* Claim No. LIB-II-152, Decision No. LIB-II-176 (2012) (“Physical-Injury Decision”). Because Claimant Estate did not file an objection to the Proposed Decision, the Proposed Decision automatically became the Commission’s Final Decision on August 28, 2012. *See* 45 C.F.R. § 509.5 (g) (2014).

On November 27, 2013, the Legal Adviser referred an additional set of claims to the Commission. *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* (“2013 Referral” or “November 2013 Referral”). One category of claims from the 2013 Referral is applicable here. That category, known as 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 our January 15, 2009 referral or by this referral, provided that (1) the claimant has received an award for physical injury pursuant to our January 15, 2009 referral or this 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 claimant did not make a

claim or receive any compensation under Category D of our January 15, 2009 referral.

2013 Referral at ¶ 6.

On December 13, 2013, the Commission published notice in the *Federal Register* announcing the commencement of the third Libya claims program pursuant to the ICSA and the 2013 Referral. *Notice of Commencement of Claims Adjudication Program*, 78 Fed. Reg. 75,944 (2013).

On May 20, 2014, the Commission received from Claimant Estate a completed Statement of Claim seeking compensation under Category D of the 2013 Referral. Claimant Estate supplemented its filing with additional information and exhibits in a submission dated December 23, 2014, which incorporated by reference evidence that Claimant Estate submitted in its physical-injury claim under the January 2009 Referral.

## DISCUSSION

### Standing

Claimant Estate has submitted an Order for Subsequent Administration of Estate, issued on March 10, 2015, by the Circuit Court for Hernando County, Florida, that identifies Magaly Hofmann and Juan Ramon Soto Acevedo as the beneficiaries of Ms. Cruz's estate. That same day, the Circuit Court also issued Subsequent Letters of Administration appointing Magaly Hofmann as personal representative of the estate, which authorizes her to act on behalf of its beneficiaries. Accordingly, the ESTATE OF ANTONIA CRUZ, DECEASED; MAGALY HOFMANN, ADMINISTRATOR is the proper claimant in this claim.

### Jurisdiction

The Commission must next consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under LIB-III-014



the “Category D” paragraph of the 2013 Referral is limited to claims of (1) “U.S. nationals”; who (2) have received an award for physical injury pursuant to the January 15, 2009 referral or this referral and (3) did not make a claim or receive any compensation under Category D of the January 15, 2009 referral. 2013 Referral ¶ 6.

*Nationality*

This claims program is limited to “claims of U.S. nationals.” Here, that means that a claimant must have been a U.S. national continuously from the date the claim arose until the date of the Claims Settlement Agreement. *See* Claim No. LIB-III-001, Decision No. LIB-III-001, at 5-6 (2014). In the case of claims brought by estates on behalf of beneficiaries, it is a well-established principle that, for purposes of determining the nationality of a claim, the nationality of the injured party and of the beneficiaries of his or her estate must be evaluated in order to establish that the claim has been continuously held by U.S. nationals from the date of injury through the date of the Settlement Agreement.<sup>1</sup>

In its Physical-Injury Decision, the Commission determined that Ms. Cruz and the beneficiaries of her estate were U.S. nationals and that the claim was held continuously by a U.S. national from the time of the incident to the effective date of the Claims Settlement Agreement. *See* Claim No. LIB-II-152, Decision No. LIB-II-176, at 3-4. Claimant Estate therefore satisfies the nationality requirement under this program.

*Prior Award*

To fall within the category of claims referred to the Commission, a claimant must have received an award under either the January 2009 or November 2013 Referrals. The

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<sup>1</sup> *See, e.g.*, Claim No. Y-0660, Decision No. Y-1171 (1954); Claim No. W-9801, Decision No. W-2107 (1965); Claim No. G-2154, Decision No. G-1955 (1981); and Claim No. ALB-338, Decision No. ALB-321 (2008).

Commission awarded Claimant Estate \$3 million based on its physical-injury claim under the January 2009 referral. Claimant Estate therefore satisfies this requirement of its Category D claim.

*No Claim Under Category D of the January 2009 Referral*

With respect to the final jurisdictional requirement, Claimant Estate did not submit a claim or receive any compensation under Category D of the January 2009 Referral. Thus, Claimant Estate meets this element of its claim as well.

In summary, this claim is within the Commission’s jurisdiction pursuant to the 2013 Referral and is entitled to adjudication on the merits.

Merits

*Standard for Special Circumstances Claims*

To make out a substantive claim under Category D, a claimant must establish that the severity of his or her injury is a “special circumstance warranting additional compensation.” 2013 Referral ¶ 6.<sup>2</sup> The Commission has previously held that, in making this determination, it would consider three factors: “[1] the nature and extent of the injury itself, [(2)] the impact that the injury has had on a claimant’s ability to perform major life functions and activities—both on a temporary and on a permanent basis—and [(3)] the degree to which the claimant’s injury has disfigured his or her outward appearance.” *Claim of ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020, at 6 (2015).

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<sup>2</sup> Strictly speaking, Category D provides *two* ways for a claimant to make out a substantive claim: the claimant must show that either (1) “the severity of the injury is a special circumstance warranting additional compensation”; or (2) “additional compensation is warranted because the injury resulted in the victim’s death.” See 2013 Referral ¶ 6. Since Ms. Cruz survived the Lod Airport attack and her subsequent death in 1999 was unrelated to the attack, only the first basis for entitlement is relevant here.

Importantly, in all of its “additional compensation” decisions under the 2009 Referral (and its 2013 Referral “additional compensation” decisions to date), the Commission addressed these three factors in light of the unique context of the Commission’s Libyan claims programs, under which every successful physical-injury claimant received an initial award of \$3 million. While noting that no amount of money can adequately compensate some victims for their injuries, the Commission recognized that \$3 million is “exceptionally high when compared to other claims programs . . . .” *See* Claim No. LIB-II-110, Decision No. LIB-II-111, at 5 (2011). For that reason, the Commission emphasized that “the eligible claimants in [the Libya claims] program [had], for the most part, been adequately compensated . . . .” *Id.* at 6. Starting from that premise, the Commission held that only the most severe injuries would constitute a special circumstance warranting additional compensation under Category D. As discussed in more detail below, Claimant Estate has not shown that Ms. Cruz’s injuries are among the most severe in this program, and thus, it is not entitled to additional compensation under the November 2013 Referral beyond the \$3 million the Commission has already awarded it.

#### *Factual Allegations*

Claimant Estate states that Ms. Cruz was in the terminal at Lod Airport in Tel Aviv, Israel, on May 30, 1972, when three armed terrorists began shooting automatic rifles and throwing hand grenades at passengers gathered in the baggage claim area. Claimant Estate states that, in that attack, Ms. Cruz was hit by either machine gun bullets or grenade shrapnel and suffered a fracture of her right humerus (the bone between the shoulder and elbow) and exit and entry wounds to her right arm. Claimant Estate further states that Ms. Cruz spent thirty-five days at a hospital in Israel where she underwent

surgery to treat her wounds and to place her arm in a cast. Claimant Estate also asserts that Ms. Cruz lost the use of her right arm and sustained permanent and extensive scarring as a result of the attack.

*Supporting Evidence*

In support of its claim, Claimant Estate has submitted a number of documents, including an affidavit from Ms. Cruz's niece, Magaly Hofmann; three photographs of Ms. Cruz's injuries; affidavits and an unsworn declaration providing additional information about the photographs from Ms. Hofmann and Jose Abner Munoz Vega, who was also injured in the attack; several newspaper articles from the *San Juan Star*; a status report from Ms. Cruz's probate case stating that she received payments from the National Insurance Institute of Israel after her death; a 1974 decision of the Superior Court of Puerto Rico addressing the distribution of *ex-gratia* funds that Japan provided to the Commonwealth of Puerto Rico for the benefit of Puerto Ricans harmed in the Lod Airport attack; and a discharge summary from the Haim Sheba Medical Center of the Tel Hashomer Hospital in Israel.

The discharge summary from the Haim Sheba Medical Center of Tel Hashomer Hospital is dated July 4, 1972. It indicates that Ms. Cruz was admitted on May 30, 1972, with a "comminuted fracture of the right humerus." It states in greater detail as follows:

On admittance, she was in a satisfactory general condition with entry and exit wounds on both sides of the right arm in the upper third, without damage to arterial blood vessels. Under general anesthetic, debridement of the wounds and fixing the arm by plaster to the body . . . 4 days later, the wounds were examined and closed with [illegible]. A number of days later, the plaster was placed on the upper section for a month. Thereafter, the plaster was removed and we continued with local treatment of the wounds. An examining x-ray indicated a good position of the fracture with a lack of [illegible] and suspended contact with chances of a connection.

The discharge summary also states that Ms. Cruz was discharged from the hospital on July 4, 1972, thirty-five days after the May 30, 1972 attack. She was released to a local hotel with a follow up appointment set for July 27, 1972.

The first photograph that Clamant Estate has submitted is undated and shows Ms. Cruz with her arm in a cast. According to Mr. Vega's first affidavit, which is dated June 28, 2010, the photograph was taken while Ms. Cruz was at Tel Hashomer Hospital. The affidavit states that Ms. Cruz's arm was in a cast because it was shattered in the attack. The second photograph was published in the July 10, 1972 edition of the *San Juan Star*, and shows Ms. Cruz reclining in a hospital bed with her arm in a cast. According to Mr. Vega's second affidavit, also dated June 28, 2010, the photograph was taken on July 9, 1972 at Tel Hashomer Hospital. The third photograph is undated and shows Ms. Cruz standing with her right arm exposed. There are visible scars on the upper part of her arm. Ms. Hofmann's declaration, which is dated December 19, 2014, states that although she was not present at the time the photograph was taken, the fact that it shows Ms. Cruz with scars makes Ms. Hofmann feel certain that it was taken after May 30, 1972 (the date of the Lod Airport attack).

In her declaration, Ms. Hofmann also makes claims about Ms. Cruz's injuries. The declaration states that Ms. Cruz had deep and disfiguring scarring on her right arm, which caused her to feel terrible humiliation and prevented her from wearing sleeveless clothing. The declaration further states that Ms. Cruz suffered from weakness in her right arm and always held that arm close to her body for support. Finally, the declaration asserts that Ms. Cruz was unable to perform daily tasks (such as dressing, showering, and brushing her hair) without assistance and that she had to teach herself to write again with her left hand. In her affidavit, which is dated June 26, 2010, Ms. Hofmann states that Ms.

Cruz suffered grenade shrapnel injuries to the upper middle section of her right arm, which “destroyed the bone in her arm.” The affidavit further states that Ms. Cruz’s arm “never looked normal” after the attack and that it “took her about a year to get the use of her arm back.” The affidavit also alleges Ms. Cruz was unable to return to her job as a probation officer after the attack and never worked again because of “the effect of her injuries and the emotional impact of the attack.”

One of the newspaper articles from the *San Juan Star*, dated May 30, 1973 and titled “Tel Aviv – One Long Year Later,” states that, while the physical wounds of Ms. Cruz and her husband<sup>3</sup> “had relatively healed,” both of them were “permanently maimed” as a result of the attack. Ms. Cruz is quoted as saying, “I can’t move my arm up or back and I can’t close my hand” and “I always have to look for help.” The article further states that Ms. Cruz had been employed as a probation officer but was unable to return to work after the attack. The article then turns to the emotional and mental impact of the attack and quotes Ms. Cruz as saying, “I can’t be where there’s a lot of people. I’m afraid they’re going to start shooting.” In addition, the article states that Ms. Cruz could no longer attend any gathering with a large crowd, including the “fiestas patronales,” a religious celebration that she had always enjoyed but had been “psychologically unable to attend” that year.

The Claimant has additionally provided the Commission with a document dated October 18, 2000 and entitled “Status Report.” The document appears to have originally been submitted to the Circuit Court for Hernando County, Florida by the attorney for the personal representative of Ms. Cruz’s estate. The document states that Ms. Cruz had received monthly payments from the National Insurance Institute of Israel during her

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<sup>3</sup> Ms. Cruz’s husband was also injured in the Lod Airport attack. *See* Claim No. LIB-II-151, Decision No. LIB-II-175.

lifetime, that the Institute was still making those payments after her death, and that counsel was trying to determine whether the payments were supposed to continue after her death. The report further states that the personal representative of Ms. Cruz's estate had "inform[ed] the court that the payments were made because of an injury [Ms. Cruz] sustained while a tourist in Israel."<sup>4</sup>

Finally, Claimant Estate has submitted a 1974 decision of the Superior Court of Puerto Rico addressing the distribution of *ex-gratia* funds that Japan provided to the Commonwealth of Puerto Rico for the benefit of Puerto Ricans harmed by the Lod Airport attack. The Special Commissioners appointed by the court established a point system for distributing those funds and awarded Ms. Cruz 1,100 points out of a possible total of 2,000.<sup>5</sup>

#### *Application of Special Circumstances Factors to Evidence*

In making award determinations for additional compensation, the Commission must take into account the severity of all of the claimants who have sought additional

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<sup>4</sup> This status report is insufficient to prove that Ms. Cruz in fact received disability benefits from the National Insurance Institute of Israel for the injuries to her arm. Other claimants in this program who have received disability payments for physical injuries suffered in the Lod Airport attack have submitted actual documents from the Institute itself, such as the Institute's specific disability determination, which provides information about the injuries for which disability was awarded, the percentage of disability awarded, and whether the disability was temporary or permanent in character. Claimant has not submitted any such documentation. Thus, even if we were to assume that Ms. Cruz did receive payments from the Institute, we cannot determine whether those payments were for disability caused by her physical injuries or for any number of other reasons for which the Institute might have awarded compensation, including psychological or mental injury and treatment. *See* Claim No. LIB-I-033, Decision No. LIB-I-046, at 9.

<sup>5</sup> This court decision adds little to our understanding of the nature and extent of Ms. Cruz's injuries. Claimant Estate has not provided any evidence explaining how the Special Commissioners determined how many points to award specifically to Ms. Cruz. Other Lod Airport attack victims in these Libyan claims programs have provided the related "Report From Special Commissioners," a victim-specific document that provides details about how the Special Commissioners determined the point totals in individual cases, but Claimant has not done so here. In any event, the Special Commissioners' formula differs from the 2013 Referral's mandate and the Commission's standards for determining whether the severity of a claimant's injuries warrants additional compensation in this program (as well from the 2009 Referral's mandate and the Commission's standard for physical-injury claims under the 2009 Referral). *See* Claim No. LIB-II-064, Decision No. LIB-II-073, 5-7 (2012) (discussing this same Report in the context of another Lod Airport victim); Claim No. LIB-II-088, Decision No. LIB-II-108, 4-6 (2012) (same). The 1974 Superior Court decision by itself is therefore of little assistance in adjudicating this claim.

compensation in these Libyan claims programs. *See* Claim No. LIB-II-110, Decision No. LIB-II-111, at 5 (2011). Moreover, “to the extent that a monetary award can ever adequately compensate for a physical injury,” the Commission views these claims for additional compensation through the lens of the \$3 million previously awarded to Claimant Estate (and all successful claimants in this program)—an amount that is “exceptionally high when compared to other programs.” *Id.* Seen through that lens, Claimant Estate’s evidence is not sufficient to carry its burden to prove that the severity of Ms. Cruz’s injuries is a “special circumstance” warranting additional compensation.

Nature and Extent of Injury: The evidence is insufficient to show that the initial injuries that Ms. Cruz suffered in the Lod Airport attack were among the most severe in this program. She certainly did sustain significant injuries in the attack, including a comminuted fracture to her right humerus and entry and exit wounds to her right arm. In addition, Ms. Cruz spent a substantial amount of time in the hospital (approximately five weeks), where she underwent procedures to debride her wounds and to heal her fracture.

Even with this evidence, however, the available medical records do not suggest that Ms. Cruz’s injuries were sufficiently severe to warrant additional compensation beyond the \$3 million Claimant Estate has already received. The only medical record submitted by Claimant Estate—the discharge summary from Haim Sheba Medical Center—indicates that Ms. Cruz was in a “satisfactory general condition” when admitted to the hospital and that she suffered no damage to the arteries in her right arm. In addition, the summary states that her fracture was in a “good position” upon discharge.

There is no evidence to support Claimant Estate’s assertions that Ms. Cruz was “permanently maimed” and that she had limited range of motion in her arm after the attack and was unable to open and close her fingers. Claimant Estate has not submitted



any medical records corroborating these claims or otherwise showing that Ms. Cruz's injuries required hospitalization after her discharge from Tel Hashomer or medical intervention upon her return to Puerto Rico.

More important than this evidentiary gap is the fact that, even if the Commission were to accept Claimant Estate's assertions about Ms. Cruz's injuries, those injuries still would not be among the most severe in this program. The Commission has denied additional compensation (that is, compensation beyond the \$3 million initial awards) to other claimants whose physical injuries were similar to, or worse than, Ms. Cruz's. *See, e.g.,* Claim No. LIB-II-148, Decision No. LIB-II-185 (2012) (denying claim for compensation above \$3 million where claimant had bullet wounds to his chest, buttocks and leg; had spent eight days in the hospital after the terrorist attack; had to fly back home while lying on his abdomen and then spent another four weeks in a hospital near his home; and had medical records showing continued pain in his lower leg, thigh, and back for the first few years after the attack); Claim No. LIB-II-109, Decision No. LIB-II-112 (2011) (denying claim for compensation above \$3 million where the claimant suffered bullet wounds to her right foot with entry and exit wounds, requiring ten days in the hospital and immediate surgery).

In sum, the nature and extent of Ms. Cruz's initial injuries are not among the most severe when compared with all the other claimants who have sought additional compensation in these Libyan claims programs.

Impact on Ms. Cruz's Major Life Functions and Activities: Claimant Estate has failed to show that the second factor—the impact of the injury on Ms. Cruz's ability to perform major life functions and activities—supports its claim for additional compensation. Although Claimant Estate has alleged that, after the attack, Ms. Cruz was

not able to return to work or to perform basic activities such as showering, dressing, and brushing her hair without assistance, it has not submitted sufficient evidence to support this claim.

First, Claimant Estate has not submitted any medical records to support its allegations. The discharge summary from Ms. Cruz's stay at Haim Sheba Medical Center makes no reference to a loss of function or a limited range of motion in her right arm or hand. Nor has Claimant Estate provided any other medical record or correspondence that corroborates its allegations concerning Ms. Cruz's loss of function in her right arm and hand. Indeed, Claimant Estate has not provided a single medical record from the period after Ms. Cruz's return to Puerto Rico until her death, raising questions about the extent to which her ability to use her right arm and hand was limited in any significant way as a consequence of the Lod Airport attack.

Second, although Claimant Estate cites the payments that Ms. Cruz received from the National Insurance Institute of Israel as evidence that she experienced some degree of disability in her arm, the evidence of these payments is not sufficient to show that the physical injuries that she suffered in the attack had a significant impact on her life functions and activities. As noted earlier, Claimant Estate has not established that these payments were disability payments awarded to Ms. Cruz for physical injuries sustained in the Lod Airport attack—indeed, it has not even conclusively established that she received any such payments.<sup>6</sup>

Moreover, the Claimant Estate's other evidence—Magaly Hofmann's affidavit and the *San Juan Star* article—is equivocal as to whether Ms. Cruz's physical injuries were the reason she was unable to return to her job as a probation officer in Puerto Rico.

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<sup>6</sup> See *supra* note 3.

Magaly Hofmann's affidavit describing Ms. Cruz's injuries states that she was unable to work because of the "emotional impact" of the attack. In addition, Ms. Cruz is quoted in the *San Juan Star* as saying that she had difficulty being in places with crowds because of her fear that "they're going to start shooting." To the extent that Ms. Cruz's inability to return to work was due to the mental and emotional harm she suffered in the attack, the Claimant Estate is not entitled to compensation for these injuries: claims for such harm are not compensable as a physical injury under these Libyan claims programs. *See, e.g.*, Claim No. LIB-III-088, Decision No. LIB-III-019, at 28.

Thus, based on the current record, it does not appear that Ms. Cruz's physical injuries had a significant enough impact on her major life functions and activities to warrant additional compensation in this program.

Disfigurement: The third factor—the degree of disfigurement—also supports our conclusion that the severity of Ms. Cruz's injuries is not a special circumstance warranting additional compensation. Disfigurement has been an important factor supporting an award of additional compensation only when the disfigurement has been significant. *See* Claim No. LIB-III-021, Decision No. LIB-III-016, at 17. Even if the Commission accepts as true Claimant Estate's assertion that Ms. Cruz sustained scarring to her upper right arm, there is no indication that these scars were disfiguring to the extent seen in claims where the Commission has granted additional compensation on the basis of disfigurement. *See e.g.* Claim No. LIB-II-174, Decision No. LIB-II-180. Thus, Ms. Cruz's physical injuries do not rise to the level of disfigurement sufficient to support an award of additional compensation.

CONCLUSION

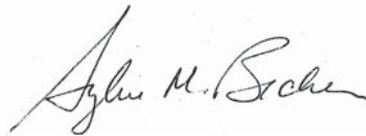
Having considered all of Claimant Estate's evidence in light of the severity of the injuries suffered by all the victims who have sought additional compensation in these Libyan claims programs, the Commission concludes that the severity of the injuries in this claim does not rise to the level of a special circumstance warranting additional compensation. While we sympathize with all that Ms. Cruz endured, Claimant Estate is not entitled to additional compensation beyond the \$3 million the Commission has already awarded it. Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, October 15, 2015  
and entered as the Proposed Decision  
of the Commission.



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Anuj C. Desai, Commissioner



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Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery 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 delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2014).