

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

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In the Matter of the Claim of	}	
	}	
	}	
	}	
ESTATE OF JUAN CRUZ,	}	Claim No. LIB-III-015
DECEASED; MAGALY HOFMANN,	}	
ADMINISTRATOR	}	Decision No. LIB-III-030
	}	
Against the Great Socialist People’s	}	
Libyan Arab Jamahiriya	}	
_____	}	

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

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 Juan 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 Mr. Cruz’s injuries constituted a “special circumstance” warranting additional compensation for those injuries.¹ On objection, Claimant Estate provides additional argument and evidence in support of its claim. It requests \$2 million in additional compensation for Mr. Cruz’s

¹ 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 Mr. Cruz's injuries warrants additional compensation. We thus affirm the denial of this claim.

BACKGROUND

Mr. 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.² 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 Mr. Cruz suffered shrapnel wounds to his legs, a laceration to his right axillary artery that caused permanent damage to the circulation in his right arm, and lacerations to the median and radial nerves in that same arm that left him unable to open and close his fingers or to move his arm up and back. 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 Mr. Cruz's injuries were sufficiently severe to constitute a special circumstance warranting additional compensation. Claim No. LIB-III-015, Decision No. LIB-III-030 (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 Mr. 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

² Claim No. LIB-II-151, Decision No. LIB-II-175 (2012).

medical records substantiating its claims. Because the medical evidence concerning Mr. Cruz's injuries was limited, the Commission considered the length of Mr. Cruz's hospitalization to be relevant in its assessment and concluded that a 15-day period of initial hospitalization, without evidence of further treatment or medical intervention upon Mr. Cruz's return to Puerto Rico, supported its conclusion that Mr. Cruz's initial injuries were not among the most severe in these Libyan claims programs.

The Commission also held that Claimant Estate had not demonstrated that the impact of Mr. Cruz's injuries on his ability to perform major life functions and activities was particularly significant. Claimant Estate failed to provide a single medical record from the 21-year period between Mr. Cruz's return to Puerto Rico and his death in 1993, raising questions about the extent of any alleged permanent incapacity. Moreover, although there was some evidence that Mr. Cruz did not return to work after the attack, the evidence was equivocal as to whether this was because of his physical or his emotional injuries, the latter not being compensable in this program.³ Finally, the evidence in the record also did not demonstrate significant enough disfigurement to warrant additional compensation.

On October 23, 2015, Claimant Estate filed a notice of objection and requested an oral hearing. On November 24, 2015, Claimant Estate submitted a brief in support of its objection. The Commission held an oral hearing on December 10, 2015. At the hearing, Mark A. Reischer, M.D., provided sworn testimony, and claimant's counsel also provided legal argument.

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

DISCUSSION

Claimant Estate must prove that the severity of Mr. 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 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 there is sufficient evidence in the record to establish the severity of Mr. Cruz's injuries. It contends that the disease summation form from the Haim Sheba Medical Center of the Tel Hashomer hospital in Israel shows that Mr. Cruz suffered a life-threatening injury to his artery and thus establishes the severity of his initial injuries. It further submits that the record includes substantial evidence which, when considered together with Dr. Reischer's testimony, establishes that Mr. Cruz experienced permanent incapacity and disfigurement sufficient to merit an award of additional compensation. The records that Claimant Estate cites in support of this argument include the disease summation form, the 1973 *San Juan Star* article, an affidavit from Dr. Alberto Folch, a convalescence grant that Mr. Cruz received from the National Insurance Institute of Israel, a declaration submitted by Mr. Cruz's niece, Magaly Hofmann, and his score of 1,700 points in a report submitted in a 1974 decision of the Superior Court of Puerto Rico addressing the distribution of funds to the victims of the attack. After carefully considering Claimant Estate's argument and evidence (including the new evidence, Dr. Reischer's testimony), we again conclude that Claimant Estate has failed to carry its burden of proving its claim.

I. New Evidence

Claimant Estate's only new evidence is the live testimony of Dr. Reischer, a board-certified physician in physical and rehabilitation medicine and internal medicine, on the nature and impact of the injuries to Mr. Cruz's right arm. Dr. Reischer testified primarily about Mr. Cruz's alleged nerve injuries, but also discussed his axillary artery as well. Dr. Reischer has never examined Mr. Cruz—Mr. Cruz had been dead for more than two decades before Dr. Reischer even became involved in this claim—and has no direct

knowledge of his injuries; his testimony was based solely on a review of the evidence that Claimant Estate has submitted in this claim.

Nerve injuries: Dr. Reischer testified about two different nerves in Mr. Cruz's right arm and hand, the radial nerve and the median nerve. Both nerves run all the way down the arm, from near the shoulder to the hand.

One key assumption that underlay Dr. Reischer's testimony was that the phrase "[l]aceration of median and radial nerves" mentioned in the 1972 Tel Hashomer discharge summary meant a complete laceration of the two nerves—that is, that the nerves had been, in essence, completely severed, such that they were no longer capable of carrying any electrochemical signals. Dr. Reischer stated repeatedly that his testimony about the damage to both nerves and the impact that damage would have had was based on this assumption. For instance, he testified that he had to "make the assumption that [the nerve injury] was a complete laceration"; that he was "assuming that the laceration's a complete laceration"; that he had "to assume that there were major, indeed, total laceration of the nerves"; that he had "to assume [that there] were complete lacerations, certainly major lacerations"; and that while he "suspect[ed] that the two pieces [of Mr. Cruz's nerve] were separated and far apart," he did not know for sure that the nerves were actually severed— "[h]e made that assumption." When asked if he could determine the character or length of the laceration based on the information available in the disease summation form, Dr. Reischer stated that he could only "say that there was a laceration that was significant enough for the surgeon to include it" on the form.

Dr. Reischer further testified that if the lacerations were "trivial," the treating physician would not have been able to see or to identify them and, in any case, would not

have noted them on the disease summation form based on the short length of the form. When questioned as to whether the treating surgeon *could* have seen the injury given that a vein graft was performed close to the injury site, Dr. Reischer stated that “if it were a small, trivial laceration, I suspect [the treating surgeon] would have tried to fix it himself, and there’s no evidence that he tried to do that.” Similarly, Dr. Reischer testified that if the lacerations were partial, the treating surgeon “would probably have attempted to at least put the connective tissue that’s not connected” in one piece. However, he acknowledged that the surgeon may have waited to repair the nerve until after Mr. Cruz’s vascular injuries were healed.

Dr. Reischer also testified that he assumed that the lacerations were complete based on the language and length of the disease summation form. He stated that, given how short the disease summation form is, the treating physician would not have included a laceration unless it was significant. In addition, he stated that he assumed that the lacerations were complete “because there’s no comment that it’s a partial laceration” on the disease summation form and because the form “doesn’t say otherwise” that it was a partial laceration.

On the basis of the assumption that Mr. Cruz suffered a complete laceration of his radial nerve, Dr. Reischer testified that he would have had difficulty performing a number of tasks with his right arm and hand. Dr. Reischer stated that Mr. Cruz’s radial nerve injury would have prevented him from raising his wrist or extending his elbow and would have caused him to experience “significant weakness.” He further testified that while Mr. Cruz would have been unable to straighten his elbow voluntarily, his injury would not have affected his ability to flex or to bend his arm because that function was

controlled by a muscle that is not enervated by the radial nerve. When asked to explain why the disease summation form would describe someone who was unable to extend his elbow as having “good arm movements from a functional aspect,” Dr. Reischer testified that he assumed that the treating physician did not have the “appropriate training” to recognize that Mr. Cruz could bend his arm without being able to straighten his elbow, and thus may have interpreted the former as evidence of “good arm movements” while remaining unaware that Mr. Cruz was unable to perform the latter.

Dr. Reischer also testified that Mr. Cruz’s radial nerve injury would have affected his ability to perform tasks with his right hand. He observed that “if somebody has a radial nerve injury, functionally the hardest thing is that [he] really can’t make a good grip.” In addition, he testified that Mr. Cruz would have been unable to make a fist and would have had difficulty writing with a pen, giving someone a “high-five,” keyboarding, playing the piano, driving, opening doors, buttoning his clothes, and manipulating a zipper. Dr. Reischer also addressed Dr. Folch’s statement that the “first three fingers of [Mr. Cruz’s] right hand had permanent flexion, clinically demonstrating nerve lesion of the radial nerve.” When asked if this position necessarily resulted from Mr. Cruz’s radial nerve laceration, Dr. Reischer stated that while that position “certainly . . . is what one would see with a radial nerve injury,” in this case, it could have been caused by other wounds that Dr. Folch alleged Mr. Cruz had sustained to his hand.

On the similar assumption that the laceration to Mr. Cruz’s median nerve was also complete, Dr. Reischer testified that it would have caused a loss of sensation in the palm of his hand, leaving him susceptible to burns, and would have rendered him unable “to significantly flex his fingers.” When asked to explain how Mr. Cruz could have had (as

stated in Dr. Folch's affidavit) permanent flexion in the first three fingers of his right hand at the same time that he suffered from a median nerve injury that would have eliminated his ability to flex his fingers, Dr. Reischer stated that while a "voluntary contraction in flexion" would be "inconsistent with the median nerve injury," the affidavit did not document that Mr. Cruz could voluntarily bend or flex his fingers. Dr. Reischer further testified that when combined with a radial nerve injury, a laceration to Mr. Cruz's median nerve would have rendered him unable to hold a cup of coffee and could have caused his hand to appear like a claw. Additionally, he stated that an individual with lacerations to his median and radial nerves would lack voluntary extension in his elbow and thus would typically hold his arm in a position similar to that Mr. Cruz had adopted in the photograph submitted by Claimant Estate: bent at the elbow with the forearm parallel to the ground.

Proceeding from the assumption that Mr. Cruz sustained complete lacerations to his median and radial nerves, Dr. Reischer further testified that there were limited treatment options for his injuries. He stated that any surgical intervention to repair the separated nerve "would have been futile" but that Mr. Cruz may have received a splint to assist with his arm and hand function. Dr. Reischer concluded his testimony regarding Mr. Cruz's nerve injuries by stating his determination of Mr. Cruz's level of permanent impairment over his lifetime due to the nerve injuries he suffered in the attack.⁴ Dr. Reischer testified that Mr. Cruz had a 65% impairment of the upper extremity for the median nerve injury, a 45% impairment to the upper extremity for the radial nerve injury,

⁴ Dr. Reischer's impairment rating was based on the framework set out in American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Although this standard AMA guide is now in its sixth edition (published in 2007), Dr. Reischer testified that Maryland, where he is licensed, uses the fourth edition (published in 1993).

and a 55% impairment to the body as a whole. Dr. Reischer stated that the disease summation form alone was a sufficient basis for his testimony on Mr. Cruz's lifetime level of impairment, assuming again that the lacerations documented in the form were complete.

Axillary artery injury: Dr. Reischer began his testimony on Mr. Cruz's vascular injuries by discussing, in general terms, the potential consequences of right axillary artery injuries. He stated that such injuries are life-threatening and may cause death if left untreated due to the associated bleeding. Turning to the specifics of Mr. Cruz's injury, Dr. Reischer stated that the fact that Mr. Cruz's pulse did not return after the vein graft procedure indicated an "impairment of the circulation." However, when questioned further, he stated that the only contention that he was making about Mr. Cruz's circulation was that "as a result of the injuries, he had developed a significant arterial injury [that] required grafting. The graft maintained the viability of the arm, and the pulse never returned." He also testified that while he had "no idea what happened" after Mr. Cruz was discharged, it is "conceivable that the pulse could [have] return[ed]." In addition, he noted that circulation can be restored after a period of pulselessness by techniques such as thrombolysis or by "collateral circulation around the area of injury." Moreover, Dr. Reischer believed that even if Mr. Cruz's pulse had not been restored, he could have maintained a functioning and viable arm. He testified that Mr. Cruz's impairment rating was calculated "predominantly on the basis of the nerve injuries" and not on the arterial (or any other vascular) injury that he sustained in the attack.

II. Analysis

Claimants seeking additional compensation for physical injuries are required to verify their injuries with medical records that establish the severity of the injuries alleged. *Claim of ESTATE OF ANTONIA CRUZ*, Claim No. LIB-III-014, Decision No. LIB-III-031 (Final Decision), at 6 (2016). Here, Claimant Estate has failed to submit sufficient medical evidence to carry its burden of proof.

Nature and Extent of Injury: Claimant Estate contends that Mr. Cruz's initial injuries, and specifically the laceration to his right axillary artery, are severe enough to warrant additional compensation. It argues that Mr. Cruz's artery injury was life-threatening, that the vein graft implant to repair his artery was not fully successful, and that he sustained permanent damage to the circulation in his right arm.

These contentions are not supported by either the medical record or Dr. Reischer's testimony, which both suggest that while Mr. Cruz's initial injuries were significant, they were not severe enough to warrant additional compensation. The only medical record in this claim, the Tel Hashomer disease summation form, indicates that Mr. Cruz's injuries had healed to the point that he displayed "good arm movements from a functional aspect" before he was discharged; this was only fifteen days after the terrorist attack. Additionally, Dr. Reischer testified that the vein graft replacement maintained the viability of Mr. Cruz's arm. While the form states that Mr. Cruz's pulse did not return, Dr. Reischer testified that it was conceivable that it could have returned and that he had "no idea what happened" after Mr. Cruz was discharged. Claimant Estate has not provided any medical evidence to fill this gap. There is no evidence—even testimonial evidence—that Mr. Cruz sought or received additional treatment for any of

his injuries in the twenty-one year period between his return to Puerto Rico in 1972 and his death in 1993. This lack of evidence, when considered in light of the relatively short period that Mr. Cruz was hospitalized (15 days), supports our conclusion that Mr. Cruz's initial injuries were not severe enough to warrant additional compensation.

Moreover, because the Tel Hashomer form (Claimant Estate's only medical record) fails to indicate in any way that Mr. Cruz's life was at risk, Dr. Reischer's testimony that the right axillary artery injuries could have been life-threatening is not relevant. In its assessment of the severity of a victim's initial injuries, the Commission considers the actual, not the potential, impact of an injury on a victim.⁵ Thus, because there is no evidence that Mr. Cruz's life was in danger or that he was at risk of losing his limb, Dr. Reischer's testimony on the potentially life-threatening consequences of right axillary artery injuries does not alter our conclusion that Mr. Cruz's initial injuries were not sufficiently severe to warrant additional compensation.

Impact on Mr. Cruz's Major Life Functions and Activities: Claimant Estate asserts that Mr. Cruz suffered from permanent damage to the circulation in his right arm. This contention is not supported by the medical record or by the testimony of Dr. Reischer, who explicitly acknowledges that he could not make any claims about Mr. Cruz's circulation beyond what was stated in the disease summation form. Nor is it connected to any specific allegation of disability or incapacity. We thus conclude that it cannot form the basis of an award for additional compensation.

⁵ Compare Claim of *ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020 (2015) (holding that Claimant Estate was due additional compensation for gunshot wound to victim's chest which caused her to fall into a state of circulatory collapse and to enter into a coma) with Claim No. LIB-II-110, Decision No. LIB-II-111 (2012) (denying additional compensation for through and through gunshot wound to the chest where claimant showed no additional injuries or complications).

The primary argument Claimant Estate make on objection is that the lacerations to the radial and median nerves in Mr. Cruz's right arm would necessarily have caused permanent incapacity in his right arm and hand and limited his ability to perform simple tasks and ordinary activities. For this argument, it relies heavily on Dr. Reischer's testimony that Mr. Cruz was significantly impaired, testimony that in turn was based on the assumption that the lacerations to Mr. Cruz's radial and median nerves were complete and that the nerves had, in fact, been completely severed.

Dr. Reischer's testimony is insufficient to establish that Mr. Cruz was severely impaired. In particular, we cannot accept Dr. Reischer's assumption that the single word "laceration" in the Tel Hashomer discharge summary necessarily had to mean a "complete laceration," and, without that assumption, Dr. Reischer's testimony about Mr. Cruz's injuries and their impact on his ability to perform major life functions and activities is unfounded. While Dr. Reischer based his assumption on *some* evidence, he made inferences that are insufficient to establish that Mr. Cruz's nerves were in fact completely severed.

For one, Dr. Reischer drew inferences about the identification and treatment of partial lacerations that conflict with each other and thus fail to support his belief that Mr. Cruz's lacerations were necessarily complete. Dr. Reischer first testified that he assumed that the lacerations were complete because the treating surgeon would not have otherwise been able to identify the laceration. But Dr. Reischer also testified that the lacerations must have been complete because he believed that the surgeon would have repaired a partial laceration, and yet there was no evidence in the record that an attempt was made to repair them. At the very least, this statement indicates that a partial laceration *could* be

identified by the treating surgeon, contradicting Dr. Reischer's statement that the surgeon would not have been able to identify a partial laceration. If it is true that the surgeon would have attempted to repair a partial laceration, then certainly he or she would have been able to identify it.

Moreover, Dr. Reischer's inference that the lacerations were complete because a partial laceration would have been repaired by the treating surgeon is inconsistent with his testimony that, where there is a significant vascular injury like that sustained by Mr. Cruz, a surgeon might not have attempted to repair a lacerated nerve until after the vascular injury had healed. Thus, it is conceivable that Mr. Cruz had a partial laceration that was not treated by the surgeon at Tel Hashomer, because Mr. Cruz's vascular injury might not have sufficiently healed by the time he was discharged.

Dr. Reischer also based his conclusion that Mr. Cruz's laceration had to be complete on the length and language of the disease summation form. He contended that only a significant laceration would have been noted in the disease summation form given its short length, and that a partial laceration would have been expressly identified as such on the form.

Neither the form's length nor the fact that the word "laceration" on the form is not modified by an adjective is enough to establish that the laceration was complete—particularly given the significant decades-long ramifications Dr. Reischer would have us draw from the single word "laceration." First, we do not agree that the brevity of the discharge summary is indicative of the meaning of the word "laceration." Dr. Reischer is not justified in supposing that only an injury as significant as a complete severing of a nerve would be included on the form, just because it summarized a fifteen-day stay in

the hospital in a few sentences and listed “[I]laceration of median and radial nerves” as one of only three short “diagnoses.” Based on our own extensive experience reviewing numerous Tel Hashomer disease summation forms, we know that they often include mention of injuries less severe than what Dr. Reischer describes a complete laceration to be.⁶ Thus, the short length of the treatment notes on Mr. Cruz’s discharge summary does not warrant the inference that the laceration could not possibly have been a partial—and thus far less severe—laceration.

Nor is the lack of an adjective before the word “laceration” enough to establish that the laceration was a complete severance of the nerves. According to Stedman’s Medical Dictionary, a laceration is a “torn or jagged wound, or an accidental cut wound.”⁷ The same source also provides definitions for a number of specialized uses of the term, including “through-and-through laceration,” which is defined as “a laceration that penetrates two surfaces of a structure, generally restricted to skin or mucosal surfaces, such as the cheek, lip, ala nasi, pinna, etc.”⁸ Moreover, nerve lacerations in particular are frequently described in the medical literature as both “partial” and “complete,” which suggests that the term laceration in and of itself does not mean that it was complete.⁹

Finally, the Tel Hashomer discharge summary gives one other clue that the nerve lacerations may not have been as severe as Dr. Reischer supposed. The phrase

⁶ See Claim No. LIB-III-024, Decision No. LIB-III-029 (2015); Claim No. LIB-III-019, Decision No. LIB-III-025 (2015).

⁷ Stedman’s Medical Dictionary 1512 (28th ed. 2006).

⁸ *Id.*

⁹ See, e.g., Lawrence C. Hurst et al., *Partial Lacerations of Median and Ulnar Nerves*, 16 J. HAND SURG. 207 (1991); Robert J. Foster et al., *Radial Nerve Palsy Caused by Open Humeral Shaft Fractures*, 18 J. HAND SURG. 121, 122 (1993) (discussing outcomes of treatment for “completely lacerated” radial nerves); Eitan Melamed and Daniel Polatsch, *Partial Lacerations of Peripheral Nerves*, 39 J. HAND SURG 1201 (2014).

“[L]aceration of median and radial nerves” is listed under a section of the form entitled “Diagnoses,” but that section is divided into “Main” and “Secondary.” “Laceration of median and radial nerves” is listed as a “Secondary” diagnosis, along with “Shrapnel wounds both legs,” whereas “Laceration of right Axillary artery” is listed under “Main.” Thus, the treating physician seems to have believed that the nerve lacerations were comparable in significance to the shrapnel wounds in Mr. Cruz’s legs (which we know were not extremely severe) and were less severe than the arterial laceration.

In short, we find insufficient evidence to support Dr. Reischer’s conjecture that Mr. Cruz’s lacerations were complete. In the absence of medical evidence that Mr. Cruz’s nerves were in fact completely severed, we conclude that Dr. Reischer’s testimony (including his impairment determination) fails to establish that Mr. Cruz’s injuries had a sufficiently significant effect on his ability to use his right arm and hand. Claimant Estate has not provided sufficient evidence to establish that Mr. Cruz had a complete laceration of either his radial or his median nerve and thus Dr. Reischer’s testimony about the necessary implications of such injuries cannot be used to establish the severity of Mr. Cruz’s injuries or the potential effect those injuries had on his ability to engage in major life functions or activities.

Moreover, as we explained in the Proposed Decision, the remainder of Claimant Estate’s evidence cannot overcome this lack of medical evidence.¹⁰ First, the Hofmann declaration, on which Claimant Estate heavily relies, cannot establish a permanent impairment severe enough to warrant additional compensation. Ms. Hofmann states that Mr. Cruz’s permanent injury to his right arm and hand had a significant impact on his

¹⁰ See Proposed Decision, *supra*, at 12 n.7; 16.

ability to perform tasks such as dressing, showering, brushing his hair, and writing. However, as we have recognized previously, a single statement from an interested party 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.¹¹

Second, the convalescence grant that Mr. Cruz received from the National Insurance Institute of Israel for the year of 1990 in the amount of 550 shekels does not provide much in the way of evidence supporting the Claimant Estate's factual assertions. Evidence that a victim has some kind of permanent disability is not sufficient in and of itself to support an award of additional compensation in these Libyan claims programs.¹² Without additional details about the underlying disability determination, the Israeli Institute payments do not provide much insight into the factors that are most important to the Commission's analysis in this claim: the degree of Mr. Cruz's alleged disability and the extent to which it affected his major life activities or functions.¹³

Third, Mr. Cruz's score of 1,700 points in a report submitted in a 1974 decision of the Superior Court of Puerto Rico is equally unavailing. As we noted in the Proposed Decision, without evidence explaining how that court's Special Commissioners determined Mr. Cruz's total, the report adds little to our understanding of the impact of Mr. Cruz's injuries on his major life functions and activities.¹⁴

Fourth, the newspaper article does not provide sufficient evidence to meet Claimant Estate's burden either. The mere use of the phrase "permanently maimed" in

¹¹ See *Claim of ESTATE OF ANTONIA CRUZ*, *supra*, at 8.

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

¹³ See Proposed Decision, *supra*, at 16.

¹⁴ See Proposed Decision, *supra*, at 12 n.7.

an article from 1973, only a year after the terrorist attack and 20 years before Mr. Cruz died—especially in the absence of any medical or disability evidence—is not sufficient to meet the Claimant Estate’s burden to demonstrate that Mr. Cruz suffered a permanent impairment severe enough to warrant additional compensation.¹⁵

Fifth, for similar reasons, Dr. Folch’s affidavit does not provide a sufficient basis either independently, or when considered together with the other evidence in the record, to find that Mr. Cruz was permanently limited in his ability to use his right hand. Dr. Folch’s testimony that the first three digits of Mr. Cruz’s hand displayed permanent flexion indicative of “nerve lesion of the radial nerve” was based on a single exchange which occurred while Mr. Cruz was hospitalized at Tel Hashomer Hospital in 1972 and is thus incapable of establishing that Mr. Cruz was permanently impaired over any or all of the twenty-one year period between his discharge and his death in 1993. In addition, his testimony does not clearly establish that the flexion Mr. Cruz displayed in his fingers resulted from his nerve injuries. Dr. Reischer testified that it was equivocal whether the permanent flexion that Mr. Cruz allegedly displayed in the first three fingers of his right hand was due to a laceration to his radial nerve or to other wounds in his right hand that were not reported on the disease summation form. Either way, Dr. Folch’s statements do not establish that Mr. Cruz had an impairment sufficiently permanent and severe to support an award of additional compensation.

Finally, the photograph adds little support for the claim that Mr. Cruz was sufficiently impaired to warrant additional compensation; a single, undated photograph of this nature cannot in and of itself establish permanent disability. If anything, the

¹⁵ See Claim of ESTATE OF ANTONIA CRUZ, *supra*, at 10.

photographic evidence available to us undermines the claim that Mr. Cruz's nerves were completely severed. Although Dr. Reischer testified that Mr. Cruz's arm position in the photo—bent at the elbow with the forearm parallel to the ground—is consistent with lacerations to the radial and median nerves, the estate of Mr. Cruz's wife submitted a photograph of Mr. Cruz in a different claim that showed that Mr. Cruz was able to extend his elbow enough to place his hand in his pocket. While Mr. Cruz's arm is not extended to a fully straight position in this picture, the two photographs together clearly show that Mr. Cruz had some range of motion in his right arm. This seeming inconsistency between Dr. Reischer's testimony and Mr. Cruz's demonstrated ability to extend his arm leads us to conclude that it is more likely than not that Dr. Reischer's conjecture that Mr. Cruz's nerve lacerations were complete is mistaken. In any event, the photograph of Mr. Cruz with his elbow bent does not establish a limitation significant and permanent enough to support an award for additional compensation.

Disfigurement: For the same reasons that we cannot infer any impairment from the photograph, we cannot infer any disfigurement either—certainly none of a severity 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.¹⁶ This photograph, when considered with the other evidence in the record, fails to establish that Mr. Cruz experienced disfigurement severe enough to warrant additional compensation.

¹⁶ See Proposed Decision, *supra*, at 17 (*citing* Claim No. LIB-III-021, Decision No. LIB-III-016, at 17 (2015)).

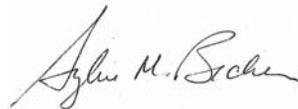
CONCLUSION

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 Mr. Cruz's injuries does not rise to the level of a special circumstance warranting additional compensation. While we sympathize with all that Mr. 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.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

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

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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 Juan Cruz during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In that attack, Mr. Cruz sustained serious wounds to his right arm and hand, including lacerations to his right axillary artery and to the median and radial nerves in his right arm. He also suffered grenade shrapnel wounds in both legs. Under a previous program, the Commission awarded Claimant Estate \$3 million in compensation for these injuries. Claimant Estate now seeks additional compensation based on the claim that the severity of these injuries is a "special circumstance warranting additional compensation." We find that Claimant Estate has not met its burden to prove that Mr. 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

Mr. 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, grenade shrapnel struck Mr. Cruz's lower extremities, right arm, and right armpit, and lacerated his right axillary¹ artery and the median and radial nerves in his right arm. After the attack, Mr. Cruz was taken to a local hospital where he underwent a saphenous vein² graft replacement of his right axillary artery. He remained at the hospital for approximately two weeks before being discharged. Soon after, he returned home to Puerto Rico. Mr. Cruz died in 1993 at the age of 82 of causes unrelated to the attack.

Although neither Claimant Estate nor Mr. 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).

¹ "Axilla" is the medical term for "armpit" and "axillary" is the corresponding adjective.

² The "saphenous veins" are the two large superficial veins in the leg.

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 Mr. Cruz had suffered physical injuries as a result of the Lod Airport attack. By Proposed Decision entered June 20, 2012, the Commission determined that Mr. 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-151, Decision No. LIB-II-175 (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 ICESA 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 dating December 23, 2014, which incorporated by reference evidence that Claimant Estate had previously 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 Mr. 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 Estate 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 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.³

In its Physical-Injury Decision, the Commission determined that Mr. Cruz and the beneficiaries of his 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-151, Decision No. LIB-II-175, at 3-4. Claimant Estate therefore satisfies the nationality requirement under this program.

³ *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).

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 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 ¶ 6.⁴ 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

⁴ 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 Mr. Cruz survived the Lod Airport attack and his subsequent death in 1993 was unrelated to the attack, only the first basis for entitlement is relevant here.

appearance.” *Claim of ESTATE OF ELIZABETH ROOT*, Claim No. LIB-III-033, Decision No. LIB-III-020, at 6 (2015).

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 Mr. 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 Mr. 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, Mr. Cruz was struck by grenade shrapnel which entered both legs and his right arm and hand. He was also struck by a bullet which

entered his right armpit and lacerated his right axillary artery and the median and radial nerves in his right arm. Mr. Cruz spent approximately two weeks at a hospital in Israel, where he underwent a saphenous vein graft replacement of his right axillary artery. Claimant Estate also asserts that Mr. Cruz sustained permanent nerve damage to his hand and was unable to open or close his fingers or to move his arm up or down as a result of the injuries he sustained in the attack. In addition, Claimant Estate asserts that Mr. Cruz's ability to walk was limited due to pain that he suffered from shrapnel fragments embedded in his legs.

Supporting Evidence

In support of its claim, Claimant Estate has submitted a number of documents, including an affidavit from Alberto Folch, M.D; an affidavit and a declaration from Mr. Cruz's niece, Magaly Hofmann; two photographs of Mr. Cruz's injuries; several newspaper articles from the *San Juan Star*; correspondence from the National Insurance Institute of Israel; 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 disease summation form from the Haim Sheba Medical Center of the Tel Hashomer hospital in Israel.

The disease summation form from the Haim Sheba Medical Center of Tel Hashomer Hospital is dated August 17, 1972. It indicates that Mr. Cruz was admitted on May 30, 1972 with shrapnel wounds in both legs and lacerations to his right axillary artery and to the median and radial nerves in his right arm. It states in greater detail as follows:

One of the victims of the terror attack at the Lod Airport, with a penetrating wound in the right armpit. No pulse in his hand[.] During

surgery . . . [a] vein implantation was performed, but the pulse did not return. The hand remained warm and the wound formed a scab, swelling appeared in the arm and forearm, but later when activating the hand, good arm movements from a functional aspect. Analgesics according to need.

The disease summation form also states that Mr. Cruz was discharged from the hospital on June 13, 1972, and referred to the hospital's outpatient clinic for an examination, which was scheduled for June 18, 1972.

The first photograph that Claimant Estate has submitted is undated and does not show any visible injuries to Mr. Cruz's arm or legs. According to the affidavit of Dr. Folch, which is dated January 1, 2012, the photograph was taken while Mr. Cruz was being treated at Tel Hashomer Hospital. The second photograph is also undated. It shows Mr. Cruz standing with his right arm and hand extended and with the fingers on his right hand curled inward. Magaly Hofmann's declaration, which is dated December 19, 2014, states that although she was not present at the time the photograph was taken, the appearance of Mr. Cruz's hand in the photograph, among other things, make her feel certain that it was taken after the Lod Airport attack.

The affidavits and declaration of Dr. Folch and Magaly Hofmann also make a number of claims about Mr. Cruz's injuries. Dr. Folch's affidavit is dated January 20, 2012, and states that he visited Mr. Cruz at Tel Hashomer Hospital and observed that

[t]he late Mr. Cruz had sustained numerous grenade and/or bullet generated wounds, most noticeably to his right hand. His first three fingers of the right hand had permanent flexion, clinically demonstrating nerve lesion of the radial nerve. His arm was in a cast. I recall that the late Mr. Cruz told me he had trouble walking and reportedly, he had a bullet wound to his armpit and wounds to his legs: however, I did not perform an evaluation of his armpit or lower extremities.

The affidavit also states that counsel for the Claimant Estate provided Dr. Folch with a copy of the discharge summary from Tel Hashomer Hospital, and that he finds that

record to be consistent with his evaluation of Mr. Cruz's right hand in 1972 and his recollection of Mr. Cruz's contemporaneous recitation of his other injuries.

Ms. Hofmann's affidavit, which is dated June 26, 2010, states that Mr. Cruz was hospitalized for over a month and was treated by Dr. Raphael Walden. The relevant section of the affidavit begins by giving an exhaustive list of Mr. Cruz's injuries, which include shrapnel wounds to both legs, his right arm, his right hand, and a bullet wound to his right armpit that damaged the nerves in his arm. It then turns to the impact of those injuries on Mr. Cruz's right hand, which it asserts, looked like a claw and was "virtually useless" because he could not extend or close his fingers. Ms. Hofmann recalls that she often saw Mr. Cruz wearing a rehabilitation glove that allowed him to stretch his fingers, and that he had to teach himself to write again with his left hand. In addition, the affidavit states that he was unable to perform household tasks like washing dishes due to the condition of his right hand.

With respect to the injuries to Mr. Cruz's legs, the affidavit states that he suffered from lifelong pain because of the fragments of shrapnel embedded in his legs, which were visible under his skin and "came out from under his skin slowly." Because of this pain, Mr. Cruz had difficulty walking and could not walk up or down stairs. The affidavit states in greater detail as follows:

Before the Lod attack when Juan was working in Puerto Rico, he used to walk around the whole town all day inspecting restaurants. After the Lod attack, he always had problems walking and he would stay in his chair a lot of the time.

The affidavit states that Mr. Cruz was unable to return to his job as a restaurant inspector with the Department of Sanitation in Puerto Rico because of his injuries and the "emotional impact of the attack."

Ms. Hofmann's 2014 declaration reiterates that Mr. Cruz's right hand "permanently looked like a claw, which he could rarely open." The declaration also repeats her affidavit's claim that Mr. Cruz was unable to perform daily tasks (such as dressing, showering, and brushing his hair) without assistance and that he had to teach himself to write again with his left hand.

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 Mr. Cruz and his wife⁵ "had relatively healed," both of them were "permanently maimed" as a result of the attack. The article notes that Mr. Cruz suffered from the same injuries as his wife, who at the time, was unable to close the fingers of her right hand or to move her arm up or back. Mr. Cruz also was unable to walk up or down stairs because of shrapnel fragments embedded in his legs. The article further states that Mr. Cruz had been employed as a sanitation inspector but was unable to return to work after the attack. He is quoted as saying, "The only income we have now is what I collect from the sick leave I had accumulated." The article then turns to the emotional and mental impact of the attack and quotes Mr. Cruz as saying, "I can't sleep without pills at night. I'm seeing a psychiatrist and that helps, but still whenever I hear a loud noise, I jump."

The Claimant Estate has additionally submitted an undated letter from the Unit for Enemy Action of the National Insurance Institute of Israel. The letter states that Mr. Cruz was entitled to a convalescence grant for the year 1990 in the amount of 550 Israeli shekels.⁶ Finally, Claimant Estate has submitted a 1974 decision of the Superior Court of

⁵ Mr. Cruz's wife was also injured in the Lod Airport attack. See Claim No. LIB-II-152, Decision No. LIB-II-176.

⁶ This form letter is insufficient to prove that Mr. Cruz in fact received disability benefits from the National Insurance Institute of Israel for the injuries to his arm. Other claimants in this program who have received disability payments for physical injuries suffered in the Lod Airport attack have submitted the Institute's

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 Mr. Cruz 1,700 points out of a possible total of 2,000.⁷

Application of Special Circumstances Factors to Evidence

In making award determinations for additional compensation, the Commission must take into account the severity of the injuries of all the victims who have sought additional 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 insufficient to meet its burden to prove that the severity of Mr. Cruz’s injuries is a “special circumstance” warranting additional compensation.

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, we cannot determine whether this payment was for disability caused by his 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.

⁷ This court decision adds little to our understanding of the nature and extent of Mr. Cruz’s injuries. Claimant Estate has not provided any evidence explaining how the Special Commissioners determined how many points to award specifically to Mr. 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 Estate 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 as 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.

Nature and Extent of Injury: The evidence is insufficient to show that the initial injuries that Mr. Cruz suffered in the Lod Airport attack were among the most severe in this program. He certainly sustained significant injuries in the attack, including lacerations to his right axillary artery and to the median and radial nerves of his right arm as well as shrapnel wounds to his legs. In addition, Mr. Cruz spent two weeks in the hospital, where he underwent a saphenous vein graft replacement of his right axillary artery.

Even with this evidence, however, the available medical records do not suggest that Mr. Cruz's injuries were severe enough to warrant additional compensation beyond the \$3 million Claimant Estate has already received. The only medical record submitted by Claimant Estate—the disease summation form from Haim Sheba Medical Center—indicates that while Mr. Cruz was admitted to the hospital without a pulse and did not initially recover one after undergoing a vein graft procedure to repair his axillary artery, there were at some point “good arm movements from a functional aspect.” This summary does not corroborate—indeed, there is no medical evidence to corroborate—Claimant Estate's assertions that Mr. Cruz was “permanently maimed” and was unable to open or to close his fingers or to move his arm up or back. Furthermore, the disease summation form is silent altogether on the issue of medical treatment for the shrapnel wounds in Mr. Cruz's legs, which raises questions about the severity of these wounds and, specifically, about whether they were serious enough to warrant any medical treatment.

Moreover, as the Commission has noted in previous claims, when the medical evidence concerning a victim's injuries is limited, as it is here, the length of

hospitalization is a relevant factor in assessing the severity of a victim's injuries.⁸ According to the disease summation form, Mr. Cruz spent 15 days in inpatient care, and was scheduled to have at least one examination at an outpatient clinic. The absence of any evidence showing that Mr. Cruz required additional hospitalization or medical intervention upon his return to Puerto Rico supports our conclusion that, on the record available, Mr. Cruz's injuries are not among the most severe in these Libyan claims programs.

In the single instance where the Commission has awarded additional compensation for injuries similar to those suffered by Mr. Cruz, it relied on detailed medical records that confirmed that the claimant had suffered permanent damage to his ulnar nerve due to a bullet wound to the elbow that required extensive medical treatment and therapy after the initial hospitalization. *See* Claim No. LIB-II-168, Decision No. LIB-II-110 (Final Decision) (2012). More commonly, 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, Mr. 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 Estate 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-116, Decision No. LIB-II-166 (2012) (denying claim for additional compensation where the claimant had nerve damage to his right leg requiring him to wear a foot brace for 18 months to mitigate

⁸ *See* Claim No. LIB-III-019, Decision No. LIB-III-025, at 12.

“foot drop,” had shrapnel remaining in both legs, and was assessed as having a partial permanent disability in both legs); Claim No. LIB-III-019, Decision No. LIB-III-025 (2015) (denying claim for additional compensation where the claimant suffered an open fracture to his tibia and fibula, which required surgery to remove necrotizing tissue and bone chips, and experienced two pulmonary embolisms in the course of that surgery).

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

Impact on Mr. Cruz’s Major Life Functions and Activities: Claimant Estate has failed to show that the second factor—the impact of the injury on Mr. Cruz’s ability to perform major life functions and activities—supports its claim for additional compensation. As noted earlier, in the single instance in which the Commission has awarded compensation for injuries similar to those suffered by Mr. Cruz, it relied on extensive medical and disability records that documented the limiting effects of the claimant’s injuries. *See* Claim No. LIB-II-168, Decision No. LIB-II-110 (Final Decision) (2012), at 2-5. Although Claimant Estate has alleged that, after the attack, Mr. Cruz suffered constant pain that limited his ability to walk and was unable to return to work or to perform basic activities such as showering, dressing, and brushing his hair without assistance, it has not submitted sufficient evidence to support these claims.

First, it has not submitted any medical records to support its allegations. The lone medical record that Claimant Estate has submitted—the disease summation form from Haim Sheba Medical Center—does not refer to any mobility problems in his legs or to any loss of function in Mr. Cruz’s right arm or hand. Moreover, the fact that Claimant Estate has not provided a single medical record from the twenty-one year period between

Mr. Cruz's return to Puerto Rico and his death raises questions about the extent to which his ability to use his right hand or the mobility in his legs were limited in any significant way as a consequence of the Lod Airport attack.

Second, although Claimant Estate states that the convalescence payment that Mr. Cruz received from the National Insurance Institute of Israel is evidence that he experienced some degree of disability in his legs and right arm, the evidence from the Institute is not sufficient to show that the physical injuries that he suffered in the attack had a significant impact on his life functions and activities. As was noted earlier, Claimant Estate has not established that the payment was a disability payment awarded to Mr. Cruz for physical injuries sustained in the Lod Airport attack; and, even if it had been, the one-time payment of 550 shekels (under \$300 at the then-exchange rate) in 1990 does not establish the *extent* of the impact of his injuries on his subsequent life.⁹ Moreover, the other evidence provided—Magaly Hofmann's affidavit and declaration and the *San Juan Star* article—is equivocal as to whether Mr. Cruz's physical injuries were the reason he was unable to return to his job as a restaurant inspector in Puerto Rico. Ms. Hofmann's affidavit states that Mr. Cruz was unable to work in part because of the "emotional impact" of the attack. In addition, Mr. Cruz disclosed to the *San Juan Star* that he found it difficult to be around loud noises. To the extent that Mr. Cruz's inability to return to work was due to the mental and emotional harm he suffered in the attack, he 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.

⁹ *See supra* note 3.

Thus, the evidence in the current record fails to carry the Claimant Estate's burden to show that Mr. Cruz's physical injuries had a significant enough impact on his 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 Mr. 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. Claimant Estate has not submitted any medical evidence to substantiate its claim that Mr. Cruz's hand was permanently deformed as a result of his injuries. The pictorial evidence, which is limited to a single undated photograph, shows that the fingers on Mr. Cruz's right hand curl inward slightly. There is no indication, however, that this condition was disfiguring to the extent observed in claims where the Commission has awarded additional compensation on the basis of disfigurement in this program. *See e.g.* Claim No. LIB-III-021, Decision No. LIB-III-016, at 17. In any event, a single photograph of this sort, capturing as it does only one moment in time, cannot by itself establish that any deformity was permanent. Thus, Mr. Cruz's physical injuries do not rise to the level of disfigurement sufficient to support an award of additional compensation.

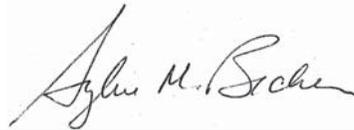
CONCLUSION

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 Mr. 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.



Anuj C. Desai, Commissioner



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).