

**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 MERCEDES ALEJANDRO GARCIA, DECEASED;	}	Claim No. LIB-III-013
JERRY CESIL MARTÍNEZ TAVAREZ, ADMINISTRATOR	}	Decision No. LIB-III-043
	}	
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	

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 Mercedes Alejandro Garcia during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. In that attack, a machine gun bullet fractured the bones in Ms. Alejandro Garcia's lower right leg, requiring invasive surgery to repair as well as a skin graft. Claimant Estate states that, as a result of these injuries, she was left with "devastating lifelong disfiguring debilitating injuries" that limited her ability to walk and stand. Under a previous program, the Commission awarded Ms. Alejandro Garcia \$3 million in compensation for these injuries. Claimant Estate now seeks additional compensation based on the claim that the severity of Ms. Alejandro Garcia's injuries was a "special circumstance . . . warranting further compensation." Because Claimant Estate has demonstrated that the

severity of Ms. Alejandro Garcia's injuries is in fact a "special circumstance warranting additional compensation," it is entitled to an additional award of \$2 million.

BACKGROUND AND BASIS OF CLAIM

Ms. Alejandro Garcia was in the terminal at Lod Airport in Tel Aviv, Israel, on May 30, 1972, when three terrorists began shooting automatic rifles and throwing hand grenades at passengers gathered in the baggage claim area. Claimant Estate alleges that, during the attack, "a machine gun bullet tore through Claimant Alejandro Garcia's right leg breaking her tibia and fibula." After the attack, Ms. Alejandro Garcia was taken to a local hospital, where doctors debrided her wound, "nail[ed]" her broken leg bones, and performed a skin graft. Ms. Alejandro Garcia remained at the hospital in Israel for 45 days before returning home to Puerto Rico, where, the Estate alleges, she was admitted to a local hospital, remaining there for several months. During that time, she underwent regular physiotherapy, and doctors noted the extensive loss of tissue in her right leg. Claimant Estate alleges that, from the time of the attack until her death forty-three years later, Ms. Alejandro Garcia had to wear a special brace on her permanently deformed right leg and suffered an assortment of injury-related complications. In 2015, Ms. Alejandro Garcia died of unrelated causes.

Although Ms. Alejandro Garcia was not among them, a number of the Lod Airport victims sued Libya (and others) in federal court in 2006. Neither Ms. Alejandro Garcia nor her estate, the Claimant in this case, ever joined that lawsuit. *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, including claims "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). Thus, although neither Ms. Alejandro Garcia nor Claimant Estate had brought a lawsuit against Libya, the U.S. and Libya settled any claim against Libya either of them might have had arising out of that terrorist attack. 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.

The 2008 Referral authorized the Commission to hear claims of physical injury arising out of a variety of terrorist attacks, including the Lod Airport attack, and recommended the Commission award a fixed sum of \$3 million for all compensable claims. Importantly, though, only claimants who had been plaintiffs in one of the lawsuits previously brought against Libya in U.S. courts, known as the “Pending Litigation” cases, were eligible under the 2008 Referral. The 2009 Referral contained two categories of claims relevant to the background of this claim: Category E, which included claims of physical injury for those claimants who had *not* been plaintiffs in any

of the Pending Litigation cases, for whom the State Department also recommended a fixed \$3 million award; and Category D, which was for additional compensation for those whose physical injuries warranted more than \$3 million, but only for those who had “received an award pursuant to [the 2008 Referral].” Thus, only claimants who had been plaintiffs in one of the Pending Litigation cases were eligible under Category D of the 2009 Referral for an award of “additional compensation” beyond the \$3 million fixed-sum recommendation; those who had not been plaintiffs were not eligible.

Ms. Alejandro Garcia was not a plaintiff in any of the Pending Litigation cases and was thus not eligible for an award under either the 2008 Referral or Category D of the 2009 Referral. She was, however, eligible under Category E of the 2009 Referral, and in 2010, she filed a claim alleging that she had suffered physical injuries as a result of the Lod Airport attack. By Proposed Decision entered May 10, 2011, the Commission determined that Ms. Alejandro Garcia was eligible for compensation under Category E of that Referral and awarded her a fixed sum of \$3 million. *See* Claim No. LIB-II-086, Decision No. LIB-II-045 (2011) (“Physical-Injury Decision”). Because Ms. Alejandro Garcia did not file an objection to the Proposed Decision, the Proposed Decision became the Commission’s Final Decision on June 20, 2011. *See* 45 C.F.R. § 509.5 (g) (2015).

The Legal Adviser then referred an additional set of claims to the Commission on November 27, 2013. *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 Estate 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 Estate 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 ICSEA and the 2013 Referral. *Notice of Commencement of Claims Adjudication Program*, 78 Fed. Reg. 75,944 (2013).

On May 2, 2014, the Commission received from Ms. Alejandro Garcia a completed Statement of Claim seeking compensation under Category D of the 2013 Referral, together with exhibits supporting the elements of her claim. Her submission also incorporated by reference the evidence she had previously submitted in connection with the physical-injury claim she made under the January 2009 Referral. On November 21, 2015, Ms. Alejandro Garcia died of unrelated causes, and her estate is now pursuing her claim.

DISCUSSION

Standing

As an initial matter, the Commission has reviewed the “Resolution Amended” issued by the General Court of Justice in San Juan, Puerto Rico, on February 1, 2016. The resolution designates Jerry Cesil Martínez Tavaréz as judicial administrator of Ms. Alejandro Garcia’s estate. Based on this review, the Commission finds that the ESTATE OF MERCEDES ALEJANDRO GARCIA, DECEASED; JERRY CESIL MARTÍNEZ TAVAREZ, 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 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 national of the United States 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 its Physical-Injury Decision, the Commission found that the claim was held by a U.S. national from the time of the attack continuously through the effective date of the Claims Settlement Agreement. Physical-Injury Decision, *supra*, at 4. Claimant Estate therefore satisfies the nationality requirement here.

Prior Award

To fall within the category of claims referred to the Commission, a claimant must have received a physical-injury award under either the January 2009 or November 2013 Referrals. The Commission awarded Ms. Alejandro Garcia \$3 million based on her physical-injury claim under the January 2009 Referral. Claimant Estate has thus satisfied this element of its Category D claim.

No Claim Under Category D of the January 2009 Referral

With respect to the final jurisdictional requirement, neither Ms. Alejandro Garcia nor her estate made a claim or received any compensation under Category D of the January 2009 Referral. Therefore, 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 ¶ 6.¹ 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).

Importantly, in all of its “additional compensation” decisions under both the 2009 Referral and the 2013 Referral to date, the Commission has addressed these factors in light of the unique context of the Commission’s Libyan claims programs, under which

¹ 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. Alejandro Garcia survived the Lod Airport attack, and her death in 2015 was unrelated to the attack, only the first basis for entitlement is relevant here.

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 has 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 has 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 will constitute a special circumstance warranting additional compensation under Category D.” *Id.* Even with this stringent standard, Claimant Estate has shown that Ms. Alejandro Garcia’s injuries are among the most severe in this program, and it is thus entitled to additional compensation beyond the \$3 million the Commission already awarded to Ms. Alejandro Garcia.

Factual Allegations

Claimant Estate alleges that Ms. Alejandro Garcia was inside Lod Airport near the baggage claim area when the attack began. It states that, while she was waiting for her luggage, three men began shooting machine guns and throwing hand grenades at Ms. Alejandro Garcia and the other passengers, and that “a machine gun bullet tore through [her] right leg breaking her tibia and fibula.”² It states that, after the attack, Ms. Alejandro Garcia was taken to the Tel Hashomer Hospital in Tel Aviv, where she underwent surgery for the fracture, as well as “excision and debridement” of her wounds, and received a skin transplant. Claimant Estate asserts that Ms. Alejandro Garcia remained in the hospital in Israel for 45 days.

² The tibia is the “medial and larger of the two bones of the leg, articulating with the femur, fibula, and talus.” *Stedman’s Medical Dictionary* 1989 (28th ed. 2006). The fibula is the “lateral and smaller of the two bones of the leg” *Id.* at 727. Both bones are found in the lower part of the leg between the knee and ankle. *See id.* at A17-A18.

Injuries Alleged: Claimant Estate asserts that, as a result of the Lod Airport attack, Ms. Alejandro Garcia “sustained serious injuries from a machine gun bullet to her right leg[]” consisting of a ““gunshot fracture”” to her right tibia and fibula that necessitated major surgery—including the “nailing” of both bones and a skin transplant—and a 45-day period of hospitalization at Tel Hashomer Hospital in Tel Aviv.

According to Claimant Estate, Ms. Alejandro Garcia was hospitalized for several more months after returning to Puerto Rico, and underwent extensive physiotherapy and further treatment for her injuries in the years following the terrorist attack. During this time, doctors found that she had an unstable ankle that made it difficult to walk, and that “she was suffering from open wounds on the lower third of her right leg as well as an ulcer on the sole of her right foot.” In addition, x-rays revealed loss of bone and tissue in her right leg, and doctors noted that “[t]he lower third of her leg was deformed due to the absence of tissue.” She also suffered limitation of movement in her knee and ankle.

Claimant Estate alleges that “[Ms.] Alejandro Garcia’s injuries from the Lod Airport [attack were] permanent and continue[d] to cause pain and debilitating complications[]” until her death in 2015. For example, Claimant Estate alleges that Ms. Alejandro Garcia had, in recent years, suffered from “acute cellulitis” in her right leg that has resulted in occasional hospitalization, leaving her bedridden and requiring antibiotics and pain medication. Claimant Estate further alleges that, from the time of the attack until her death, Ms. Alejandro Garcia “[could not] fully flex her ankle[,]” and needed to wear “a special shoe with bilateral metal bars running from the ankle to knee in order to support her right lower leg.”

Further, as a result of these injuries, Claimant Estate alleges that Ms. Alejandro Garcia “[was] forced [to] continue experiencing daily pain and discomfort[,]” and that

her “right foot and ankle [were] permanently disfigured.” Claimant Estate also avers that Ms. Alejandro Garcia “suffered lost wage and work opportunities[,]” noting that, prior to the attack, she “worked as a sewer in a factory but was unable to return to work due to the loss of full use of her right foot.” In sum, the Estate alleges that Ms. Alejandro Garcia “lost her mobility and years of her life to hospitalizations, recurrent infections, and medical treatment because of the Lod Airport Massacre.”

Supporting Evidence

Claimant Estate has supported its claim with, among other things, a video recording of Ms. Alejandro Garcia in which she describes, under oath, the incident and her injuries (recorded sometime in 2015 prior to her death); several newspaper articles from around the time of the incident describing the attack and identifying Ms. Alejandro Garcia as one of the wounded; an affidavit (dated January 21, 2009) from one of the other victims noting Ms. Alejandro Garcia’s presence at the scene of the attack and confirming that she was injured; photographs of Ms. Alejandro Garcia’s injured foot and leg from 2014; and various medical records from the 1970s and the mid to late 2000s. The medical records include those from Ms. Alejandro Garcia’s initial treatment in Israel (the discharge summary from Tel Hashomer Hospital), as well as a number of medical reports and letters describing Ms. Alejandro Garcia’s subsequent treatment in Puerto Rico. Claimant Estate has also provided 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.

Initial Injuries/Stay in Israel: In her video,³ Ms. Alejandro Garcia states that she and her fellow travelers were standing in the terminal after arriving at Lod Airport, when “[the] gunmen started to shoot” and “pursued [them].” She states that “that’s when [her] foot got broken.” Ms. Alejandro Garcia also states that, when the attack ended, she was taken to the hospital and “was there for quite a while . . . because [she] couldn’t walk.”

The discharge summary from Tel Hashomer Hospital indicates that Ms. Alejandro Garcia was admitted on May 30, 1972, with a “[g]unshot fracture Tibia Fibula lower 1/3 Rt.” after being “injured in a terrorist attack at Lod Airport on 5.30.72[.]” It notes that “[n]ailing of the tibia was performed although there was considerable doubt whether the leg was viable.” The summary also indicates that “5 days later . . . nailing of the fibula and skin grafting was performed[,]” but that “[s]ubsequently, the graft broke down with necrosis of the fibula.”⁴ It adds that “[t]he nails of [the] distal 1/3 of the fibula were removed and local daily treatment was implemented[.]” The summary notes that an “x-ray examination shows good alignment of the tibial fragments[,]” and that “[f]urther

³ In the video, which runs for approximately 15 minutes, Ms. Alejandro Garcia appears with two individuals: Carlos Gonzalez Alonso and Ms. Rodriguez-Benet, both of whom identify themselves as attorneys and notaries public in Puerto Rico. Ms. Alejandro Garcia is first administered an oath by Mr. Gonzalez Alonso, who then proceeds to ask her a series of questions about the attack and her injuries. All the questions and Ms. Alejandro Garcia’s responses are in Spanish. Ms. Alejandro Garcia’s answers and some of the questions are interpreted into English by Ms. Rodriguez-Benet throughout the video. In addition to this simultaneous interpretation, Claimant Estate’s counsel has also provided a certified English translation of the interview. As to its evidentiary value, the Commission notes that Ms. Alejandro Garcia’s video is effectively an out-of-court statement that was not subject to cross-examination. We have given similar video statements little weight—equivalent to that of a written declaration—especially where questions exist as to the reliability of the English interpretation of the testimony. *See, e.g.*, Claim No. LIB-III-025, Decision No. LIB-III-023, at 6-9 (Final Decision). Here, however, because Ms. Alejandro Garcia’s statements in the video are largely duplicative of other evidence in the record, the weight given to the video does not affect the outcome of this claim.

⁴ The “nailing” of a major bone such as the tibia or fibula consists of inserting a metal rod into the central cavity of the bone shaft. The “nail” is also known as an intramedullary nail or rod—“intramedullary” referring to the “medullary” cavity, which is the bone shaft’s central cavity. *See Amer. Acad. of Orthopaedic Surgeons, Tibia (Shinbone) Shaft Fractures*, OrthoInfo.org, <http://orthoinfo.aaos.org/PDFs/A00522.pdf> (last visited June 1, 2016); *Stedman’s Medical Dictionary*, *supra* note 2, at 1171 (The “medulla” is “[a]ny soft marrowlike structure, especially in the center of a part.”).

treatment includes local wound treatment + serial x-rays[.]” Finally, it indicates that Ms. Alejandro Garcia was discharged on July 14, 1972, and was “[t]ransferred to Puerto Rico at the patient’s request”— 45 days after being admitted. Other documents from the Israeli National Insurance Institute confirm the dates of Ms. Alejandro Garcia’s hospitalization in Israel.

Various letters (apparently provided to the Israeli insurers) from Ms. Alejandro Garcia’s treating physicians in Puerto Rico include brief descriptions of her initial injuries from the 1972 attack. Three of these, from 1972 and 1973, are from Julio Fiol Vazquez, M.D. One, dated August 9, 1973, notes that Ms. Alejandro Garcia “sustained a gunshot fracture wound of the right tibia and fibula that required debridement of extensive tissue and nailing of both bones with skin grafts.” Another, dated June 26, 1973, indicates that Ms. Alejandro Garcia’s treatment in Israel consisted of “excision and debridement, nailing of tibia and [homograft] skin transplant.” Yet another letter from Dr. Vazquez, dated November 24, 1972, confirms this treatment.

Rehabilitation after return to Puerto Rico/1970s: According to the medical records, Ms. Alejandro Garcia received extensive rehabilitative services through at least late 1973. Dr. Vazquez notes in his June 26, 1973 letter that Ms. Alejandro Garcia was admitted to a medical facility in Puerto Rico on July 18th, 1972; a letter from Dr. Edsel Delorme, a surgeon in Puerto Rico, dated July 29, 2009, indicates that Ms. Alejandro Garcia was hospitalized for “several months” after returning to Puerto Rico (although Dr. Delorme does not give a precise date of discharge). In his November 1972 letter, Dr. Vazquez noted that Ms. Alejandro Garcia had been undergoing physiotherapy since then and had undergone unspecified surgery. He added that her physiotherapy “[would] continue until further notice; at present her condition is improving only slightly.” The

letter further notes that she had an unstable ankle, “making it impossible to ambulate, with pain on weight bearing.” Also, x-rays “revealed loss of distal right fibula with evidence of inflammation.” Under the heading “Impression,” Dr. Vazquez noted a “post-Gunshot fracture and loss of right distal fibula; - loss of soft tissue, debridement and skin[.]grafted with osteomyelitis;⁵ partial improvement in drainage; marked functional impairment with unstable right ankle and loss of substance.”

On April 1, 1973, the Israeli National Insurance Institute determined that Ms. Alejandro Garcia was 37% permanently disabled as a result of her injuries, and the medical records indicate that she continued with physiotherapy in the months that followed. In his June 26, 1973 letter, Dr. Vazquez noted that Ms. Alejandro Garcia had an “open wound of [approximately] 1 x 1/2 inch on lateral aspect on lower [third] (R) leg with good granulation tissue.” He also observed “another ulcer of aprox. 1/4 x 1/4 inch in the sole of the (R) foot[.],” as well as a “deformity of the leg with [a] depression on the lower third due to absence of tissue.” In addition, he noted a “limitation of flexion on (R) knee joint 45% due to pain and [a] limitation of extension and flexion of foot.” Dr. Vazquez noted “normal muscle strength in all other joints[.]” but recommended that Ms. Alejandro Garcia undergo additional rehabilitative therapy. In August 1973, he recommended rehabilitative therapy “until further notice[.]” adding that “[a]t present [Ms. Alejandro Garcia’s] condition continues as before, with loss of function of right ankle, ample loss of tissue in right leg with deformity, limitation of movement of right knee joint and permanent disability in that leg.”

⁵ Osteomyelitis is a term for “[i]nflammation of the bone marrow and adjacent bone.” *Stedman’s Medical Dictionary*, *supra* note 2, at 1391. It is an infection that “can reach a bone by traveling through the bloodstream or spreading from nearby tissue[.]” and can “also begin in the bone itself if an injury exposes the bone to germs.” *Osteomyelitis*, Mayo Clinic, <http://www.mayoclinic.org/diseases-conditions/osteomyelitis/basics/definition/con-20025518> (last visited June 1, 2016).

Recent Condition (2000s): Claimant Estate has provided no medical records from 1974 through 2003, although the more recent records, described below, do contain substantial evidence of injuries to Ms. Alejandro Garcia's lower right leg, which are either the very same as those she suffered in 1972-73 or those that can easily be viewed as caused by the terrorist attack. These records show that the injuries caused Ms. Alejandro Garcia permanent, disabling effects and disfigurement to her right leg.

In his 2009 letter, Dr. Delerme indicates that he began treating Ms. Alejandro Garcia in 1995, although he provides no detail on the nature of the treatment or the decedent's injuries at that point. However, Claimant Estate has provided medical records starting from 2003, which indicate that Ms. Alejandro Garcia was hospitalized at the Hospital San Pablo del Este on April 16, 2003, complaining of pain and tenderness in the right ankle. In a radiological examination performed that day, x-rays of Ms. Alejandro Garcia's right ankle showed "soft tissue swelling and increase in density of soft tissues as seen in patients with cellulitis." There was also "severe demineralization of bony structures[]" and indications of osteomyelitis in the tibia, "possibly longstanding." The discharge summary, dated April 27, 2003, eleven days after her admission, indicates that Ms. Alejandro Garcia was discharged with a diagnosis of "acute cellulitis" in the right leg and ankle, ankylosis⁶ in the right ankle, and osteoporosis. Her condition was "improved," and the prognosis was good, although she was "bed ridden." She was prescribed various medications, and a follow-up was scheduled for May 3, 2003.

Claimant Estate has also submitted the report of a radiological examination performed on June 9, 2005. The x-rays of Ms. Alejandro Garcia's feet revealed, among

⁶ Ankylosis is characterized by "[s]tiffening or fixation of a joint as the result of a disease process, with fibrous or bony union across the joint" *Stedman's Medical Dictionary*, *supra* note 2, at 95.

other things, “soft tissue swelling” and cellulitis “bilaterally.” They also revealed osteoporosis (more so on the right foot), and “[b]ony erosive changes” in the right fibula.

A few years later, on January 17, 2009, Ms. Alejandro Garcia was hospitalized at the Hospital Hima-San Pablo with “acute cellulitis” in her right lower leg, as well as “acute osteomyelitis” in R distal fibula. The medical records show that she had edema in her right leg and foot; she was treated with medication, and the affected area was cleaned and bandaged. According to the records, her hospitalization was “uneventful,” and she was released on February 3, 2009—a hospitalization of about two and a half weeks—with a prognosis of “good” and her condition “improved.”

Dr. Delerme’s July 2009 letter states that Ms. Alejandro Garcia had “lost a lot of soft tissue in the lower part of her right leg with nerve damage and is not able to dorsiflex or plantar flex . . . her right ankle.” Moreover, he states, she “also [has] a chronic ulcer in the right ankle that cause[s] acute osteomyelitis and frequent episodes of cellulitis of the right leg[] that sometimes required hospitalization.” Dr. Delerme also writes that Ms. Alejandro Garcia has used “[s]pecial shoes since 1972 with bilateral metal bars from ankle to knee to give support to the right [lower] leg.”

The 2014 color photographs of Ms. Alejandro Garcia’s injured foot and leg clearly depict a significant deformity to her right leg, characterized by ulcers, redness, and apparent loss of tissue. Some of these 2014 photographs also depict Ms. Alejandro Garcia wearing a leg brace that appears consistent with the description Dr. Delerme used in his 2009 letter (i.e., “bilateral metal bars from ankle to knee”). In an affidavit authenticating the photographs, Ms. Alejandro Garcia’s grandson states that his grandmother “has been required to wear a brace since she was shot in the terrorist attack[,]” and that she “can only walk with the brace.” He also states that she wears

compression stockings, and that the “injury is prone to infection, and so most of the time she has ulcers on her right foot that must be heavily bandaged.”

In her video, Ms. Alejandro Garcia states that, at the time of the video, she was “still receiving treatment[,]” although she did not specify what kind of treatment. She states that, although she is able to walk, she must “take a few breaks[.]” and “can only walk a little on [her foot,]” and uses both a wheelchair and a walker. She also explains that, prior to the attack, she worked in a factory, but after the incident, she was unable to work. This is consistent with Ms. Alejandro Garcia’s claim form submitted to the Israeli Insurance Institute, in which she indicates she had been a sewing operator up until the attack.

Application of Special Circumstances Factors to Evidence

In light of the extensive evidence submitted by Claimant Estate about Ms. Alejandro Garcia’s injuries and the permanent ailments that resulted from those injuries, Claimant Estate has proven that the severity of Ms. Alejandro Garcia’s physical injuries is a special circumstance warranting additional compensation under this claims program.

Nature and Extent of Injury: There is no doubt that Ms. Alejandro Garcia’s initial injuries were severe and life-altering. Her right leg was broken by a machine gun bullet, requiring “nailing” of both the tibia and fibula, and the doctors expressed “considerable doubt [as to] whether the leg was viable.” They also performed a skin graft, but the graft “broke down.” Ms. Alejandro Garcia further suffered “necrosis of the fibula.” Moreover, she underwent “debridement of extensive tissue” and spent forty-five days in the hospital before returning home to Puerto Rico. While this evidence standing alone would not necessarily warrant an award of additional compensation, when combined with other factors, it supports our finding of compensability in this claim.

Impact on Claimant's Major Life Functions and Activities: Ms. Alejandro Garcia's physical injuries also had a substantial impact on her ability to perform major life activities. She underwent at least a year of physiotherapy (and perhaps more, since the final notation in the medical record in August 1973 states that rehabilitation will continue "until further notice[]"), and was unable to walk for months. Further, Ms. Alejandro Garcia suffered severe limitation of movement in her right leg and foot, evidenced both in the earlier and in the more recent medical records. The Israeli Insurance Institute's finding of a 37% permanent impairment also provides evidence of the significant impact Ms. Alejandro Garcia's injuries had on her life.

The more recent medical records confirm that many of the specific ailments caused by the physical injuries Ms. Alejandro Garcia suffered during the terrorist attack persisted until the time of her death. She suffered episodes of acute cellulitis and osteomyelitis in her right leg, and the nerve damage continued to prevent her from flexing her foot. Her right lower leg osteomyelitis, first diagnosed in 1973, was still a serious problem as much as thirty-six years later, when she had to spend two-and-a-half weeks in the hospital in part because of it. She also developed acute cellulitis in her right leg, ankylosis in her right ankle, and inflammation of the right distal fibula in those same lower right leg bones. While not explicitly tied in the medical records to the 1972 terrorist attack, all of these injuries seem very plausibly caused by the bullet wounds that tore through Ms. Alejandro Garcia's lower leg bones, and the medical records do not suggest other possible causes. The inflammation is on the very bones that the terrorists shot, and the cellulitis and ankylosis are precisely where her leg bones were fractured, and where she received a skin graft. The ulcer on her right foot, first identified in 1973, was still present as late as July 2009. Moreover, Dr. Delerme reports—and both Ms.

Alejandro Garcia and her grandson confirm—that she has worn a leg brace with a special shoe (as seen in the 2014 photographs) ever since the attack in 1972. Given this evidence, the Commission finds that this factor supports an award of additional compensation.

Disfigurement: Ms. Alejandro Garcia’s injuries have left her with significant disfigurement to her right leg and foot. The color photographs provide ample evidence of the loss of tissue, the foot ulcer, and the inflammation and poor condition of the skin in that area. These conditions are also confirmed by the video, which includes clear footage of the affected areas. In addition, Ms. Alejandro Garcia has had to wear a leg brace since the attack, a constant reminder of the injury she suffered.

Considering all these factors together, the Commission concludes that the severity of Ms. Alejandro Garcia’s injuries rises to the level of a special circumstance warranting additional compensation under Category D. Accordingly, Claimant Estate is entitled to compensation as set forth below.

COMPENSATION

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation. In its first decision awarding “additional compensation” for physical injuries under the 2013 Referral, the Commission held that, “in determining the appropriate level of compensation [for successful claimants], it will consider, in addition to the [State Department’s] recommendation[,] . . . such factors as the severity of the initial injury, the number of days claimant was hospitalized as a result of his or her physical injuries (including all relevant periods of hospitalization in the years since the incident), the number and type of any subsequent surgical procedures, the degree of permanent impairment, taking into account any

disability ratings, if available, and the nature and extent of disfigurement to the claimant's outward appearance." Claim No. LIB-III-021, Decision No. LIB-III-016, at 15 (2015) (Proposed Decision) (citing Claim No. LIB-II-118, Decision No. LIB-II-152, at 14).

Severity of Initial Injury: Ms. Alejandro Garcia's physical injuries were unquestionably severe: a machine gun bullet fractured both her tibia and fibula in the right leg. As noted in the discharge summary, it was not even clear that her leg was viable. Indeed, necrosis was already evident in the fibula following a failed skin graft procedure.

Hospitalizations/Subsequent Surgeries: The attack and her initial injuries were only the beginning of Ms. Alejandro Garcia's ordeal. She spent 45 days in the hospital in Israel, where she underwent numerous surgeries to care for her fractured leg, including the nailing of her tibia and fibula, one (or possibly two) skin graft procedures, excision and debridement of extensive tissue, and additional daily wound treatment. Ms. Alejandro Garcia then spent several months undergoing physiotherapy at medical facilities in Puerto Rico (although the medical records are not clear as to precisely how long—and whether some or all of this period was spent in outpatient or inpatient treatment). Nevertheless, during this time she underwent additional, unspecified surgery, and was still undergoing physiotherapy until at least August 9, 1973 (more than fourteen months after the terrorist attack), when the medical records indicate that rehabilitation would continue "until further notice."

Although there are no medical records between 1974 and 2002, the records from 2003 forward indicate that she was hospitalized twice between 2003 and 2009 for conditions caused by the physical injuries she suffered in the attack—once for 11 days in

2003 for treatment of acute cellulitis and ankylosis (and was then prescribed bed rest for several days), and another time for 17 days in 2009 for treatment of acute cellulitis and acute osteomyelitis. In addition, Dr. Delerme suggests that Ms. Alejandro Garcia may have been hospitalized more than twice, stating in his 2009 letter that her chronic ulcer resulting in acute osteomyelitis and “frequent episodes of cellulitis ... sometimes required hospitalization.” In sum, Ms. Alejandro Garca was hospitalized for significant periods of time and underwent numerous surgical procedures.

Permanent Impairment/Disfigurement: Ms. Alejandro Garcia suffered significant permanent impairment, and she was permanently disfigured until the end of her life. Her physical injuries resulted in the Israeli National Insurance Institute giving her a permanent disability rating of 37% as of April 1, 1973. Moreover, the medical and photographic evidence clearly indicate that Ms. Alejandro Garcia was left with a significant deformity on her right leg, characterized by loss of tissue, significant inflammation and redness, and an ulcer on her right foot. In addition, evidence, including one medical record, indicates that she wore a metal brace on her right leg from 1972 until her death in 2015; Ms. Alejandro Garcia herself stated in her sworn statement that she cannot walk without the brace.

In light of these facts, and in consideration of the factors listed above, the Commission holds that \$2,000,000.00 is an appropriate amount of compensation in this claim. Claimant Estate is not entitled to interest as part of this award. *See* Claim No. LIB-III-021, *supra*, at 17. Accordingly, the Commission determines that the Claimant Estate is entitled to an award of \$2,000,000.00 and that this amount constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

The Commission therefore enters the following award, which will be certified to the Secretary of the Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-1627 (2012).

AWARD

Claimant is entitled to an award in the amount of Two Million Dollars (\$2,000,000.00).

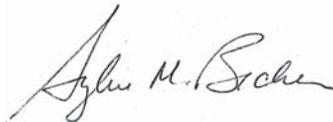
Dated at Washington, DC, June 1, 2016
and entered as the Proposed Decision
of the Commission.

**This decision was entered as the
Commission's Final Decision on**

August 2, 2016



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) (2015).