

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

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Counsel for Claimant:

Oral hearing held on July 21, 2011.

Claim No. LIB-I-007

Decision No. LIB-I-024

Stuart H. Newberger, Esq.
Crowell & Moring LLP

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986.

By Proposed Decision entered October 16, 2009, the Commission denied the claimant's physical injury claim on the ground that the claimant failed to meet his burden of proving that his alleged injuries satisfied the Commission's standard for physical injury. Specifically, the Commission determined that the claimant failed to establish either the injury was "more significant than a superficial injury," as that term is used in its physical injury standard, or that the injury was caused by the hijacking incident.

By letter dated October 26, 2009, the claimant objected to the Commission's Proposed Decision and requested an oral hearing. On February 2, 2010, the claimant provided additional evidence in support of his claim including medical records from 2009 and a medical opinion dated January 19, 2010. On June 30, 2011, the claimant, through counsel, filed "Claimant's Objection and Request for Oral Hearing Before the Commission" ("Objection Brief"), setting forth claimant's arguments in objecting to the Proposed Decision. The oral hearing was held on July 21, 2011.

DISCUSSION

I. Applicable Standard for Physical Injury Claims

As an initial matter, claimant asserts that the Commission should apply a broad and liberal interpretation to its physical injury standard because other claimants of this same settlement fund (*i.e.*, the LaBelle Discotheque victims) were allegedly held to a less strenuous standard (*i.e.*, presence at the site alone). In support of this assertion, counsel cited the Commission's decision in the *Claim of ESTATE OF VIRGEN MILAGROS FLORES*, Claim No. LIB-II-065, Decision No LIB-II-043 (2011), wherein the Commission stated that "[f]undamental principles of equity require that in any claims program similar damages be available to similarly-situated claimants."

Claimant's reliance on *MILAGROS FLORES* is inapposite. In that case, the Commission concluded that the claimant's decedent was killed as a result of one of the "Covered Incidents" specified in the January Referral Letter (*i.e.*, the 1972 Lod Airport terrorist attack). In determining the appropriate amount of compensation for that wrongful death, the Commission noted the language of the January Referral Letter, in which the State Department recommended that the Commission "take into account the

fixed amounts awarded by the Department of State for wrongful death claims.” Indeed, the January Referral Letter disclosed the amount paid directly by the State Department to each eligible wrongful death claimant. In that circumstance, the Commission took due notice of the Department’s recommendation, and the equitable consideration that similar damages be awarded to similarly-situated claimants, and determined to compensate wrongful death victims in the same amount as the State Department awarded to eligible wrongful death claimants included in the Pending Litigation.

With regard to the *criteria* for physical injury claims, however, the December Referral Letter did not identify the standard applied by the State Department in making payments directly to claimants for physical injury and the Commission is unaware of any such standard. Instead, the December Referral Letter asked the Commission to adopt a standard for physical injury to be applied in this program.¹ Consistent with the December Referral Letter, the Commission proceeded to establish a standard appropriate to this program, equitable to the claimants, and consistent with its jurisprudence.

For these reasons and the reasons set forth in *Claim of 1* ^{5 U.S.C. §552(b)(6)}, Claim No. LIB-I-008, Decision No. LIB-I-011 (2010), and reaffirmed by the Commission consistently in other claims in this program, the physical injury standard adopted by the Commission in *Claim of* ^{5 U.S.C. §552(b)(6)}, Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), applies here; namely, that a claimant must establish that he suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation; establish that he received medical

¹ December Referral Letter at para. 3.

treatment for the physical injury within a reasonable time; and verify his injury by medical records, in order to establish a compensable claim.

II. Claimant's Physical Injury

Claimant asserts that while escaping from Pan Am Flight 73 he injured his left knee in the act of jumping from a wing of the airplane to an escape slide approximately eight to twelve feet away. Claimant further asserts that this injury required medical treatment, including arthroscopic surgery to repair a torn meniscus. The evidence submitted in this claim consists of current medical opinions, affidavits from both interested and disinterested parties, contemporaneous news articles establishing claimant's presence on the airplane, documentation regarding the reasons for the unavailability of contemporaneous medical records, and finally, the live testimony of the claimant himself during the oral hearing.

The affidavits submitted in support of this claim provide a consistent narrative of claimant's injury and subsequent medical treatment, corroborated to a critical extent by recent medical reports. Because of the scant medical record, the outcome of this claim has depended in large part on the credibility and veracity of claimant's testimonial evidence.

In weighing the probative value of this evidence, the Commission notes that many international tribunals have found testimonial evidence admissible in support of claims for compensation. The weight that has been afforded such evidence by tribunals has been dependent, *inter alia*, on the availability of the witness for cross examination

either by opposing counsel or the members of a tribunal,² the availability of other evidence,³ and the extent to which the testimony is corroborated.⁴ Further, international tribunals, including this Commission, consistently have found that while testimonial evidence may be sufficient to substantiate that an event occurred, it alone may not be sufficient to establish the quantum of damages necessary to compensate for the harm.⁵ The Commission bears these guidelines in mind in assessing the weight to be afforded to the testimonial evidence provided by the claimant in this case.

At the outset, the Commission notes that the claimant had employed reasonable efforts to obtain medical records created contemporaneously with the injury, which, by virtue of document retention policies, are unavailable. Claimant testified that he had maintained his own copy of these records until he had reached settlement with Pan Am

² For example, the Tripartite Claims Commission (United States, Austria, and Hungary) held that “a claimant is a competent witness before this Commission and that his unsupported but unrebutted testimony on a material fact *prima facie* establishes that fact. But where the Agent of either respondent Government is not satisfied with the claimant's testimony ... [he] will be accorded the privilege of propounding interrogatories to the claimant.” *United States of America on behalf of Benjamin Albert Kapp v. Hungary*, Docket No. 1293, Tripartite Claims Commission, Final Report of Commissioner and Decisions and Opinions (1929) p. 69. In the case of affidavits, however, the British Mexican Claims Commission of 1926 concluded that affidavits could be admissible, however, they would constitute sufficient evidence only in the rarest of occasions. The Commission premised its finding on the theory that “such documents are sworn without the guarantee of cross examination by the other party; in nearly all cases a false statement will remain without penalty, and as they are signed by the party most interested in the judgment, they cannot have the value of unbiased and impartial outside evidence.” *Durward V. Sandifer, Evidence Before International Tribunals*, (1975) p. 351.

³ The *Garza Case*, under the American Mexican Claims Commission of 1868, was “dismissed for lack of evidence that would have been easy to obtain” it was observed “that in cases where it has been impossible or even very difficult to obtain evidence, [the Umpire] had ‘been inclined to overlook its absence and to give credit to a certain extent to the statements of the claimants.’ If the claimant could have obtained other evidence by reasonable effort, however ... the Umpire did not hesitate to disallow the claim.” *Durward V. Sandifer, Evidence Before International Tribunals*, (1975) p. 355.

⁴ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (2006) p. 313.

⁵ See, *Claim of LOUIS CHUSED Against Bulgaria*, Claim No. BUL-1140, Decision No. BUL-224 and *Durward V. Sandifer, Evidence Before International Tribunals*, (1975) p. 353. (“the affidavits of the claimants, with some slight corroboration, furnished sufficient evidence to attach blame ... but that their unsupported statements as to damages could not be accepted.”)

in the early 1990's, at which point he destroyed them, because he believed that there was no further action he could take with regard to the injuries.⁶

Claimant was subject to examination by the members of the Commission, and, as noted, has submitted corroborating evidence including recent medical opinions and affidavits. Claimant provided compelling, credible testimony at the hearing and described the ordeal that he and the other passengers suffered. Specifically, he testified that in order to escape from the airplane he exited onto the wing and after assessing his options "[he] ran as fast as [he] could to the trailing edge of the wing and leapt into space...[and] as [he] approached the slide ...[he] tucked [his] left shoulder under [him]...And [he] slammed into the slide on [his] left side and then [his] legs came slamming down on the edge of the slide mechanism... with everything from [his] knee on down hanging out in space." On his way to the terminal, claimant stated that he was urged to run by a security guard, "went about two paces...and came down on [his] left leg" and experienced a "bolt of pain." He further testified that he "nearly stopped and [he] said 'I can't, I can't';" however, "[he] started to walk, and [he] found that [he] could walk just fine," and in that manner made his way from the tarmac into the terminal.

Claimant went on to testify that he walked with a limp thereafter, which was noticeable to his employer, who met him at the airport. Claimant was given two weeks off, during which he rested with his family. After about two weeks, claimant testified that he went to "test" his knee out for running, and that within a few steps his knee turned to "mush." Claimant stated that he was seen by a Dr. Wells that same afternoon;

⁶ 28 U.S.C. 1605(a)(7), which provided jurisdiction to the federal court over Libya for terrorism related claims, was not enacted until 1996.

he was informed that arthroscopic surgery was required, and several weeks later that surgery was performed by Dr. Wells. In support of claimant's testimony, he has also submitted a medical opinion dated January 19, 2010 by a Dr. Gryler. In his opinion Dr. Gryler states "with a reasonable degree of medical certainty...Mr. Grantier's knee injury and arthroscopic surgery scars, are consistent with a probable meniscal tear caused when Mr. Grantier jumped from the wing of Flight 73 to the escape chute, landing on his knee." Moreover, claimant's testimony is consistent with both the sworn declarations of Gareth Stenner --claimant's former employer-- and Dan Grantier, claimant's son.

Based on claimant's testimony, corroborated by recent medical records and the affidavits of an interested as well as disinterested parties, the Commission finds the following facts to be true: that as a result of the manner by which claimant landed on the escape slide he injured his knee; that claimant's injury manifested itself immediately while claimant was attempting to run to the terminal; that claimant sought treatment for his injury approximately two weeks after the incident; and that said treatment included arthroscopic surgery. Based on these findings the Commission is now persuaded that the claimant has satisfied the Commission's standard for physical injury under the December Referral Letter. Accordingly, the Commission now finds him entitled to compensation as set forth below.

COMPENSATION

In the *Claim of* 5 U.S.C. §552(b), *supra*, the Commission held that \$3 million is an appropriate amount of compensation for physical injuries that meet the Commission's standard in this claims program. The Commission also held that

compensable physical injury claims in this claims program are not entitled to interest as part of the awards granted therein. *Id.* Accordingly, the Commission determines that the claimant, 5 U.S.C. §552(b)(6), is entitled herein to an award of \$3,000,000.00 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

Therefore, the Commission withdraws its denial of the claimant's claim as set forth in the Proposed Decision, and issues an award as set forth below, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICOSA. 22 U.S.C. §§ 1626-27. This constitutes the Commission's final determination in this claim.

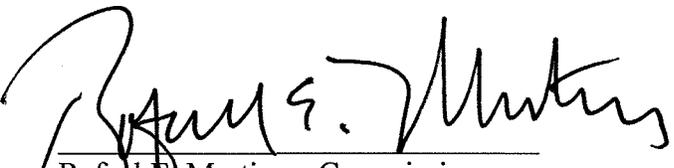
AWARD

Claimant, 5 U.S.C. §552(b)(6), is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

Dated at Washington, DC, September 6, 2011
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
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In the Matter of the Claim of

Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-I-007

Decision No. LIB-I-024

Counsel for Claimant:

Stuart H. Newberger, Esq.
Crowell & Moring LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by the claimant during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On December 11, 2008, under a delegation of authority from the Secretary of State, the State Department Legal Adviser referred to the Commission for adjudication a category of claims of United States nationals against Libya. *Letter from the Honorable*

John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (“December Referral Letter”). The category of claims referred consists of

claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya’s agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

Related to the December Referral Letter, a number of official actions were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* (“Claims Settlement Agreement”) 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the Secretary of State certified, pursuant to the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure “fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya” December Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any

pending suit within the terms of the Claims Settlement Agreement, and directing the Secretary of State to establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this Libya Claims Program pursuant to the ICOSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On June 4, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the elements of the claimant's claim, including evidence of: his United States nationality; his inclusion as a named party in the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; the dismissal of the Pending Litigation against Libya; and his physical injuries. The claimant,

Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

states that he was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. He further states that he injured his knee while attempting to escape during the final attack by the terrorists who had hijacked the plane.

DISCUSSION

Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the December Referral Letter is limited to claims of individuals who

are: (1) United States nationals and (2) named parties in a Pending Litigation which has been dismissed. December Referral Letter, *supra*, ¶¶ 2-3.

Nationality

In the *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Based on the evidence submitted with this claim, the Commission determines that the claimant was a United States national at the time of the injury on which his claim is based and continuously thereafter until the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must be a named party in the Pending Litigation listed in Attachment 1 to the December Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. December Referral Letter, *supra*, ¶ 3. The claimant has provided a copy of the complaint in Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, which names him as a party. Additionally, the claimant has provided a Stipulation of Dismissal as evidence of the dismissal of this Pending Litigation dated December 16, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

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

Merits

Standard for Physical Injury

As stated in the December Referral Letter, to qualify for compensation, a claimant asserting a claim for physical injury must meet a threshold standard for physical injury adopted by the Commission. In order to develop such a threshold standard for compensability, the Commission has considered both its own jurisprudence and pertinent sources in international and domestic law.

After careful and thorough consideration, the Commission held in the *Claim of* Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) *supra*, that in order for a claim for physical injury to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation;
and
- (2) must have received medical treatment for the physical injury within a reasonable time;
and
- (3) must verify the injury by medical records.

Physical Injury

According to his Statement of Claim, claimant Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in

Karachi, Pakistan. In his sworn statement, the claimant states that, during the hijackers' final attack on the passengers, he escaped through an exit door onto the wing of the airplane. In order to get down to the tarmac below, claimant states that he jumped from the wing to a nearby escape chute, landing on the chute on his left side. He further states that sometime after he returned to the United States he experienced knee problems requiring arthroscopic surgery. The claimant did not provide any medical records with his original submission to support his claim or otherwise to document the injury on which his claim is based. The Commission, by letter dated June 30, 2009, specifically requested that the claimant provide medical records to support his statement. In response, by letter dated July 31, 2009, claimant stated that he disposed of these records after the Pan Am litigation which occurred in the 1990's and provided a record of examination dated July 22, 2009, conducted by the claimant's current physician, Dr. Dan Grinstead. Dr. Grinstead concluded that the claimant had scars "consistent with the history...of having had an arthroscopic surgery on the knee." No other supporting documents have been submitted.

Section 509.5(b) of the Commission's regulations provides:

The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. 509.5(b)(2008).

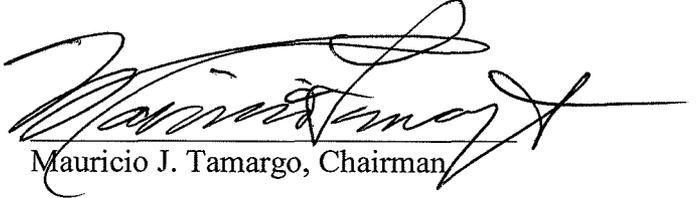
The Commission finds that the claimant has not met the burden of proof in establishing either the extent of the injury on which this claim is based, or a nexus between the injury and the incident, as required by the Commission's physical injury standard. In light of the foregoing, the Commission is constrained to conclude that the claimant, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6), does not meet the standard for compensation under

the December Referral Letter. Accordingly, while the Commission sympathizes with the claimant for the ordeal that he must have endured during the terrorist incident in question, his claim based on a physical injury suffered as a result of that incident must be and is hereby denied.

The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

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

OCT 16 2009



Mauricio J. Tamargo, Chairman



Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. 509.5 (e), (g) (2008).