

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

In the Matter of the Claim of

ESTATE OF DAVID GAISER, DECEASED;
GILLIAN GAISER, ADMINISTRATOR

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-I-013

Decision No. LIB-I-032

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 late David Gaiser 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, pursuant to a delegation of authority from the Secretary of State, the State Department's 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.

The December Referral Letter followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 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*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On June 4, 2009, the Commission received a completed Statement of Claim and accompanying exhibits supporting the elements of the claim, including evidence: of the United States nationality of the late David Gaiser and that of the beneficiary of the claimant estate; of the date and place of the late David Gaiser's death; of the inclusion of the claimant estate as a named party in the complaint filed in *Patel, et al. v. Socialist People's Libyan Arab Jamahiriya*, 06-cv-0626 (D.D.C.), part of the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; of the dismissal of *Patel*; and of the claimant's decedent's physical injuries.

The claimant estate states that the late David Gaiser, who died in April 2002, was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. According to the Statement of Claim and accompanying exhibits, the decedent suffered a gunshot wound to his foot, calf, and knee during the final attack by the terrorists who had hijacked the plane. In support of the present claim, the claimant estate has provided evidence of its decedent's United States nationality as of the date of the incident and the U.S. nationality of the estate's beneficiary as of the decedent's date

of death and thereafter up to the time of the Claims Settlement Agreement. Additionally, the claimant estate has provided Letters of Administration of Mr. Gaiser's estate, sworn declarations from Mr. Gaiser's treating physician and Gillian Gaiser; medical records relating to the late David Gaiser's injuries; and other documents in support of its claim.

DISCUSSION

As an initial matter, the Commission has reviewed the court documents relating to the estate of the late David Gaiser, who died without a will. In the Order of the Superior Court of Washington for King County dated April 19, 2006 the court found Gillian Gaiser, as the surviving spouse of the late David Gaiser, to be the sole beneficiary of the decedent's estate. Documentation in the file reflects that Mrs. Gaiser was a United States national on the date of the late David Gaiser's death. Based on this review, the Commission finds that the ESTATE OF DAVID GAISER, DECEASED; GILLIAN GAISER, ADMINISTRATOR, is the proper claimant in this claim.

Jurisdiction

The Commission must first 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: (1) are United States nationals, (2) have been named as parties in a Pending Litigation which has been dismissed, and (3) set forth a claim for an injury other than emotional distress alone in the Pending Litigation. 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 this claim was held by a United States national at the time of the injury on which the claim is based, that it was continuously held thereafter by the claimant's decedent until his death in 2002, and that it has been continuously held from that point until the effective date of the Claims Settlement Agreement by a U.S. national.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must also 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 estate 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 the claimant estate 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 estate was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

Claim for Injury Other than Emotional Distress

Claimant estate has provided, with the Statement of Claim, a copy of the Second Amended Complaint in the Pending Litigation, in which claimant states a cause of action for, *inter alia*, battery and assault, of claimant's decedent, under Counts VI and VII of the

complaint. The Commission therefore finds that the claimant set forth a claim for injury other than emotional distress alone in the Pending Litigation.

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 *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), 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 the Statement of Claim, claimant's decedent, the late David Gaiser, was a passenger on Pan Am flight 73 which was hijacked by terrorists on September 5, 1986 in Karachi, Pakistan. In the sworn statement of Gillian Gaiser, who was also a passenger on board Pan Am Flight 73, she states that, during the hijackers' final attack on the passengers, her husband was shot at several times and in one instance he was struck in the foot or ankle and the bullet travelled up his leg to his knee. Further, she states that when she and her husband reached the tarmac, her husband was taken on a truck with other injured passengers for treatment, and he returned to the terminal sometime later "bandaged with a dirty dressing." She further states that she arranged to have her husband treated at the Aga Kahn hospital where he underwent surgery to remove the bullet from his knee. According to Mrs. Gaiser, upon their return to the United States, her late husband underwent further knee surgery at Sacred Heart Medical Center in Spokane, Washington. The claimant estate has provided a sworn declaration made by Alexander P. Greer, M.D. (claimant's treating physician in the United States in 1986), a letter from Dr. Greer to Vernon Judkins, Esq. dated October 26, 1987* and the record of Mr. Gaiser's initial visit with Dr. Arnold Peterson dated October 16, 1987 as evidence of David Gaiser's physical injuries and medical treatment. In his declaration, Dr. Greer states that he saw Mr. Gaiser on October 24, 1986 because of concerns Mr. Gaiser had about swelling and pain in his leg. Dr. Greer states that upon examination he observed a "fresh surgery scar" on Mr. Gaiser's right leg consistent with the type of surgery said to have been performed in Pakistan after the hijacking. Dr. Greer further states that, as a

* In his sworn declaration, Dr. Greer states that this letter was drafted in support of a prior legal claim by Mr. Gaiser.

result of Mr. Gaiser's leg injury, Mr. Gaiser had been putting more weight on his left leg which aggravated a residual joint problem from a previous knee injury. Further, Dr. Greer states that he examined Mr. Gaiser again in October of 1987 and noted that Mr. Gaiser was experiencing chronic pain and soreness in his left knee. Dr. Greer then referred Mr. Gaiser to Dr. Peterson for treatment of his knee problems. Dr. Peterson notes in Mr. Gaiser's history that, as a result of the injury suffered during the hijacking, Mr. Gaiser was forced to bear much more weight on his left side causing an increase of pain in the medial compartment of his left knee.

Based on the evidence submitted, the Commission finds that the claimant's injury meets the standard for physical injury set forth above. Accordingly, claimant ESTATE OF DAVID GAISER, DECEASED; GILLIAN GAISER, ADMINISTRATOR is entitled to compensation in this claim.

COMPENSATION

In the *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6), *supra*, the Commission held that \$3,000,000.00 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, ESTATE OF DAVID GAISER, DECEASED; GILLIAN GAISER, ADMINISTRATOR, 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.

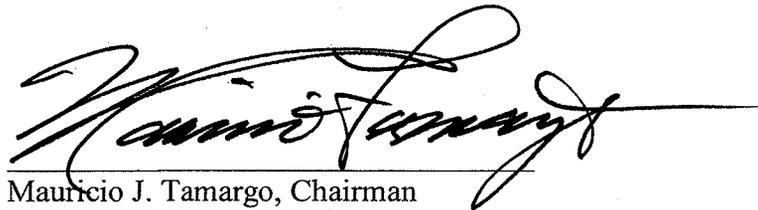
Therefore, the Commission enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-27 (2006).

AWARD

Claimant ESTATE OF DAVID GAISER, DECEASED; GILLIAN GAISER, ADMINISTRATOR, is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

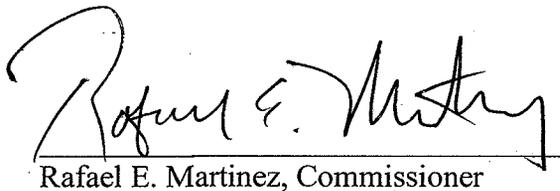
Dated at Washington, DC, and entered as the Proposed Decision of the Commission.

JAN 1 2 2010



Mauricio J. Tamargo, Chairman

**This decision was entered as the
Commission's Final Decision on
FEB 2 4 2010**



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).