

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

Claim No. LIB-II-096

Decision No. LIB-II-055

Counsel for Claimant:

Joshua Ambush, Esq.
Joshua M. Ambush, LLC

Oral hearing held on November 17, 2011.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries sustained by 5 U.S.C. §552(b)(6) at Lod Airport in Tel Aviv, Israel on May 30, 1972. By Proposed Decision entered June 3, 2011, the Commission concluded that the claimant's injuries met the Commission's standard for physical injury adopted under Category E of the January 15, 2009 *Letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("January Referral"), and awarded claimant \$3 million, the fixed amount awarded to all eligible Category E claimants. In the same Proposed Decision, the Commission denied the claimant's further request under Category E for "enhanced compensation" beyond the fixed amount awarded of \$3 million.

On June 15, 2011, the claimant filed an objection and requested an oral hearing on the sole issue of the Commission's denial of his request for enhanced compensation. In support of his objection, claimant submitted a Hearing Brief on October 27, 2011. The hearing on the objection was held on November 17, 2011.

DISCUSSION

The claimant's request for "enhanced compensation" is based on his contention that because physical injury claimants under the December Referral¹ are eligible, under Category D of the January Referral, for compensation beyond the fixed sum of \$3 million, he should also be entitled, given the relative severity of his injuries, to compensation beyond that amount.²

Specifically, in the Hearing Brief and during the hearing, claimant's counsel argued that the Commission's interpretation of the January Referral results in unconstitutional discrimination against similarly-situated January Referral Category E claimants in favor of December Referral claimants, in violation of the Equal Protection clause of the Fifth Amendment. Counsel further argued that the plain language of Category E is sufficiently broad to permit the Commission to exercise jurisdiction over claims for enhanced compensation, and that the Commission should do so in order to "preserve the constitutionality of the January referral letter."

¹ December 11, 2008, *letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral").

² As noted in the Proposed Decision, Category D of the January Referral provides for additional compensation "provided that (1) the claimant has received an award pursuant to [the] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance..." January Referral, *supra*, ¶ 6. This claim was not among the claims covered by the December Referral, and, consequently, was not the subject of an award pursuant to that Referral. Therefore, as the claimant acknowledges, he is ineligible under Category D.

Analysis

With regard to claimant's constitutional argument, the Commission has previously held that consideration of constitutional issues is outside the scope of the Department of State's referral to the Commission. *See Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-005, Decision No. LIB-I-014, at 5 (2010) (Final Decision). Accordingly, this portion of the claimant's objection must be rejected.

The Commission next considers claimant's argument that the plain language of Category E "is sufficiently broad to permit jurisdiction over claims for enhanced compensation." The January Referral Letter states in regard to Category E that

This category shall consist of claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents listed in Attachment 2 ("Covered Incidents"), incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission. If the Commission decides to award compensation for these claims, we recommend that the Commission take into account the fixed amounts awarded by the Department of State for wrongful death claims and recommended for physical injury claims in our December 11, 2008 referral.

Id. at ¶ 7. In support of this contention, claimant contrasts the use of the mandatory "shall" in relation to the types of claims to be included under Category E with the use of the word "recommendation" in relation to the amount to be awarded to successful claimants. In addition, claimant asserts that there is significance in the contrast between the use of the word "recommend" in the compensation section under Category E and the use of the phrase "believe and recommend" in the same section under Categories A and B.

Claimant's argument here combines two separate and distinct issues, namely, the scope of the jurisdiction conferred on the Commission by the January Referral, and the law to be applied by the Commission in its decisions on claims.

With regard to the scope of the Commission's jurisdiction under the January Referral, the language of Category E, on its face, is sufficiently broad to permit the Commission to consider claims for compensation beyond the fixed amount of \$3 million that it has awarded under that category. The pertinent language is as follows: "[i]f the Commission decides to award compensation for these claims, we recommend that the Commission take into account the fixed amounts awarded by the Department of State for wrongful death claims and for physical injury claims in our December 11, 2008 referral." It is clear from this language that the Commission has jurisdiction to make awards it considers appropriate to claims it determines to be eligible for compensation under Category E.

The law to be applied by the Commission in its decisions on claims—including amounts to be awarded to successful claimants—is set forth in section 4(a)(2) of the International Claims Settlement Act, 22 U.S.C. §1623(a)(2). This section requires that the Commission "shall apply the following in the following order: (A) The provisions of the applicable claims agreement as provided in this subsection; (B) The applicable principles of international law, justice and equity." 22 U.S.C. § 1623(a)(2) (2006). These statutory provisions thus give the Commission discretion in this program to award to successful claimants more, or less, than the amount recommended by the State Department, subject to the provisions of the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement") and applicable principles of international law, justice and equity.

The core issue in this appeal, therefore, is whether claimant's request that the Commission exercise its discretion by awarding "enhanced compensation" to him on the

same basis that the Commission may award additional compensation to claimants eligible under Category D, comports with the provisions of the Claims Settlement Agreement and international law, justice and equity. The claimant argues that the Commission can only avoid the “clearly unconstitutional” effect of the January Referral, which “arbitrarily discriminates” against Category E claimants, who are not, by its terms, eligible for additional compensation under Category D, by granting his request.

While the Commission is unable, as stated above, to address claimant’s constitutional assertions on their merits, the Commission sees no constitutional infirmity in deciding claims on the basis of its applicable law, and has done so with respect to claims eligible for compensation under Category E.

Indeed, in making his argument for enhanced compensation under Category E, claimant’s focus on the January Referral alone is far too narrow. As noted above, 22 U.S.C. § 1623(a)(2) directs the Commission to first apply the provisions of the applicable claims settlement agreement. In cases where—as here—the text of an agreement is silent, the Commission then refers to the documents implementing that agreement to determine the intent of the parties in reaching the settlement. In this program, such documents include the December and January Referrals, the Libya Claims Resolution Act, and as necessary, correspondence between the State Department and the Congress relating to the Claims Settlement Agreement. *See, e.g., Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-I-049, Decision No. LIB-I-019 (2011). These documents reveal a very carefully structured settlement agreement designed to address and satisfy a variety of often competing equities—for example, pending and non-pending litigants, U.S. nationals and non-U.S. nationals, claimants with more and less advanced federal court cases—in light of

a finite compensation fund. Therefore, the Commission must exercise its discretion in its decisions on claims in this program mindful of the object and purpose of the Claims Settlement Agreement. That object and purpose is reflected in the Referrals.

As the Commission noted in its Proposed Decision in this claim, the Department of State implicitly excluded claims arising under the January Referral from enhanced compensation under Category D, while it separately provided for compensation for injuries suffered by non-pending litigants under Category E of that Referral. Given that the claims of non-pending litigants were clearly before it in Category E, the Commission cannot view it as accidental that the State Department excluded them from enhanced compensation under Category D by the plain terms of that category. In these circumstances, the Commission must attribute meaning to the State Department's particular and specific construction of the January Referral, namely, the Department of State's understanding that the Claims Settlement Agreement did not make provision for such compensation.

In summary, the Commission concludes that to award compensation under Category E over and above the \$3 million awarded to eligible claimants³ would effectively remove the distinctions drawn by the Department of State, would be contrary to the overall structure of the January Referral, and would be inconsistent with the Claims Settlement

³ In the *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-039, Decision No. LIB-I-015 (2010), the Commission held that \$3 million was an appropriate amount of compensation for physical injuries under Category E that meet the Commission's standard for such injuries. The Commission's decision in 5 U.S.C. §552(b)(6) in turn, was based on its prior decision in the *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), a claim under the December Referral in which the Commission held that \$3 million was an appropriate amount of compensation for physical injuries that meet the Commission's standard in this claims program. In arriving at its conclusion that \$3 million is the appropriate amount of compensation to be awarded to eligible claimants under Category E in this program, the Commission applied the provisions of both the applicable claims settlement agreement and general principles of international law, justice and equity.

Agreement.⁴ For these reasons, claimant's objection is rejected.

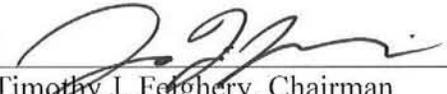
CONCLUSION

For the reasons set forth above, claimant's claim for enhanced compensation is rejected. Accordingly, the Commission reaffirms its award as set forth in the Proposed Decision in this claim, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA (22 U.S.C. §§ 1626-1627). This constitutes the Commission's final determination in this claim.

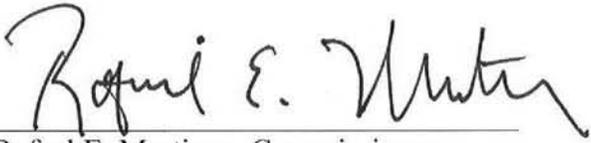
AWARD

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, May 17, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

⁴ In his objection brief, claimant cites the Commission's decision in *Claim of ESTATE OF VIRGEN MILAGROS FLORES*, Claim No. LIB-II-065, Decision No. LIB-II-043 (2011), where the Commission held that, for purposes of determining compensation for wrongful death claims under Category E, the distinction between pending litigants and non-pending litigants "is not a difference that holds any legal significance for the purpose of determining the amount of compensation to be awarded." In that case, however, there was no indication that the State Department intended to recommend awards of different levels of compensation for wrongful death claims based on litigation status. The Commission's conclusion, therefore, was consistent with both the Claims Settlement Agreement and the January Referral, and, accordingly, was a reflection of those documents' obvious intent. In contrast, on the specific issue of enhanced compensation for physical injury claims, the State Department made a clear distinction between pending litigants and non-pending litigants, and opted to provide enhanced compensation only for claimants who had received an award under the December Referral.

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Counsel for Claimant:

Joshua M. Ambush, Esq.
Joshua M. Ambush, LLC

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 5 U.S.C. §552(b)(6) at Lod Airport in Israel on May 30, 1972.

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 January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the*

Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission
(“January Referral Letter”).

The present claim is made under Category E. According to the January Referral Letter, Category E consists of

claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents listed in Attachment 2 (“Covered Incidents”), incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission.

Id. at ¶ 7. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

The January Referral Letter, as well as a December 11, 2008 referral letter (“December Referral Letter”) from the State Department, 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 4, 2008, the President signed into law the Libyan Claims Resolution Act (LCRA), Pub. L. No. 110-301, 122 Stat. 2999, and 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 President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures

governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On May 18, 2010, the Commission received from claimant a completed Statement of Claim, in which he asserts an injury claim under Category E of the January Referral Letter, along with exhibits supporting the elements of his claim, including evidence of claimant's U.S. nationality, his presence at the scene of the terrorist incident, and his alleged physical injuries.

Specifically, the claimant states that he was present in the terminal at Lod Airport in Israel on May 30, 1972, when three terrorists armed with automatic rifles began shooting and throwing hand grenades at passengers gathered in the baggage claim area. According to the Statement of Claim and accompanying exhibits, claimant was shot in his right eye, face, chest, stomach, right shoulder and left thigh. He further states that despite a variety of extensive medical procedures, he continues to suffer pain, disability and disfigurement.

The Statement of Claim concludes with a further statement by claimant, wherein he argues that "the permanent, debilitating and catastrophic [nature] of his physical injuries constitute a 'special circumstance' warranting that the Commission exercise its discretion to grant Claimant Ernesto Delgado Crespo payment of damages equal to [the]

fullest extent permitted by the State Department's January 15, 2009, letter: an additional award of up to ten million dollars equal to that of a Category D Claimant." The claimant has also submitted a brief in support of this request for enhanced compensation.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under the January Referral Letter; namely, claims of individuals who: (1) are U.S. nationals; (2) set forth a claim before the Commission for wrongful death or physical injury resulting from one of the Covered Incidents; and (3) were not plaintiffs in a Pending Litigation case against Libya. January Referral Letter, *supra* ¶ 7.

Nationality

In the *Claim of* 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 the nationality requirement to have been met, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. To meet this requirement, the claimant has provided copies of his U.S. birth certificate (issued in Puerto Rico) and his current U.S. passport. Based on this evidence, the Commission determines that the claim was held by a U.S. national at the time of the incident and has been so held until the effective date of the Claims Settlement Agreement.

Claim for Death or Injury Resulting From a Covered Incident

To fall within the category of claims referred to the Commission, the claimant must also assert a claim for wrongful death or physical injury resulting from one of the Covered Incidents listed in Attachment 2 to the January Referral Letter. January Referral Letter, *supra*, ¶ 7. This list includes the “May 30, 1972 attack at Lod Airport in Israel, as alleged in *Franqui v. Syrian Arab Republic, et al.* (D.D.C.) 06-cv-734.” *Id.*, Attachment 2, ¶ 1. In his Statement of Claim, the claimant sets forth a claim for physical injury suffered as a result of the May 30, 1972 Lod Airport terrorist attack. The Commission therefore finds that the claimant has satisfied this element of his claim.

Pending Litigation

Finally, the January Referral Letter states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral Letter, *supra*, ¶ 7. Attachment 2 to the January Referral Letter identifies the Pending Litigation cases associated with each Covered Incident, which in this claim, as noted above, is the *Franqui* case. Claimant has provided a copy of the First Amended Complaint in *Franqui*, which establishes that he was not a party to that litigation. In addition, claimant has averred under oath in his Statement of Claim that he was not a plaintiff in the Pending Litigation against Libya. Based on this evidence, the Commission finds that the claimant has also satisfied this element of his claim.

In summary, therefore, the Commission concludes, on the basis of the foregoing, that this claim is within the Commission’s jurisdiction pursuant to the January Referral Letter and is entitled to adjudication on the merits.

Merits

Standard for Physical Injury

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category E must meet "the standard for physical injury or wrongful death, as appropriate, adopted by the Commission" for purposes of this referral. January Referral Letter, *supra*, ¶ 7. The Commission held in *Claim of*, 5 U.S.C. §552(b)(6)

Claim No. LIB-II-039, Dec. No. LIB-II-015 that in order for a claim for physical injury pursuant to Category E to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; and
- (2) must have received medical treatment for the physical injury within a reasonable time; and
- (3) must verify the injury by medical records.

Claim of, 5 U.S.C. §552(b)(6) *supra*, at 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

The contemporaneous medical records provided with this claim indicate that the claimant was shot in his right eye such that "only remnants remain," and that he was also shot in the face, chest, stomach, right shoulder and left thigh. He was subsequently admitted to the Haim Sheba Medical Center at Tel Hashomer, where he underwent several emergency surgical procedures. The medical records further indicate that the claimant was discharged from Haim Sheba Medical Center on July 4, 1972, more than a month after the incident, and received further treatment for his wounds at the Centro

Medico de Puerto Rico beginning on July 7, 1972. According to the submitted medical records, over the course of several years subsequent to the incident the claimant underwent a variety of additional surgeries and procedures.

Based on the evidence submitted, the Commission finds that the claimant's injuries meet the standard for physical injury set forth above. Accordingly, claimant ^{5 U.S.C. §552(b)(6)} is entitled to compensation as set forth below.

Claim for Enhanced Compensation

As noted above, the claimant also requests that the Commission provide enhanced compensation in this claim, equal to that of a Category D claimant, because of the extent and severity of the claimant's injuries. The Commission notes that, in making this equitable plea, claimant recognizes that he has not, and cannot, make a claim directly under Category D. The terms of the January Referral Letter specify that in order to make a Category D claim, a claimant, among other things, "must have received an award pursuant to [the] December 11, 2008 referral." January Referral Letter, *supra*, ¶ 6. This claim was not part of the December Referral Letter, and, consequently, was not the subject of an award pursuant to that Referral. The State Department's exclusion of claims arising under the January Referral Letter from enhanced compensation under Category D, without further provision therefor, clearly signifies the State Department's intent not to provide such compensation under the January Referral Letter. Certainly, if the State Department intended that such claims were to be eligible for additional compensation under the January Referral Letter, it could and would have so specified in the January Referral Letter. In light of this, and notwithstanding the Commission's finding that the claimant's injuries qualify for compensation under Category E in this claim, any finding

of "special circumstances" sufficient to warrant enhanced compensation equal to that of a Category D claimant would run counter to this clear intent. Given the clear specifications and categorizations of claims in the Referrals which provide the Commission's jurisdiction, the Commission must, and hereby does, deny this request.

COMPENSATION

In the *Claim of* 5 U.S.C. §552(b)(6), *supra*, the Commission held that \$3 million is an appropriate amount of compensation for physical injuries that meet the Commission's standard under Category E, and that compensable physical injury claims in this claims program are not entitled to interest as part of the awards granted therein. 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.

The Commission therefore enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSEA. 22 U.S.C. §§ 1626-1627 (2006).

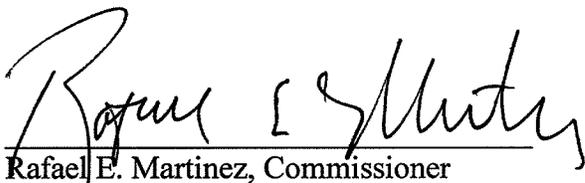
AWARD

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, June 3, 2011
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, 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) (2010).