

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 LUIS CONDE, DECEASED;
SAMUEL CONDE LÓPEZ, ADMINISTRATOR

Against the Great Socialist People's
Libyan Arab Jamahiriya

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} Claim No. LIB-II-123

} Decision No. LIB-II-091
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Counsel for Claimant:

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

Oral Hearing held on March 15, 2012.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by the ESTATE OF LUIS CONDE, DECEASED; SAMUEL CONDE LÓPEZ, ADMINISTRATOR (the "claimant"), based upon physical injuries said to have been sustained by Mr. Conde at Lod Airport in Tel Aviv, Israel on May 30, 1972.¹ The claim was made under Category E of the *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"). By its Proposed Decision entered October 17, 2011, the Commission denied the claim on the grounds that claimant had not met its burden of proving an injury sufficient to meet the Commission's standard for physical injury. In particular, the

¹ Mr. Conde died in 1977 of causes unrelated to the attack.

Commission cited the absence of evidence sufficient to establish a discernible, non-superficial physical injury in the contemporaneous medical record and the unclear duration of Mr. Conde's hospital stay in Tel Aviv.

On November 7, 2011, the claimant filed a notice of objection and requested an oral hearing, asserting various factual errors in the Commission's Proposed Decision. The oral hearing was initially scheduled for January 25, 2012, but was postponed at claimant's request. On February 24, 2012, claimant submitted an objection brief containing further evidence and argument in support of its objection. The hearing on the objection was held on March 15, 2012. Claimant provided further evidence on March 29, and submitted a letter, dated April 2, 2012, summarizing its argument and raising additional points in support of its objection.

In its objection brief and during the oral hearing, claimant argued that Mr. Conde suffered a physical injury in the Lod Airport attack that was severe enough to meet the Commission's standard. In particular, claimant argued that newly-submitted evidence confirms that Mr. Conde was hospitalized for six days following the incident, and that his shrapnel injuries were "severe" and left him "severely debilitated." Claimant contended that, although Mr. Conde did not undergo surgery to remove the shrapnel left in his body, it was "so deeply embedded in Mr. Conde's gluteal region that it could *only* be detected upon x-ray[.]" (emphasis in original) and that, in such cases, surgery to remove the shrapnel is typically contraindicated, on the basis that the risk of permanent damage is too great. Claimant further noted that, according to the sworn statements of various individuals who had seen Mr. Conde shortly after the attack, Mr. Conde had difficulty walking after his return to Puerto Rico.

DISCUSSION

In its Proposed Decision in this claim, the Commission determined that the documentation submitted—including a discharge summary from Tel Hashomer Hospital and copies of newspaper articles identifying Mr. Conde as among the wounded—contained insufficient evidence of significant physical injury. In particular, the Commission noted that, although the discharge summary indicated that Mr. Conde had suffered “two lacerations [in] the gluteal region[,]” it appeared that the lacerations were only “cleaned,” and did not require suturing or other treatment. The Commission further noted that, although x-rays showed “small shrapnel . . . left in the gluteus[,]” the only description of these fragments in the discharge summary indicated that they were “not visible for the wounds are clean and dry.” In addition, although claimant alleged that Mr. Conde was hospitalized for six days, the dates listed on the discharge summary were unclear as to when Mr. Conde was admitted and released. No other medical documentation was provided. Under these circumstances, the Commission concluded that claimant had not met its standard for physical injury claims.

In support of its objection, claimant submitted, *inter alia*, a translated certification, dated February 7, 2012, from Tel Hashomer Hospital, confirming that Mr. Conde was hospitalized there from May 30, 1972 to June 5, 1972; a January 2012 affidavit from Raphael Walden, M.D., who was lead surgeon at Tel Hashomer Hospital at the time of the incident, and who treated several of the Lod Airport victims, discussing the information contained in the discharge summary; affidavits from several individuals who met and spoke with Mr. Conde after his return to Puerto Rico, attesting to his difficulty with walking and his assertion that he had been injured in Israel; and a further,

post-hearing affidavit from Dr. Walden discussing the dates contained in the medical records and describing the nature of Mr. Conde's lacerations and shrapnel wounds as reflected in the discharge summary.

The February 2012 Hospital Stay Certificate clarifies that the claimant was hospitalized in Tel Hashomer for a period of six days: May 30, 1972 to June 5, 1972. Dr. Walden confirms this in his post-hearing affidavit, noting that, based on his review of the original, untranslated discharge summary "and [his] personal knowledge of the method used for keeping track of patients administratively, [he] conclude[s] that the handwritten date of '5.6.72' . . . on the index card scanned along with the discharge summary can mean nothing else than the patient's date of discharge from the hospital." He further explains that the Lod Airport attack occurred at approximately 11:00pm on May 30, 1972 and that the victims did not arrive at the hospital "until almost midnight"; therefore, "there is no way Mr. Conde could have been admitted and discharged on May 30, 1972 (the only other date on the index card)."

With regard to the precise nature of claimant's injury, Dr. Walden notes in his affidavit that the code "877.0" appears on the discharge summary next to the notation "shrapnel wound Rt. gluteus." Attached to his affidavit is a printout from an internet database, which he identifies as "a page from the International Classification of Diseases (a medical code used by hospitals worldwide) stating that Code 877.0 is code for 'Open wound of buttock, without mention of complication.'" Dr. Walden states that the "code provided to me by [claimant's counsel] conforms to my understanding of the medical code listed on Mr. Conde's discharge summary." He adds that "[c]omplication here refers to infection or injury to nearby structures (muscles, nerves or blood vessels." Dr.

Walden concludes, therefore, that Mr. Conde sustained “open wounds of his buttock, which did not become infected.”

Dr. Walden also addresses the Commission’s observation in its Proposed Decision that, based on the evidence presented, there was no indication that Mr. Conde’s lacerations required suturing or any other treatment beyond cleaning, although “[o]n x-rays small shrapnel was left in the gluteus[.]” Dr. Walden explains, in his January 2012 affidavit, that “[i]n such cases, the hospital’s policy is to generally leave shrapnel in the patient’s body. This is because the operation to remove the shrapnel creates a greater risk of permanent damage to the area of the body affected.” Dr. Walden restates this in his more recent affidavit, indicating that, indeed, “it is likely that Mr. Conde’s wounds were not sutured. There is always a danger of infection after shrapnel wounds and the surgical practice is not to suture them, should an infection manifest afterwards, which will necessitate opening of the wound.” Even without surgery to remove the shrapnel, however, Dr. Walden explains that “it has always been . . . the hospital’s policy to only keep patients in hospital only when it is medically necessary to do so.”

Considering the totality of the evidence submitted, and in particular the contemporaneous medical record and Dr. Walden’s explanations of the information contained therein, the Commission finds that claimant’s shrapnel injuries meet the standard for physical injury set forth in the Proposed Decision. Accordingly, claimant ESTATE OF LUIS CONDE, DECEASED; SAMUEL CONDE LÓPEZ, ADMINISTRATOR, is entitled to compensation as set forth below.

COMPENSATION

In *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, ESTATE OF LUIS CONDE, DECEASED; SAMUEL CONDE LÓPEZ, 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.

The Commission accordingly withdraws the denial in its Proposed Decision in this claim, and 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 ESTATE OF LUIS CONDE, DECEASED; SAMUEL CONDE LÓPEZ, ADMINISTRATOR, is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

Dated at Washington, DC, December 12, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
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UNITED STATES DEPARTMENT OF JUSTICE
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Decision No. LIB-II-091

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 brought by the Estate of Luis Conde (the "claimant"), based upon physical injuries said to have been sustained by Mr. Conde at Lod Airport in Tel Aviv, Israel on May 30, 1972. Mr. Conde died in 1977 of causes unrelated to the attack.

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 ICOSA and the January Referral Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On July 1, 2010, the Commission received from claimant a completed Statement of Claim in which the claimant asserts a claim under Category E of the January Referral Letter, along with exhibits supporting the elements of its claim. This submission included evidence of: the U.S. nationality of the claimant's decedent, the late Luis Conde; his presence at the scene of the terrorist incident; and his alleged physical injuries for which the claimant now claims compensation.

The claimant states that Mr. Conde was present in the terminal at Lod Airport in Tel Aviv, 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. Claimant asserts that Mr. Conde suffered injuries from machine gun fire and grenade shrapnel on the right side of his body. Claimant states that, immediately following the incident, Mr. Conde was taken to a local hospital, where he underwent treatment that included the cleansing of his wounds. According to the claimant, Mr. Conde remained hospitalized in Israel for six days. In addition, the claimant states that

Mr. Conde's "[t]reatment in the hospital was unable to remove the shrapnel that became permanently lodged in his gluteal region, causing him lifelong pain and discomfort."

DISCUSSION

As an initial matter, the Commission has reviewed the Declaration of Heirs issued by the Puerto Rico Court of First Instance, Carolina Judicial Center, Superior Division, on September 16, 2010, indicating that Mr. Conde died intestate and identifying the heirs to his estate. Specifically, the court identified the following persons as his heirs: Samuel Conde López, decedent's son; Luis Felipe Conde López, decedent's son; Eliecer Conde López, decedent's son; and Juanita López Moyeno, decedent's widow, "with respect to the usufructuary portion of surviving spouse pursuant to law[.]" The claimant estate has also provided a copy of a Determination issued on June 29, 2011 by the Puerto Rico General Court of Justice, Court of First Instance, Superior Division of Carolina, appointing Samuel Conde López as administrator of the estate. Documentation submitted by the claimant reflects that all of the above-named individuals are U.S. nationals by birth. Based on this review, the Commission finds that the ESTATE OF LUIS CONDE, DECEASED; SAMUEL CONDE LÓPEZ, ADMINISTRATOR, is the proper claimant in this claim.

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; in this case, Category E, 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* ⁵U.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 to meet the nationality requirement, 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. In the case of claims brought by estates on behalf of beneficiaries, it is a well-established principle of the law of international claims, which has been applied by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that, for purposes of determining the nationality of a claim, the nationality of the injured person as well as the beneficiaries of his or her estate must be evaluated in order to establish that the claim has been held continuously by U.S. nationals from the date of injury through the date of the Settlement Agreement.¹

To meet this requirement, the claimant has provided: the birth certificate of the claimant's decedent, Luis Conde, showing his place of birth in Trujillo Alto, Puerto Rico; a signed letter to claimant's attorney from the U.S. Department of State indicating that, in response to his inquiry, there was no record of Mr. Conde (or any of the other numerous individuals that were the subject of the inquiry) having renounced his U.S. citizenship;

¹ See, e.g., *Claim of THE ESTATE OF JOSEPH KREN, DECEASED against Yugoslavia*, Claim No. Y-0660, Decision No. Y-1171 (1954); *Claim of PETER KERNAST*, Claim No. W-9801, Decision No. W-2107 (1965); *Claim of RALPH F. GASSMAN and URSULA ZANDMER against the German Democratic Republic*, Claim No. G-2154, Decision No. G-1955 (1981); *Claim of ELISAVETA BELLO, et. al. against Albania*, Claim No. ALB-338, Decision No. ALB-321 (2008).

copies of birth certificates for Samuel Conde López, Luis Felipe Conde López, and Eliecer Conde López, evidencing their birth in Puerto Rico; copies of Samuel, Luis Felipe, and Eliecer's current U.S. passports; and a copy of the birth certificate for Juana López Moyeno, showing her place of birth in Arecibo, Puerto Rico. In a separate claim for physical injury under Category E filed by the Estate of Juanita López de Conde,² the estate provided a signed letter to claimant's attorney from the U.S. Department of State, similar to the aforementioned, indicating that, in response to his inquiry, there was no record of Ms. López having renounced her U.S. citizenship.

Based on this and other evidence in the record, the Commission determines that the claim was owned by a U.S. national at the time of the incident continuously through 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 its Statement of Claim, the claimant sets forth a claim for physical injury suffered by the late Luis Conde as a result of the May 30, 1972 Lod Airport terrorist attack. The Commission therefore finds that the claimant has satisfied this element of its claim.

² Ms. López died on November 24, 1999, as evidenced by a copy of Ms. López' death certificate that was provided in support of this claim. As a result, the three children named in the Declaration of Heirs appear to be the only surviving heirs of Mr. Conde's estate.

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 and includes the *Franqui* case, which, as noted above, is the Pending Litigation related to this claim. Claimant has provided a copy of the First Amended Complaint in *Franqui*, which demonstrates that neither the claimant estate, nor any of the beneficiaries, were plaintiffs in the Pending Litigation. In addition, claimant, through its duly-appointed administrator Samuel Conde López, has stated under oath in its Statement of Claim that it was not a plaintiff in the Pending Litigation against Libya. Based on this evidence, the Commission finds that the claimant has satisfied this element of its 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)} _{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.

Id. at 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

According to the Statement of Claim and accompanying documents, the decedent suffered physical injuries on May 30, 1972 when, as discussed above, three gunmen attacked passengers waiting in the baggage claim area at Lod Airport in Tel Aviv, Israel. Specifically, claimant avers that the late Mr. Conde suffered “severe lacerations to his glutueal region from machine gun bullets and grenade shrapnel.” Claimant further avers that Mr. Conde “was rushed to the Tel Hashomer/Haim Sheba Medical Center[.]” where “doctors cleaned and treated the lacerations[.]” Claimant alleges that Mr. Conde “spent six days in the hospital and was released on June 5, 1972 to return to Puerto Rico.”

In support of its claim, claimant has provided, *inter alia*, a contemporaneous medical record; copies of newspaper articles, published in the days following the incident, identifying claimant as one of those wounded in the attack; and a copy of a program from a June 1972 memorial service held in Puerto Rico in memory of the Lod Airport attack, which lists claimant as among those wounded.

The contemporaneous medical record provided with this claim provides little evidence of physical injury. Although the discharge summary provided by the claimant

indicates that Mr. Conde received treatment at the Haim Sheba Medical Center at Tel Hashomer, it notes that he was in “general good condition but for two lacerations [in] the gluteal region.” It also indicates that “[b]oth lacerations were cleaned”; however, there is no indication that the lacerations required suturing or any other treatment beyond cleaning, the extent of which is not detailed in the summary provided. In addition, although the discharge summary notes that “[o]n x-rays small shrapnel was left in the gluteus[,]” it also indicates that the shrapnel “was not visible for the wounds are clean and dry.” Finally, the summary indicates that Mr. Conde “[i]s released [and] needs no further treatment.” Moreover, while the date of June 6, 1972 appears handwritten on this record, it is unclear whether this refers to the date of discharge, or rather some other date; therefore, it is not clear whether Mr. Conde required hospitalization for six days, as the claimant alleges, or was treated and released the same day. The Commission finds that the nature of the treatment disclosed in the summary makes it highly unlikely that the claimant was confined to hospital for such a period.

Given the limited information available in the discharge summary and the absence of any other medical records submitted in support of this claim, the Commission cannot conclude that the claimant’s decedent suffered “a discernible physical injury, more significant than a superficial injury.” On this point, it should be noted that in proceedings before the Commission, the burden of submitting sufficient evidence lies with the claimant. 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.

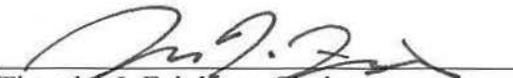
45 C.F.R. § 509.5(b) (2010).

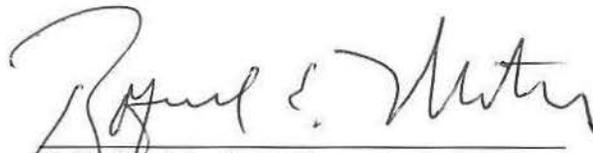
In this case, based on the entirety of the evidence presented, the Commission finds that the claimant has not met its burden of proof in that it has failed to provide evidence sufficient to establish that its decedent “suffered a discernible physical injury, more significant than a superficial injury,” and that the injury be verified by medical records, as required under the Commission’s physical injury standard.

In light of the foregoing, the Commission is constrained to conclude that the claimant, ESTATE OF LUIS CONDE, DECEASED; SAMUEL CONDE LÓPEZ, ADMINISTRATOR, does not qualify for compensation under the January Referral Letter. Accordingly, its claim 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, October 17, 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).