

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

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-010

Decision No. LIB-I-002

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 allegedly sustained during the hijacking of Pan Am flight 73 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.

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 ICSA 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,

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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 was injured when he was hit by a bullet in his elbow during the final attack by the terrorists who had hijacked the plane. The claimant has provided contemporaneous medical documentation in support of his claim.

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

As indicated above, the December Referral Letter tasked the Commission with adjudicating and certifying a category of claims of United States nationals. In order to determine who qualifies as a United States national, the Commission must look to the provisions of ICOSA, the statute under which the referral is made. Under that statute, the Commission is directed to apply, in the following order, “the provisions of the applicable claims agreement” and “the applicable principles of international law, justice and equity” in its deliberative process. 22 U.S.C. § 1623(a)(2) (2006).

Although the Claims Settlement Agreement states that it settles the claims of “United States nationals,” it does not define that term. However, the Commission’s authorizing statute defines the term “nationals of the United States” as “(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens.” 22 U.S.C. § 1621(c) (2006).¹ Accordingly, the Commission holds that it is authorized to adjudicate and certify the claims of persons who meet this definition with respect to their U.S. nationality.

The Claims Settlement Agreement is silent, however, as to *when* a claimant must be a United States national in order to be eligible for compensation under the Claims Settlement Agreement. Therefore, the Commission must look to United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, to make this determination. It is a well-established principle of the law of international claims, which has been applied without exception by both this Commission

¹ The Commission notes that both the LCRA and Executive Order No. 13,477 define the term “national of the United States” by reference to the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22) (2006), which similarly defines the term as a citizen of the United States, or a person who, though not a citizen, owes permanent allegiance to the United States. LCRA § 2(3), 122 Stat. at 2999; Exec. Order No. 13,466, Exec. Order No. 13,477, 73 Fed. Reg. at 65,965.

and its predecessors, the War Claims Commission and the International Claims Commission, that a claim may be found compensable only if it was owned by a United States national at the time the claim arose. *See, e.g., Claim of EUGENIA D. STUPNIKOV against Yugoslavia*, Claim No. Y-2-0071, Decision No. Y-2-0003 (1967); *Claim of ILONA CZIKE against Hungary*, Claim No. HUNG-2-0784, Decision No. HUNG-2-191 (1976); *Claim of JOSEPH REISS against the German Democratic Republic*, Claim No. G-2853, Decision No. G-2499 (1981); *Claim of TRANG KIM against Vietnam*, Claim No. V-0014, Decision No. V-0001 (1982). This principle has also been recognized by the courts of the United States. *See, e.g., Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir. 1957), *cert. denied* 355 U.S. 854 (1957). Indeed, in the statute authorizing the Second Czechoslovakian Claims Program, Congress reaffirmed “the principle and practice of the United States to seek compensation from foreign governments on behalf only of persons who were nationals of the United States at the time” of loss. 22 U.S.C. note prec. § 1642 (2006).

Further, a claim may be found compensable only if it was continuously held by a United States national from the date the claim arose until the date of the claims settlement agreement. *See, e.g., Claim of ESTATE OF JOSEPH KREN, DECEASED, BY MAGDALENA KREN, EXECUTRIX against Yugoslavia*, Claim No. Y-0660, Decision No. Y-1171 (1954); *Claim of RICHARD O. GRAW against Poland*, Claim No. PO-7595, Decision No. PO-8583 (1965); *Claim of DUDE PRIFTI against Albania*, Claim No. ALB-054, Decision No. ALB-157 (1997). Therefore, consistent with its past jurisprudence, the Commission holds 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, at the time the claim arose and continuously thereafter 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 that he has been a United States national 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 dated December 16, 2008 as evidence of the dismissal of this Pending Litigation. 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.

As part of the General War Claims Program, conducted in the 1960s under Title II of the War Claims Act of 1948, as amended, 50 U.S.C. App. § 2017 et seq. (2006), the Commission adjudicated the claims of civilian United States nationals who, while passengers on a ship, were injured as a result of military action by Germany or Japan between September 1, 1939, and December 11, 1941. Congress defined eligible claimants as persons with claims for “loss or damage on account of . . . injury or personal disability.” *Id.* at § 2017a(d)(2). The Commission accordingly concluded that in order for an injury to qualify for compensation it had to be “disabling.” *Claim of Robert Newton Pritchard*, Claim No. W-009, Decision No. W-2271 (1965).

More recently, both the United Nations Compensation Commission (“UNCC”), which compensated for losses resulting from Iraq’s invasion of Kuwait in 1991, and the September 11th Victim Compensation Fund of 2001 (“9/11 VCF”), developed their own threshold standards to apply in determining whether a physical injury was compensable.

The UNCC defined serious personal injury as

(a) dismemberment; (b) permanent or temporary significant disfigurement, such as substantial change to one’s outward appearance; (c) permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; (d) any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.

Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991: Personal Injury and Mental Pain and Anguish, S/AC.26/1991/3, Oct. 23, 1991. The UNCC expressly excluded “bruises, simple strains and sprains, minor burns, cuts and wounds; or other irritations not requiring a course of medical treatment.” *Id.*

For its part, the 9/11 VCF defined physical harm as

(1) . . . a physical injury to the body that was treated by a medical professional within 24 hours of the injury having been sustained, or within

24 hours of rescue, or within 72 hours of injury or rescue for those victims who were unable to realize immediately the extent of their injuries . . . ;
and

(2) In every case not involving death, the physical injury must be verified by contemporaneous medical records created by or at the direction of the medical professional who provided the medical care.

28 C.F.R. § 104.2 (2008).

Based upon the foregoing, and after careful and thorough consideration, the Commission holds 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, the claimant suffered physical injuries while he 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 was hit by a bullet in his left elbow. He further states that after he escaped from the plane he was taken to a hospital in Karachi where he spent several days. The claimant has provided detailed medical records documenting the extent and treatment of his injuries including removal of the bullet.

Based on the evidence submitted, the Commission finds that the claimant's injury meets the standard for physical injury set forth above. Accordingly, claimant is entitled to compensation in this claim.

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COMPENSATION

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation.

Amount

The December Referral Letter states that “the Administration assured Congress that ‘fair compensation’ would include amounts comparable to what was provided for physical injuries in the LaBelle Discotheque settlement—a fixed amount of \$3 million per physical injury claimant.” December Referral Letter, *supra*, ¶ 4.² Indeed, according to the *Congressional Record* of July 31, 2008, the understanding of Congress during its consideration of the LCRA was that compensation would be “comparable to the . . . LaBelle [Discotheque bombing] settlements.” 154 Cong. Rec. S7979 (2008). On this basis, the December Referral Letter recommends that the Commission award this fixed amount for claims that meet the threshold standard for compensability that it establishes. December Referral Letter, *supra*, ¶ 4.

The magnitude of the awards that has been recommended by the Legal Adviser for physical injury claims is a matter of first impression for this Commission. However, each claims settlement is based on a unique set of circumstances, which may in turn lead to breaks with past practices--though without setting a precedent for the future. In order to evaluate whether this recommended fixed amount is appropriate for the purposes of

² As mentioned above, the LCRA required the Secretary of State to certify that proceeds from the settlement would be sufficient to provide “fair compensation of claims of nationals of the United States for wrongful death or physical injury cases pending on the date of enactment of this Act . . .” LCRA § 3, 122 Stat. at 2999.

this agreement, the Commission has carefully reviewed its prior claims programs as well as those of other tribunals and commissions which have adjudicated physical injury claims. The 9/11 VCF program, in particular, provides useful insight in this regard. The awards for serious injury and death in that program ranged from \$250,000 to \$7,100,000 and averaged \$2,080,000. Lloyd Dixon & Rachel Kaganoff Stern, *Compensation for Losses from the 9/11 Attacks* xxiii (RAND Corp. 2004). In the 9/11 VCF program, “serious injuries” were defined as “physical injuries that resulted in hospitalization for one day or more in the immediate aftermath of the attack.” *Id.* The Commission believes that the amount representing the average individual award received under the 9/11 VCF program is a useful base amount for determining what amount would constitute “fair compensation” in this claims program.

In reaching its decision on this point, the Commission has considered the recommendations in the December Referral Letter. Further, it considered the intent of Congress in passing the LCRA, as well as the significance of the terrorist incidents covered and the injuries suffered by the victims. The Commission has also taken note of the length of time that these individuals have waited for justice. Based on the totality of these facts and circumstances, the Commission concludes that \$3,000,000.00 is an appropriate amount of compensation for physical injury claims that meet the Commission’s standard in this claims program. Accordingly, the Commission determines that the claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) is entitled herein to an award of \$3,000,000.00.

Interest

An important question to be considered in this claim is whether the claimant should be granted interest as part of his award. The Claims Settlement Agreement, the LCRA, and the December Referral Letter are silent with regard to the issue of interest.

As noted above, however, the December Referral Letter includes a recommendation calling for awards under the Claims Settlement Agreement to be in a "fixed amount."

In prior programs, also authorized under Title I of the ICOSA, the Commission has awarded interest on compensable claims for the nationalization or other taking of property. In doing so, the Commission relied on sections 7 and 8 of the ICOSA, which provide for the payment of "accrued interest" on awards certified by the Commission. 22 U.S.C. §§ 1626-27 (2006). Under those provisions, however, the Commission is not required to make an award of accrued interest, but rather is permitted to do so, if it determines that such an award is appropriate. *See, e.g., Claim of Martin M. Conklin*, Docket No. PAN-3, Decision No. 1 (1954).

The Commission has not had occasion to address the issue of awarding accrued interest on tort claims under Title I of the ICOSA; however, it previously did so under Title III of that statute. In its Panel Opinion No. 5, issued in April 1956, the Commission held that "an award of interest should not be made with respect to . . . personal tort claims. . . ." *Foreign Claims Settlement Commission, Fourth Semiannual Report to the Congress*, 12 (Jan.-June 1956). The Commission's approach in that program is in accord with that of other international tribunals. For example, the Mixed Claims Commission, United States and Germany, concluded in its Administrative Decision No. III that

[t]here is no basis for awarding damages in the nature of interest where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely. In claims of this class no such damages will be awarded . . . To this class belong claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor.

Mixed Claims Commission United States and Germany, *Administrative Decisions and Opinions of a General Nature 1925-1926*, 62 (1926).

Awards of interest were also denied in claims of physical injury or wrongful death presented to the United States – Mexican General Claims Commission. A. H. Feller, *The Mexican Claims Commissions 1923-1934*, 310-311 (1935). Indeed, Professor Jackson Ralston notes that “the question of the allowance of interest has in fact arisen before almost every international tribunal . . . and [its allowance has been considered rightful] *except where the claim was for a tort purely*” (emphasis added). Jackson H. Ralston, *The Law and Procedure of International Tribunals*, at 129 (1926).

In addition, the Department of State’s *Digest of International Law*, in its chapter on personal injury claims, contains some detailed discussion relating to interest awards, including the following:

When a compromise sum or an arbitrary “round sum” or “lump sum” is paid in settlement of a case, it is frequently difficult to determine whether or not interest was taken into consideration in arriving at the figure named. Interest is often not payable on such sums, evidently on the theory that since the principal amount was not fixed with precision, it would be inequitable to allow interest. (footnotes omitted.)

Marjorie M. Whiteman, *Digest of International Law 1991-92* (1967).

After consideration of the applicable principles of international law and the precedent decisions discussed above, the Commission is constrained to conclude that the claimant herein is not entitled to interest as part of his award. Therefore, the award of \$3,000,000.00 made herein constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

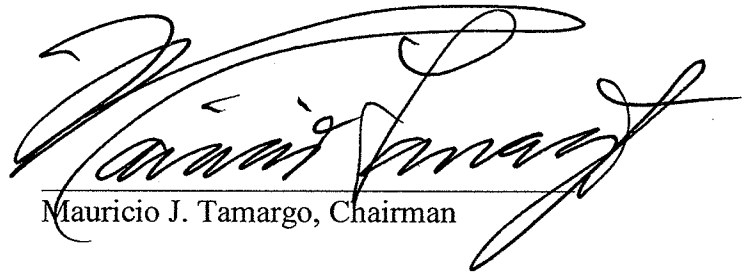
Accordingly, the Commission enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-27.

AWARD

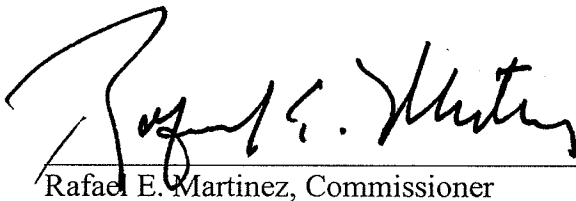
Claimant Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

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

JUL 28 2009



Mauricio J. Tamargo, Chairman



Rafael E. Martinez, Commissioner

**This decision was entered as the
Commission's Final Decision on
SEP 04 2009**

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).