

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

In the Matter of the Claim of	}	
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	}	
5 U.S.C. §552(b)(6)	}	Claim No. LIB-I-016
	}	
	}	Decision No. LIB-I-038
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	
Counsel for Claimant:	}	Stuart H. Newberger, Esq. Crowell & Moring LLP
Oral hearing held on July 21, 2011.		

FINAL DECISION

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

By Proposed Decision entered February 18, 2010, the Commission denied the claimant's physical injury claim on the ground that the claimant had failed to meet his burden of proving that his alleged injuries satisfied the Commission's standard for physical injury. Specifically, the Commission determined that the claimant failed to establish that the injury was "more significant than a superficial injury," as that term is used in its physical injury standard, or that the injury was caused by the hijacking incident.

By letter dated March 8, 2010, the claimant objected to the Commission's Proposed Decision and requested an oral hearing. Under cover of his March 8, 2010

letter, the claimant provided additional evidence in support of his claim including an updated medical opinion dated August 4, 2009. On June 30, 2011, the claimant, through counsel, filed "Claimant's Objection and Request for Oral Hearing Before the Commission" ("Objection Brief"), setting forth his arguments in objecting to the Proposed Decision. The oral hearing was held on July 21, 2011.

DISCUSSION

I. Applicable Standard for Physical Injury Claims

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

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

each eligible wrongful death claimant. In that circumstance, the Commission took due notice of the Department's recommendation, and the equitable consideration that similar damages be awarded to similarly-situated claimants, and determined to compensate wrongful death victims in the same amount as the State Department awarded to eligible wrongful death claimants included in the Pending Litigation.

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

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

¹ December Referral Letter at para. 3.

II. Claimant's Physical Injury

Claimant asserts that while escaping from Pan Am Flight 73 his left foot was injured when it was jammed under the exit door as he tried to exit onto a wing of the airplane. He further asserts that this injury required medical treatment, including stitches and immobilization in a special boot. The evidence submitted in this claim consists of a recent medical opinion, claimant's own affidavit, documentation regarding the reasons for the unavailability of contemporaneous medical records, and finally, the live testimony of the claimant himself during the oral hearing.

At the outset, the Commission notes that the claimant had employed reasonable efforts to obtain medical records created contemporaneously with the injury, which, by virtue of document retention policies, are unavailable. The Commission further notes that claimant was subject to examination at the oral hearing (including an inspection of his injured foot), and that, as noted, claimant has submitted corroborating evidence including a medical opinion dated August 4, 2009 from a Dr. DiMenna. Based on Dr. DiMenna's examination of the claimant he determined that the current condition of claimant's foot is consistent with the trauma described by claimant. The doctor further stated that, in order to correct the deformity caused by the injury, claimant would be required to undergo surgery.

The Commission finds Dr. DiMenna's report to be thorough, persuasive, and consistent with claimant's narrative and the visible deformity and scarring of claimant's foot. The claimant provided credible testimony at the hearing, describing in detail the ordeal that he and the other passengers endured. Specifically, claimant testified that his left "foot was caught between the bottom of the door ... [and] the exit" and "because of

the push of the people coming out of the plane ... pushing from the right ... [his] foot got jammed into [a] small ... area.” causing his foot to be “torn by the pressure of the people ... pushing to get out of the exit.” He further testified that when he arrived at the terminal he “took off [his] shoe ... [and] socks [to find] ... a gashing wound” and he noted that “the big toe and the other toe[s] next to it ... were off track or something” and that the front of his shoe had “two inches cut apart.” Claimant went on to testify that when he arrived at the hospital “they took X-rays ... [a]nd ... a doctor came to [him] and ... said, ‘... you have dislocated three of your toes ... [w]e can ... take care of your gashing wound right now ... so that it can stop the bleeding” and, further, “advised [him] ...[to] have [an] operat[ion] [on his] dislocated toes.”

Based on the recent medical records, corroborated by claimant’s testimony, the Commission finds the following facts to be true: that as a result of claimant’s left foot becoming “jammed” under the exit door he suffered a dislocation deformity of three of his toes and suffered a deep wound to his foot; and that claimant sought and received medical treatment for his injury immediately after the incident in Pakistan. Based on these findings the Commission is now persuaded that the claimant has satisfied the Commission’s standard for physical injury under the December Referral Letter. Accordingly, the Commission now finds him entitled to compensation as set forth below.

COMPENSATION

In the *Claim of* ^{5 U.S.C. §552(b)(6)}, *supra*, the Commission held that \$3 million is an appropriate amount of compensation for physical injuries that meet the Commission’s standard in this claims program. The Commission also held that compensable physical injury claims in this claims program are not entitled to interest as part of the awards

granted therein. *Id.* Accordingly, the Commission determines that the claimant, ⁵ U.S.C. §552(b)(6)

, is entitled herein to an award of \$3,000,000.00 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

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

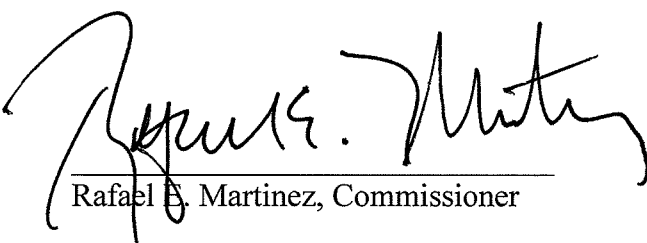
AWARD

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

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



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
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-016

Decision No. LIB-I-038

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 Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986.

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

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

22 U.S.C. § 1623(a)(1)(C) (2006).

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

Chairman, Foreign Claims Settlement Commission (“December Referral Letter”). The category of claims referred consists of

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

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

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

falling within the terms of the Claims Settlement Agreement. On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this Libya Claims Program pursuant to the 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 10, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the elements of the claim, including evidence of: his United States nationality; his inclusion 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; the dismissal of *Patel*; and his physical injuries.

The claimant states that he 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, claimant's left foot was injured as he attempted to escape during the final attack by the terrorists who had hijacked the airplane. By letter dated July 26, 2009, the Commission recommended that medical records be submitted in support of the claim. By letter dated August 26, 2009, the claimant responded that contemporaneous medical records could not be located but in lieu of contemporaneous records a report, including x-rays, from Dr. Joseph DiMenna dated August 4, 2009 was submitted. Subsequently, on December 3, 2009, the claimant submitted documentation verifying the efforts undertaken to retrieve contemporaneous documents.

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: (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, and that it has been held by a United States national continuously 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 his as a party. Additionally, the claimant has

provided a Stipulation of Dismissal as evidence of the dismissal of this Pending Litigation dated December 16, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

Claim for Injury Other than Emotional Distress

Claimant has provided with his Statement of Claim a copy of the Second Amended Complaint in the Pending Litigation, in which he states a cause of action for, *inter alia*, battery and assault 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 the *Claim of*
supra, that in order for a claim for physical injury to be considered compensable, a claimant:

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

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

Physical Injury

According to his Statement of Claim, claimant, ^{Personally Identifiable Information} ~~Redacted under 5 U.S.C. §552(b)(7)~~ 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 jammed his left foot in the escape door opening, lacerating his foot, and then jumped from the door, dislocating his toes. He further states that he was taken to the hospital in Karachi where he received x-rays, his wounds were stitched and his left foot was fitted for a boot. Claimant has provided evidence that he unsuccessfully attempted to retrieve records of the medical treatment he received upon his return to the United States, his treating physician at the time was Dr. Goberman. According to an affidavit submitted by claimant's counsel, Dr. Goberman stated in a phone conversation that he recalls treating the claimant after the hijacking incident, but he is unable to recall any details of the treatment. In light of the unavailability of contemporaneous records, the claimant has provided a medical report from Dr. DiMenna dated August 4, 2009, which includes x-rays of the claimant's left foot. In the medical report the doctor states that the deformities of claimant's foot are "consistent with a trauma", but does not elaborate further.

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

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

45 C.F.R. 509.5(b)(2008). The Commission finds that the claimant has not met the burden of proof in that he has failed to provide evidence establishing that he suffered a discernible physical injury, more significant than a superficial injury, as a result of an incident referred to in the Pending Litigation, as required under the Commission's physical injury standard.

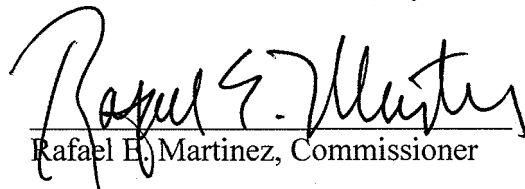
In light of the foregoing, the Commission is constrained to conclude that the claimant, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) does not qualify for compensation under the December Referral Letter. Accordingly, while the Commission sympathizes with the claimant for the ordeal that he must have endured during the terrorist incident in question, his claim based on a physical injury suffered as a result of that incident must be and is hereby denied.

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

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

FEB 18 2010


Mauricio J. Tamargo, Chairman


Rafael E. Martinez, Commissioner

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