

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

Counsel for Claimant:

Oral hearing held on July 21, 2011.

Claim No. LIB-I-017

Decision No. LIB-I-012

Stuart H. Newberger, Esq.  
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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 September 23, 2009, the Commission denied the claimant's physical injury claim on the ground that the claimant failed to meet his burden of proving that his alleged injuries satisfied the Commission's standard for physical injury. Specifically, the Commission determined that claimant failed to provide evidence sufficient to establish that the friction burn to his arm was a discernible, more-than-superficial, physical injury, and that the dehydration and hepatitis A ("illness") from which he allegedly suffered was caused by the terrorist incident.

By letter dated October 2, 2009, the claimant objected to the Commission's Proposed Decision and requested an oral hearing. On December 1, 2009 and January 27, 2010, the claimant provided additional evidence in support of his claim, including additional contemporaneous medical records and a medical opinion dated November 24, 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 claimant's 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.<sup>1</sup> 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* <sup>5 U.S.C. §552(b)(6)</sup> 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* <sup>5 U.S.C. §552(b)(6)</sup> 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

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<sup>1</sup> December Referral Letter at para. 3.

for the physical injury within a reasonable time; and verify his injury by medical records, in order to establish a compensable claim.

### *II. Friction Burn*

By its Proposed Decision, the Commission denied the portion of the present claim based on a friction burn to claimant's right arm because he failed to establish that this injury satisfied the Commission's standard for physical injury; specifically, that claimant failed to establish that the injury was more than superficial.

The medical records, as supplemented by the claimant, specify that he suffered a "[s]crape wound at upper arm and elbow," a "wound (skin only) near the right elbow," and "sl abrasion R elbow." The claimant testified at the oral hearing that the staff at the Goethe Clinic in Frankfurt, Germany, cleaned the wound and placed a dressing on it. The Commission notes that the medical records submitted in support of this claim contain no indication of further treatment of the wound. Thus, even accepting the evidence and claimant's testimony as true, it fails to establish that the wound was more than superficial. The Commission, therefore, affirms its holding that the claimant has not met his burden of proving that this friction burn meets the Commission's threshold standard for physical injury.

### *III. Illness*

By its Proposed Decision the Commission denied the portion of the claim for physical injury based on claimant's assertion that he suffered from hepatitis A as a result

of the terrorist incident. Specifically, the Commission held that claimant's allegations failed due to a lack of medical records supporting the diagnosis of hepatitis A and, further, that the claimant had not established that the illness was caused by the incident.

In support of his objection, the claimant provided additional medical records and his own live testimony during the oral hearing. The additional medical records include a report dated September 12, 1986 from the Goethe Clinic confirming that the claimant had hepatitis A. Also included in the newly submitted medical records is a report dated November 24, 2009 from a Dr. Ehrensaft, wherein he provides his opinion that "the hijacking's negative effects on <sup>5 U.S.C. §552(b)</sup><sub>(6)</sub> immune system could have to a reasonable degree of medical certainty turned a benign asymptomatic hepatitis A exposure into Mr. <sup>5 U.S.C. §552(b)</sup><sub>(6)</sub> full blown case of hepatitis A." Both the claimant and Dr. Ehrensaft assert that the stress of the incident weakened claimant's immune system, and that the stress had the effect of turning a benign asymptomatic hepatitis A exposure (which claimant acknowledged he acquired prior to the attack), into a full blown case of hepatitis A. While this evidence supports a diagnosis of hepatitis A, it does not assist in demonstrating that the illness was caused by the incident in question.

In order to determine the relevant factors that may have contributed to the claimant's illness, the Commission notes the following narrative timeline of events leading up to and following the hijacking. On July 22, 1986, claimant along with his mother and sister arrived in India. On or about July 26, 1986, claimant went to a hospital

in India complaining of abdominal pain, fever and diarrhea. By August 5, 1986, claimant's condition appears to have improved and by August 15, 1986, he was considered "well". On the day before the hijacking<sup>2</sup>, claimant drank unboiled water in Karachi and began to have vague abdominal pain. On September 5, 1986 claimant endured the 16 hour hijacking ordeal during which he was only provided a small amount of food and water. On September 6, 1986, the evening after the hijacking, while staying overnight at a hotel in Karachi, claimant had a fever, abdominal pain and hallucinations. On September 7, 1986, claimant boarded a flight in Karachi bound for Frankfurt, Germany, and scheduled to continue to the United States.

Claimant testified at the Oral Hearing that during this flight to Frankfurt he began to experience abdominal pain as well as dehydration and delirium. Upon arriving in Frankfurt, claimant was transported to the Goethe Clinic for treatment. The primary clinical diagnosis of claimant was "gastrointestinal infection" along with secondary diagnosis of "Hepatitis A...cold [and] shock (psych.)." Contemporaneous medical records establish that claimant was treated with "i.v. infusion with glucose and electrolyte, an expectorant ... and paracetamol." On September 10, 1986, claimant boarded a flight from Frankfurt and returned to the United States. During the flight, claimant vomited but did not experience diarrhea.

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<sup>2</sup> The contemporaneous medical record notes that this occurred on September 5, 1986 and that the hijacking occurred on September 6, 1986, although the hijacking actually occurred on September 5, 1986. Therefore, the Commission concludes that, regardless of the dating, the record reflects that the event occurred the day before the hijacking.


Upon his return to the United States, the record establishes that claimant went to a Kaiser Permanente facility, but was not admitted. He was instructed to drink plenty of fluids as well as "Ensure." On September 15, 1986, claimant felt better, however, he began to look jaundiced. On September 16, 1986, the Clinic notified claimant that the blood tests had determined that he was suffering from hepatitis A. On October 2, 1986, claimant's pediatrician, Dr. Johnson, approved his return to school.

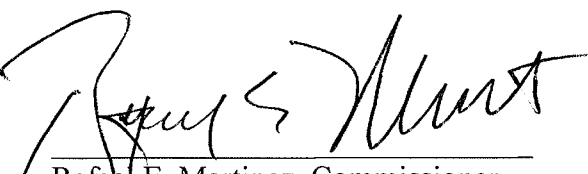
The record of this claim, and in particular the medical record, reveals a complicated history of illnesses, before, during and after the period of the hijacking. From this record, it is simply not possible for the Commission to conclude, with any reasonable degree of confidence, that the injury for which claimant seeks compensation here – the onset of a full blown case of hepatitis A – was caused by stress attendant to the hijacking incident. Consequently, based on the evidence submitted in support of this claim, the Commission finds that the claimant has failed to establish that the illness he attributes to the hijacking incident was in fact caused by that incident as opposed to the illness he contracted while in India or the illness caused by the consumption of contaminated water on the evening prior to this incident. The Commission, therefore, affirms its holding that the claimant has not met his burden of proof in establishing that the illness on which this claim is based meets the threshold standard for physical injury.

CONCLUSION

In summary, therefore, the Commission affirms that this claim for compensation under the December Referral Letter must be denied. Accordingly, while the Commission sympathizes with the claimant for the ordeal that he endured during the terrorist incident in question, the denial set forth in the Proposed Decision in this claim is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, August 31, 2011  
and entered as the Final Decision  
of the Commission.

  
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Timothy J. Feighery, Chairman

  
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Rafael E. Martinez, Commissioner



FOREIGN CLAIMS SETTLEMENT COMMISSION  
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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  
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Claim No. LIB-I-017

Decision No. LIB-I-012

Counsel for Claimant:

Stuart H. Newberger, Esq.  
Crowell & Moring LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by the claimant 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 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, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6)

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 received a burn on his arm while sliding down the emergency chute to escape from the terrorists who had hijacked the plane, suffered severe dehydration and contracted Hepatitis.

#### 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*

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 the claimant was a United States national at the time of the injury on which his claim is based.

#### *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 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.

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* Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), that in order for a claim for physical injury to be considered compensable, a claimant:

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

*Physical Injury*

According to his Statement of Claim, claimant Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) 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 stated that “[he] received a burn on [his] left arm from sliding down the escape chute [which] left a scar that was visible...for approximately ten years.” Personally Identifiable Information  
Redacted under 5 U.S.C. §552(b)(6) Aff. ¶ 25. He further stated that “[he] was diagnosed with severe dehydration and Hepatitis...[due to] the conditions on Flight 73 during the 17 hour ordeal.” Id. at ¶ 27. The claimant did not provide any medical records with his original submission to support his claim or otherwise to document the injury on which his claim is based.

The Commission, by letter dated July 6, 2009, requested that the claimant provide medical records to support his claim. In response, by letter dated August 26, 2009, claimant provided contemporaneous medical records along with an affidavit explaining a small inconsistency in his original statement<sup>1</sup>.

The medical records submitted by the claimant confirm that he received a burn on his arm described as “wound (skin only) near the right elbow.”<sup>2</sup> As noted above the claimant states that the burn left a scar on his arm which was visible for ten years. However, he has not provided any evidence of the permanency of his scar nor details of any treatment.

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 his injury was

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<sup>1</sup> Claimant states that he had recollected that he received a burn on his left arm but upon his review of the medical records it was clear that it was on his right arm.

<sup>2</sup> Claimant's submission at Personally Identifiable Information  
Redacted under 5 U.S.C. §552(b)(6)

more significant than a superficial injury, as required under the Commission's physical injury standard and therefore this portion of the claim must be and is hereby denied.

The medical records submitted by the claimant regarding his claim of severe dehydration and hepatitis contain a timeline of the progression of claimant's illness. According to the timeline the claimant went to India on July 20, 1986 and became ill soon after arrival. The illness which included fever and vomiting lasted for approximately four weeks. The claimant reportedly began to improve during the two weeks preceding the terrorist incident but relapsed thereafter. It is noted in the medical history, that on the day before the flight, claimant drank un-boiled water in Karachi, whereas his mother and sister drank boiled water<sup>3</sup>. The medical records include a diagnosis of a suspicion of hepatitis. However, the laboratory results which would confirm a diagnosis of hepatitis have not been submitted.

The Commission has carefully reviewed the medical records submitted by the claimant in support of his claim for severe dehydration and hepatitis due to the terrorist incident. However, the Commission finds that the claimant has not met the burden of proof in establishing that the injury on which this claim is based meets the standard for physical injury set forth above because he has failed to provide medical records supporting the diagnosis of suspected hepatitis. Further, the records, in fact, document that the claimant had been ill for several weeks prior to the incident during which the claimant experienced similar symptoms to those claimed to be caused by the terrorist incident. The Commission is, therefore, not persuaded that the evidence submitted supports a finding that claimant's conditions were caused by the hijacking incident. Accordingly, this portion of claimant's claim must also be and hereby is denied as

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<sup>3</sup> Id. at Personally Identifiable Information  
Redacted under 5 U.S.C. §552(b)(6)

sufficient medical records have not been provided and the injury did not result from the incident, as required by the Commission's 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.

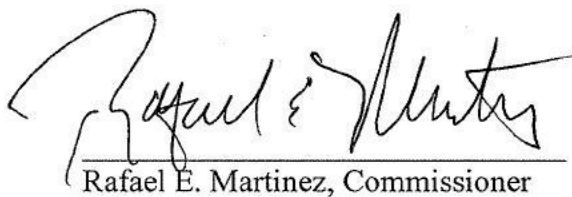
The Commission finds it unnecessary to make determinations with respect to other aspects of this claim.

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

SEP 23 2009



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).