



Security Council

Distr.
GENERAL

S/AC.26/2004/12
23 September 2004

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

SPECIAL REPORT AND RECOMMENDATIONS MADE BY THE "D1" PANEL
OF COMMISSIONERS CONCERNING THIRTY CLAIMS FILED PURSUANT
TO GOVERNING COUNCIL DECISION 12

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Introduction

1. This is the twenty-second report to the Governing Council of the United Nations Compensation Commission (the “Commission”) submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the “Rules”) by the “D1” Panel of Commissioners (the “Panel”), being one of two Panels appointed to review individual claims for damages above 100,000 United States dollars (USD) (category “D” claims). This special report contains the determinations and recommendations of the Panel in respect of three category “B” claims and 27 category “C” claims filed pursuant to Governing Council decision 12 (S/AC.26/1992/12), submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules.

2. All 30 claims were submitted by the Government of Kuwait. No category “D” claims have been filed by the claimants. The Executive Secretary has referred these 30 claims to the Panel for review as the categories “B” and “C” claims processing programmes were completed in 1994 and 1999 respectively.¹ The three category “B” claims² have been transferred to category “C” and reviewed in accordance with the category “C” methodologies, because they comprise claims for mental pain and anguish resulting from personal injury, a loss which does not fall within the scope of category “B” claims.³ Therefore all 30 claims have been reviewed by the Panel in accordance with the applicable category “C” methodologies and compensation criteria.

I. BACKGROUND

A. Background information

3. In reviewing the claims in this special report, the Panel has taken into consideration relevant material, including information accompanying the submission of these claims provided by the Executive Secretary pursuant to article 32 of the Rules. In addition, the Panel has considered information and views presented by Iraq and other Governments in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules. The Panel has also considered the reports of the category “C” Panel of Commissioners (“the ‘C’ Panel”) insofar as they set out the methodologies and compensation criteria that are relevant to the claims included in this special report.

B. Applicable evidentiary standard

4. The evidentiary standard to be applied in reviewing category “C” claims is set out in Governing Council decision 1 (S/AC.26/1991/1), and more specifically in article 35 of the Rules. Article 35(1) imposes the evidentiary requirement that:

“Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted.”

5. With respect to category “C” claims, article 35(2)(c) of the Rules provides that the claims must be documented by appropriate evidence of the circumstances and amount of the claimed loss. It stipulates that documents and other evidence required will be the reasonable minimum that is appropriate under the particular circumstances of the case. A lesser degree of documentary evidence will ordinarily be sufficient for smaller claims, such as those below USD 20,000.

II. REVIEW OF THE CLAIMS BY THE PANEL

6. All 30 claims included in this special report comprise losses resulting from injuries sustained by the claimants as a result of the explosion of landmines and other ordnance in Kuwait after 2 March 1991. The claimants have not filed claims for the physical injury (although supporting documentation regarding the injuries has been provided in all cases), but rather for the associated mental pain and anguish suffered and, in three cases, loss of earnings due to an inability to work as a result of the injuries sustained. The claimants sustained a wide range of injuries – from temporary injuries such as deep wounds to parts of the body for which the claimants successfully underwent treatment – to permanent injuries such as the complete loss of limbs or eyesight. Nine claimants sustained temporary injuries only, 15 claimants sustained permanent injuries, and the remaining six claimants suffered both temporary and permanent injuries.

7. When reviewing the claims, the Panel has applied the category “C” methodologies and compensation criteria established by the “C” Panel in respect of “C2” claims for mental pain and anguish and in respect of “C6” claims for loss of earnings. During the regular category “C” programme, claims for mental pain and anguish were subject to individual review, while those for loss of earnings were subject to the computerized application of a compensation formula. The three category “B” claims included in this special report have been subject to individual review as they comprise mental pain and anguish losses.

A. Mental pain and anguish

8. In respect of the mental pain and anguish losses included in all 30 claims, the Panel has applied the approach taken by the “C” Panel in its report for the First Instalment of category “C” claims, in which it determined that once the fact of injury had been proven, the presence of mental pain and anguish could reasonably be assumed.⁴ In its report for the Seventh Instalment of category “C” claims, the “C” Panel determined that a statement by the claimant mentioning or implying a causal link between Iraq’s invasion and occupation of Kuwait and the injury, whether provided on the claim form or separately, created a presumption that the injury was attributable to Iraq.⁵

9. The Panel notes the evidentiary standard for category “C” claims set out in article 35(2)(c) of the Rules (see paragraph 4 above). The Panel finds that all 30 claimants have submitted sufficient documentary evidence to establish the fact of injury and the requisite causal link between the injury and Iraq’s invasion and occupation of Kuwait, in the form of medical reports and photographs depicting the injuries sustained. Accordingly, the Panel recommends awards of compensation for the mental pain and anguish suffered by the claimants in accordance with the ceilings set out in Governing Council decision 8 (S/AC.26/1992/8).

10. The ceilings set out in decision 8 that are applicable to the claims included in this special report are USD 5,000 for temporary injuries and USD 15,000 for permanent injuries. These amounts are payable cumulatively where the claimant suffers more than one distinct injury. The Panel notes that 16 of the claimants included in this special report sustained two or more distinct injuries. The ceiling amounts that may be awarded to claimants for mental pain and anguish pursuant to decision 8 are USD 30,000 per claimant and USD 60,000 per family unit.

B. Loss of salary

11. There are three claims for loss of earnings due to an inability to work as a result of the injuries. The Panel applies to these claims the principles adopted by the “C” Panel in its report for the Seventh Instalment of category “C” claims. In this report, the “C” Panel determined that claims by gainfully employed persons whose ability to work had been permanently or temporarily affected by a disability or injury, could be classified as employment-related support claims, and that these claims should be reviewed in accordance with the “C6” loss of salary methodology. The “C” Panel also included in the category of employment-related support claims, claims by persons who were not employed, but who, as a result of a permanent disability, might never be able to be fully employed.⁶

12. The “C” Panel noted that employment-related claims comprised very different types of losses, often arose out of very different factual circumstances, and raised legal and valuation issues specifically relevant to the particular type of loss. Considering these losses to be among the most complex to be processed, the “C” Panel adopted a methodology entailing: (a) the review of sample claims, (b) the use of statistical data regarding the patterns of evidence and the amounts claimed, (c) a detailed study of employment-related legislation, international standards and factual information regarding employment practices in Iraq and Kuwait, and (d) the computerized application of a compensation formula based on all factors considered.⁷ The compensation formula developed by the “C” Panel is based on the application of a multiplier of seven to the asserted monthly salary that the claimant was earning immediately before Iraq’s invasion and occupation of Kuwait in order to determine the amount of compensation to be awarded. The Panel has applied this compensation formula to the three claims that include a loss of earnings component.

13. The Panel accordingly recommends awards of compensation calculated in accordance with the compensation formula established by the “C” Panel and described in paragraph 12 above.

III. RECOMMENDATIONS OF THE PANEL IN RESPECT OF THE CLAIMS

14. The Panel finds that all 30 claims are compensable under the category “C” methodologies and compensation criteria and recommends awards of compensation as set out in the tables below. As stated in paragraph 6 above, nine claimants sustained temporary injuries, 15 claimants sustained permanent injuries, and the remaining six claimants suffered both temporary and permanent injuries.

Table 1. Recommended awards in respect of nine claimants with temporary injuries

<u>UNCC claim number</u>	<u>Claimed amount (USD)</u>	<u>Recommended award (USD)</u>
1854420	Temporary MPA ^a	5,000
1854423	Temporary MPA ^b	10,000
1854425	Temporary MPA	5,000
1854426	Temporary MPA	5,000
1854427	Temporary MPA	5,000
1854430	Temporary MPA	5,000
1854432	Temporary MPA	5,000
1854435	Temporary MPA ^b	20,000
1854444	Temporary MPA ^b	10,000
<u>Total</u>	MPA	70,000

^a “MPA” indicates a claim for mental pain and anguish. To indicate a claim for MPA, claimants do not specify a particular amount, but simply tick a box on the claim form.

^b These claimants sustained two or more temporary injuries.

Table 2. Recommended awards in respect of fifteen claimants with permanent injuries

<u>UNCC claim number</u>	<u>Claimed amount (USD)</u>	<u>Recommended award (USD)</u>
1854421	Permanent MPA	15,000
1854422	Permanent MPA	15,000
1854424	Permanent MPA ^a	30,000
1854428	Permanent MPA	15,000
1854429	Permanent MPA	15,000
1854433	Permanent MPA ^a	30,000
1854436	Permanent MPA + 4,117.65 ^b	19,117.65
1854437	Permanent MPA	15,000
1854438	Permanent MPA ^a	30,000
1854439	Permanent MPA ^a	30,000

<u>UNCC claim number</u>	<u>Claimed amount (USD)</u>	<u>Recommended award (USD)</u>
1854440	Permanent MPA	15,000
1854442	Permanent MPA ^a	30,000
1854445	Permanent MPA + 98,615.92 ^b	27,110.73
1854446	Permanent MPA ^a	30,000
1854448	Permanent MPA ^a	30,000
<u>Total</u>	MPA + 102,733.57	346,228.38

^a These claimants sustained two or more permanent injuries.

^b Claims for both MPA and “C6” losses.

Table 3. Recommended awards in respect of six claimants with both temporary and permanent injuries

<u>UNCC claim number</u>	<u>Claimed amount (USD)</u>	<u>Recommended award (USD)</u>
1854431	MPA	20,000
1854434	MPA	20,000
1854441	MPA	20,000
1854443	MPA + 98,615.92 ^a	35,211.07
1854447	MPA	20,000
1854449	MPA	20,000
<u>Total</u>	MPA + 98,615.92	135,211.07

^a Claims for both MPA and “C6” losses.

IV. OTHER ISSUES

A. Exchange rates

15. For the purpose of calculating recommended amounts, the “C” Panel determined that for claims stated in Kuwaiti dinars, the currency exchange rate is the rate of exchange in effect on 1 August 1990 for converting Kuwaiti dinars into United States dollars. The Panel adopts the exchange rate

determined by the “C” Panel in the calculation of the recommended amounts for the claims included in this special report.

B. Interest

16. The Panel notes the view expressed by the “C” Panel in its report for the First Instalment of category “C” claims,⁸ that the phrase “the date the loss occurred” in Governing Council decision 16 (S/AC.26/1992/16)⁹ should be interpreted to be a single fixed date for all category “C” claims and that the date of Iraq’s invasion and occupation of Kuwait, namely 2 August 1990, should serve as the fixed date. The Panel finds, however, that this date does not apply to the claims included in this special report. For these claims, the date the loss occurred should be taken to be the date of the physical injury, which is available on record in respect of each of the 30 claims.

V. RECOMMENDED AWARDS

17. In respect of the 30 claims the subject of this special report, the Panel recommends a total award of compensation of USD 551,439.45 as set out in tables 1, 2 and 3 above.

VI. SUBMISSION OF THE REPORT

18. The Panel respectfully submits this report through the Executive Secretary to the Governing Council pursuant to article 38(e) of the Rules.

Geneva, 23 June 2004

(Signed) R.K.P. Shankardass
Chairman

(Signed) G. Abi-Saab
Commissioner

(Signed) M.C. Pryles
Commissioner

Notes

¹ The Executive Secretary referred the 30 claims the subject of this special report, to the Panel by a special memorandum.

² UNCC claim numbers 1854425, 1854426 and 1854427.

³ In its first instalment report, the category “B” Panel of Commissioners (“the ‘B’ Panel”) confirmed that claims for mental pain and anguish should not be advanced under category “B”, but rather should be made under either category “C” or “D”. In reaching this conclusion, the “B” Panel made a distinction between claims for mental injuries, which fell within its jurisdiction, and claims for mental pain and anguish, which did not. See chapter II of the “Recommendations made by the Panel of Commissioners concerning individual claims for serious personal injury or death (category ‘B’ claims)” (S/AC.26/1994/1).

⁴ See page 112 of the “Report and recommendations made by the Panel of Commissioners concerning the first instalment of individual claims for damages up to US\$100,000 (category ‘C’ claims)” (S/AC.26/1994/3) (“report for the First Instalment of category ‘C’ claims”). See also paragraph 136 of the “Report and recommendations made by the Panel of Commissioners concerning the seventh instalment of individual claims for damages up to US\$100,000 (category ‘C’ claims)” (S/AC.26/1999/11) (“report for the Seventh Instalment of category ‘C’ claims”).

⁵ Paragraph 118.

⁶ See paragraph 284 of the report for the Seventh Instalment of category “C” claims. In respect of the three claims with “C6” losses included in this special report, two of the three claimants were students at the time of injury and are therefore claiming for the loss of future earnings, while the remaining claimant was employed at the time of injury.

⁷ See paragraphs 258 and 290 of the report for the Seventh Instalment of category “C” claims.

⁸ See chapter II.G of the report for the First Instalment of category “C” claims, pages 32-33.

⁹ Governing Council decision 16 provides that “[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.” The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
