

U.S. Department of
Homeland Security

United States
Coast Guard




Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 1-800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2446 1134

5890/DWHZ
11 June 2012

Kenneth Beaird


RE: Claim Number: N10036-1753

Dear Mr. Barksdale:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on claim number N10036-1753 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request.


Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number N10036-1753.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,


Claims Adjudication Division
National Pollution Funds Center
U.S. Coast Guard

Kenneth Beaird


CERTIFIED MAIL - RETURN RECEIPT REQ:
Number: 7011 1570 0001 2446 1141

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1753
Claimant	Kenneth Beard
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$64,096.69

FACTS

On or about 20 April 2010, the Mobile Offshore Drilling Unit Deepwater Horizon (Deepwater Horizon) exploded and sank in the Gulf of Mexico. As a result of the explosion and sinking, oil was discharged. The Coast Guard designated the source of the discharge and identified BP as a responsible party (RP). BP accepted the designation and advertised its OPA claims process. On 23 August 2010, the Gulf Coast Claims Facility (GCCF) began accepting and adjudicating certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 10 April 2012, Kenneth Beard via his legal representative, Mr. Arthur Barksdale of Vance, Lotane & Burkhardt, PA (referred to collectively as "Claimant") presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$64,096.69 for loss of profits and impairment of earnings capacity to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill.

The Claimant works in Destin Florida as an ad hoc freelance fishing captain on boats owned by friends and for two separate companies, Deep Sea Adventures and Top Gun.¹ The Claimant alleges he lost 47 fishing trips in 2010 totaling \$8,958.00 in damages and other lost income from non calls and a lack of vacationers.²

APPLICABLE LAW

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone, as described in § 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. One type of damages available pursuant to 33 C.F.R. §136.231 is a claim for loss of profits or impairment of earning capacity due to injury to or destruction of natural resources.

Under 33 C.F.R. § 136.233 a claimant must establish the following:

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.

¹ Hardship letter from Kenneth Beard undated.

² Hardship letter from Kenneth Beard undated.

- (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 C.F.R. § 136.235, the amount of compensation allowable for a claim involving loss of profits or impairment of earning capacity is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for-

- (a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertaken, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local, and Federal taxes.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support his claim, the Claimant submitted:

- Vance, Lotane & Bookhardt, P.A. intro letter dated 10 April 2012
- Representation letter dated 27 March 2012
- Gulf Coast Claims Facility Full Review Final Payment claim form
- Claimant's hardship letter undated
- 2008 1099R from State of Florida for \$7,693.50
- 2008 1099R from Defense Finance and Accounting Service for \$28,145.88
- 2008 W-2 from Select Employment Services Inc for \$430.50
- 2008 Form 1040 U.S. Individual Income Tax Return
- 2009 W-2 from Top Gun for \$12,806.45
- 2009 1099R from State of Florida for \$7,900.92
- 2009 1099R from Defense Finance and Accounting Service for \$30,008.00
- 2009 Form 1040 U.S. Individual Income Tax Return
- 2010 1099DIV from Nexen Inc for \$11.58
- 2010 1099R from State of Florida for \$8,114.52
- 2010 1099R from Defense Finance and Accounting Service for \$30,180.00

- 2010 W-2 from Top Gun for \$4,109.95
- 2010 Form 1040 U.S. Individual Income Tax Return
- Letter from Rick Derek owner of MV Mary Lou and MV Cat-N-Around dated 19 November 2011
- Letter from Brant Kelly owner of MV Relentless dated 18 November 2011
- Letter from Dr John Dunn MD dated 18 November 2011
- Letter from Dr Glenn Beck DDS dated 19 November 2011
- TWIC Card copy
- Copy of US Merchant Mariner Credentials
- Monthly P&L for Kenneth Beard for 2010 and 2011
- Letter in response to NPFC's request for additional information dated 07 May 2012
- GCCF Denial letter on interim/final payment claim dated 01 July 2011
- BP compensation letter dated 16 July 2010

The Claimant seeks lost profits and impairment of earnings capacity in the amount of \$64,096.69.

Prior to presenting his claim to the NPFC, the Claimant filed a BP claim (BP1) on 01 June 2010 and was paid \$4,567.00.³ Claimant asserts that he initially received a \$2,500.00 payment from BP and later received an additional \$2,500.00 from the GCCF.⁴ Additionally the Claimant filed a Final claim (FC1) with the GCCF on 28 September 2010 in the amount of \$40,000.00.⁵ He was assigned Claimant ID #1026875 and claim #100849.⁶ This claim was denied.⁷ Additionally, the Claimant filed an Interim 2 claim (ICQ22011) with GCCF #9356124 and was filed on 14 April 2011 for \$25,000.00.⁸ This claim was denied.⁹

Based upon the evidence provided by the Claimant, it appears that the subject matter for each of the GCCF claims is the same as the subject matter of his claim before the NPFC, i.e., that he lost business as a result of the Deepwater Horizon oil spill. The NPFC deems each of Claimant's two denied GCCF claims to be properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary determination for NPFC Claim N10036-1753 considers and addresses the earnings claimed in both of the claims presented to the responsible party, specifically; GCCF Claim #'s 100849 (FC1) and 9356124 (ICQ2011).

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any loss of income was due to injury or destruction or loss of real or personal property or a natural resource as a result of a discharge or substantial threat of a discharge of oil. Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim. The NPFC considered all the documentation submitted by the Claimant.

Here, in order to prove a claim for loss of profits and impairment of earning capacity damages, a Claimant must provide documentation sufficient to prove (1) that the claimant sustained an

³ Report from the GCCF dated 21 May 2012.

⁴ Claimant Answer to NPFC Request for Additional Information dated 07 May 2012; answer #'s 4 and 14.

⁵ Report from the GCCF dated 21 May 2012.

⁶ Report from the GCCF dated 21 May 2012.

⁷ Report from the GCCF dated 21 May 2012.

⁸ Report from the GCCF dated 21 May 2012.

⁹ Report from the GCCF dated 21 May 2012.

actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

(1) Failure to Prove the Claimant Sustained a Financial Loss:

According to the Claimant's W-2 and Tax information, he earned the following money as a boat captain; \$5,690.00 in 2008,¹⁰ \$10,225.45 in 2009,¹¹ and \$9,173.95 in 2010.¹² Thus, the Claimant earned \$1,051.50 less in 2010 compared to 2009 according to the Claimant's taxes.¹³ However, the Claimant was paid \$4,567.00 from the BP claim he filed 01 June 2010.¹⁴ Thus the Claimant was fully compensated by the RP for the damages evidenced.¹⁵

Furthermore the Claimant alleged that he made \$10,000.00 dollars in unreported and undocumented income in 2010.¹⁶ The Claimant states "I don't always keep records of cash received... my CPA who prepared my tax return failed to account for all of my fishing income and is going to prepare an amended return."¹⁷ If the Claimant did amend his tax return, the \$10,000 would be reported in 2010 and thus the Claimant would show a positive gain in income for 2010 year over year when compared to 2009.¹⁸ Accordingly, the Claimant has not established his sum certain as presented to the NPFC by a preponderance of the evidence.

(2) Failure to Prove the Alleged Loss Was Due to the Oil Spill:

The Claimant worked as a free lance charter boat captain in and around Destin Florida.¹⁹ The Claimant states "I was the captain of the Top Gun, Mary Lou, and Cat-N-Around charter boats when they had fishing trips."²⁰ NPFC staff asked the Claimant for contact information for Top Gun,²¹ however the Claimant directed the NPFC staff to the address of the business on his 2009 W-2 and stated "they have sold the boat and gone out of business."²² NPFC staff located the telephone number for Top Gun and attempted to contact them for verification but the number has been disconnected.²³ NPFC staff contacted Captain Rick Derek of Deep Sea Adventures (DSA)²⁴ in Destin Florida.²⁵ Captain Rick stated that prior to the oil spill in 2009, the Claimant went to work for Top Gun and that the Claimant did not work with him in 2010.²⁶

The Claimant stated that he had forty-seven cancellations²⁷ in 2010 due to the Deepwater Horizon oil spill. NPFC staff requested evidence of the cancellations,²⁸ however the Claimant

¹⁰ 2008 Form 1040 US Individual Income Tax Return at line 12.

¹¹ 2009 W-2 from Top Gun for \$12,806.45 minus Self Employment Business Expenses on 2009 tax return of \$2,581.00 equals \$10,225.45.

¹² 2010 W-2 from Top Gun for \$4,109.95 plus line 12 of 2010 US Tax Return of \$5,064.00 equals \$9,173.95.

¹³ 2009 & 2010 US Tax Returns. \$10,225.45 minus \$9,173.95 equals \$1,051.50.

¹⁴ Report from the GCCF dated 21 May 2012.

¹⁵ Loss of \$1,051.50 minus BP payment of \$4,567.00 equals \$3,515.50 in excess of loss amount.

¹⁶ Hardship letter from the Claimant and response to question 10 to the NPFC's request for additional information dated 07 May 2012.

¹⁷ Answer to question 10 to the NPFC's request for additional information dated 07 May 2012.

¹⁸ \$10,000.00 > \$1,051.50.

¹⁹ Claimant's hardship letter undated.

²⁰ Claimant's hardship letter undated.

²¹ NPFC's request for additional information dated 23 April 2012 at question 7.

²² Claimant's response to NPFC's request for additional information dated 07 May 2012 at question 7.

²³ Top Gun 150 Industrial park Rd Suite 7 Destin, FL 32541, 850-217-8939.

²⁴ Operator of Mary Lou and Cat-N-Around.

²⁵ Call log with Captain Rick Derek from Deep Sea Adventures dated 07 June 2012 at 11:30am.

²⁶ Call log with Captain Rick Derek from Deep Sea Adventures dated 07 June 2012 at 11:30am.

²⁷ Claimant's hardship letter undated.

²⁸ NPFC's request for additional information dated 23 April 2012 at question 6.

responded with "I do not have [a] record of cancellations other than those on the letters in the claim."²⁹ The Claimant submitted four letters; however only one states that a customer cancelled fishing trips³⁰ with no accompanying contact information that would allow the NPFC to verify the cancellation. The Claimant states that the majority of cancellations were done by telephone and when they cancelled, he would draw a line through their name on his calendar.³¹

The Claimant reports that he submitted the calendar to the GCCF.³² Claimants are expected to present the same claim to the NPFC that they presented to the Responsible Party. If the Claimant chooses to return to the NPFC on reconsideration, he should ensure that any documentation that was originally presented to the RP is also presented to the NPFC for consideration.

Accordingly, this claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a financial loss in the amount alleged or (2) that his alleged loss was due to the injury to, destruction of, or loss of real or personal property or natural resources.

Claim Supervisor:  *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *6/11/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

²⁹ Claimant's response to NPFC's request for additional information dated 07 May 2012 at question 6.

³⁰ Letter from Dr. Glenn Beck DDS stating he cancelled four fishing trips because of the threat of oil dated 19 November 2011.

³¹ Claimant's response to NPFC's request for additional information dated 07 May 2012 at question 6.

³² Claimant's response to NPFC's request for additional information dated 07 May 2012 at question 6.