

U.S. Department
of Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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5890/DWHZ
23 May 2013

Javier A. Salazar
[REDACTED]

Re: Claim Number: N10036-1926

Dear Mr. Salazar:

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 the claim number N10036-1926 involving the Deepwater Horizon oil spill. Please see the attached 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 N10036-1926.

Mail reconsideration requests to:

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

Sincerely,
[REDACTED]

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

Enclosure: Claim Summary/Determination

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1926
Claimant	Javier Salazar
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$9,610.29

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 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.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 7 May 2013, Mr. Javier Salazar, ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$9,610.29 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was employed at Tampa Ship, LLC as a "Ship Fitter."² In March of 2011, the Claimant's hourly wages and working hours were reduced. The Claimant stated that "the reason given [for the reduction in wages] was that the spill caused a slowdown in business and that meant less production."³

At the time of the oil spill, the Claimant was earning \$19.00 per hour. In March of 2011, his hourly wage was reduced to \$17.50. The Claimant seeks to recover \$9,610.29, which is the difference between his actual 2011 earnings and the average of his 2009 and 2010 earnings.⁴

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 water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

¹ Optional OSLTF Claim Form, signed on 30 April 2013

² Letter of Explanation, 2 May 2013.

³ Letter of Explanation, 2 May 2013.

⁴ Loss Calculation Worksheet.

The OSLTF is available to pay claims for uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136. 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;
- (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; and
- (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.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring, by subrogation, all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the NPFC

The Claimant submitted the following documentation in support of this claim:

- Optional OSLTF Claim Form, signed on 30 April 2013;
- List of claim contents, 28 April 2013;
- Letter of explanation, 2 May 2013;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 3 April 2012;

- BP Claim Determination Notification, 18 April 2013;
- Letter confirming the Claimant's employment dates, 18 January 2013;
- Lost Earning Worksheets (Regular and Overtime);
- 2009, 2010, 2011, weekly earning records;
- 2009 Form 1040;
- 2009 Schedule A (Form 1040);
- 2009 Form 8812;
- 2009 Form W-2 Wage and Tax Statement;
- 2010 Form 1040;
- 2010 Schedule M (Form 1040A or 1040);
- 2010 Form W-2 Wage and Tax Statement;
- 2011 Form 1040A;
- 2011 Form W-2 Wage and Tax Statement;
- List of Witnesses;
- Sworn Statement, Javier Salazar;
- Sworn Statement, Javier Sanchez;
- Sworn Statement, Evelio Gutierrez;
- Sworn Statement, Orlando Pelaez;
- Sworn Statement, Ruben Castillo;
- Form W-9 Request for taxpayer Identification Number and Certification;

Prior to presenting this claim to the NPFC, the Claimant attempted to recover loss of profits or impairment of earning capacity damages from the Responsible Party through the GCCF and the BP Claims Program. Both entities denied the claims.⁵

On 7 May 2013, the Claimant presented this claim to the NPFC, seeking to recover \$9,610.29 in earnings allegedly lost 2011 as a result of the Deepwater Horizon oil spill. Because this claim was first presented to and denied by the Responsible Party, this claim satisfies presentment requirements under OPA.⁶

Furthermore, evidence in this claim submission indicates that the Claimant is likely not a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).⁷

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, destruction or loss of real or personal property or of 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 all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

In order to prove a claim for loss of profits damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the

⁵ GCCF Denial Letter on Interim Payment/Final Payment Claim, 3 April 2012; BP Claim Determination Notification, 18 April 2013.

⁶ 33 C.F.R. § 136.103(a).

⁷ Claims for losses resulting from the moratorium on deepwater drilling are not covered by the terms of the E&PD Settlement.

financial loss was specifically due to *damage to real or personal property or natural resources caused by the discharge of oil* resulting from the discharge of oil during the Deepwater Horizon oil spill.

The Claimant provides evidence indicating that his wages were reduced from March of 2011 until he was laid off on 26 January 2012.⁸ However, documentation provided by the Claimant fails to indicate that the Claimant's loss of income was due to damage to a property or natural resources caused by the oil spill. According to the company's website, the shipyard where the Claimant was employed at the time of the spill

specialize[s] in conversions, general repair and overhaul of a wide range of vessels, including product tankers, container ships, general cargo vessels, drill ships and rigs, offshore supply vessels, bulk carriers, passenger/cruise ships, LPG and LNG carriers and reefer ships.⁹

The nature of the Claimant's employment and the fact that his hours were not reduced until March 2011, long after all federal waters had been reopened, indicates that the oil spill itself could not have been the cause of the reduction in the Claimant's hours. It is more likely that the reduction in offshore activity caused by the deepwater drilling moratorium in the Gulf of Mexico, prompted the Claimant's employer to decide to cut the Claimant's hours and wages. As such, this claim is not compensable under OPA, and is denied.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove that the alleged loss is due to the injury, destruction, or loss of property or natural resources as a result of a discharge or substantial threat of discharge of oil.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *5/23/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁸ Sworn Statement, Javier Salazar.

⁹ See, <http://www.tampabayship.com/index.html>, accessed on 22 May 2013.