

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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US COAST GUARD
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5890/DWHZ
14 May 2012

Mr. Kelly McInturff


Re: Claim Number: N10036-1715

Dear Mr. McInturff:

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 N10036-1715 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 N10036-1715.

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

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1699
Claimant	Kelly McInturff
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$25,000.00

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 12 March 2012, Mr. Kelly McInturff (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$25,000.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

Intermittently, from approximately 2008 until the present, the Claimant has been a contract employee, working as a "marine observer" for the National Oceanic and Atmospheric Administration's National Marine Fisheries Service.² The Claimant alleged that from 2010 through 2011, he has lost income due to a "lack of at sea work" following the Deepwater Horizon oil spill.³

In his claim submission, the Claimant stated, "I have searched for other work in the Gulf of Mexico, but observer work as a whole has been reduced due to a decrease in fishing activities."⁴

For losses in income allegedly sustained in 2011 as a result of the Deepwater Horizon oil spill, the Claimant seeks \$25,000.00 in lost profits and impairment of earning capacity damages.⁵

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.

¹ Optional OSLTF Claim Form, received on 12 March 2012.

² Optional OSLTF Claim Form, received on 12 March 2012.

³ Optional OSLTF Claim Form, received on 12 March 2012.

⁴ Optional OSLTF Claim Form, received on 12 March 2012.

⁵ Optional OSLTF Claim Form, received on 12 March 2012.

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.
- (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 this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, received on 12 March 2012;
- Email from the Claimant to NPFC Staff, 25 April 2012;
- Email from Kenneth Keene to the Claimant, 25 April 2012;
- Email from the Claimant to NPFC Staff, 25 April 2012;
- NOAA Technical memorandum, NMFS-SEFSC-588, April 2009;
- Fax Cover Sheet, received on 24 April 2012;
- 2010 Form W-2 Wage and Tax Statement, showing earnings of \$13,976.52;
- 2010 Form 1099-MISC, showing GCCF payment to the Claimant of \$20,300.00;
- 2010 Form W-2 Wage and Tax Statement, showing earnings of \$22,707.15;
- 2008 Form W-2 Wage and Tax Statement, showing earnings of \$42,776.48;
- 2009 Form W-2 Wage and Tax Statement, showing earnings of 25,348.25;
- Email from the Claimant to the NPFC Staff, noting inclusion of 2011 W-2, 14 March 2012;
- 2011 Form W-2 Wage and Tax Statement, showing earnings of \$20,233.97;

- Emails between the Claimant and the NPFC regarding GCCF documentation;

On 20 May 2010, the Claimant submitted a claim to BP, seeking compensation for lost earnings.⁶ BP issued a payment to the Claimant in the amount of \$15,296.00.⁷

On 1 September 2010, the Claimant submitted a six-month Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking \$95,000.00 in lost profits and earning capacity damages. The Claimant was assigned Claimant ID 1027791 and the EAP claim was assigned claim # 9453. The RP/GCCF issued payment on this claim in the amount of \$20,300.00.⁸

On 8 February 2011, the Claimant submitted a Full Review Final (FRF) claim to the RP/GCCF, seeking lost earning compensation in the amount of \$427,776.00.⁹ The FRF claim was assigned claim # 9280251, and as of the date of this determination, the GCCF has not made a payment on this claim.¹⁰

On 23 December 2011, the Claimant submitted a Fourth Quarter Interim Payment Claim (ICQ42011) to the RP/GCCF, seeking lost earning compensation in the amount of \$32,413.00.¹¹ This claim was assigned claim # 9423867, and as with the Claimant's FRF claim, no determination has been issued on this claim as of the date of this letter.¹²

On 12 March 2012, the Claimant submitted this claim to the NPFC, seeking \$25,000.00 in loss of profits and impairment of earning capacity damages.¹³ OPA requires that a claimant first present a claim for costs or damages to the RP prior to presentment to the NPFC.¹⁴ Because the Claimant has first presented these damages to the RP/GCCF and because no determination has been issued within the 90 day period proscribed by OPA,¹⁵ the NPFC may fully adjudicate this claim for loss of profits and impairment of earning capacity damages, totaling \$25,000.00.

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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an *uncompensated* financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

⁶ GCCF United States Coast Guard Report, 12 April 2012.

⁷ GCCF United States Coast Guard Report, 12 April 2012.

⁸ GCCF United States Coast Guard Report, 12 April 2012.

⁹ GCCF United States Coast Guard Report, 12 April 2012.

¹⁰ GCCF Claimant Status, accessed on 9 May 2012.

¹¹ GCCF United States Coast Guard Report, 12 April 2012.

¹² GCCF Claimant Status, accessed on 9 May 2012.

¹³ Optional OSLTF Claim Form, signed on 20 February 2012.

¹⁴ 33 C.F.R. § 136.103(a).

¹⁵ 33 C.F.R. § 136.103(a).

1. Failure to prove uncompensated financial loss.

Documentation available to the NPFC indicates that the Claimant has received compensation for lost income from both BP and the GCCF, totaling \$35,596.00.¹⁶ In continuing to seek loss of profits damages, allegedly sustained by the Claimant in 2011, the Claimant states that he is, “[j]ust trying to get BP to match the money [he] used to make in the Gulf prior to the Deepwater Horizon accident.”¹⁷

Tax documentation provided by the Claimant indicates prior to the Deepwater Horizon oil spill, the Claimant earned wages of \$42,776.58 in 2008 and \$25,348.25 in 2009.¹⁸ The Claimant has not provided evidence indicating why the Claimant’s income in 2009 dropped significantly from his 2008 income. In 2010 and 2011, the Claimant earned \$13,976.52 and \$20,233.97, respectively.¹⁹

In order to prove that a Claimant has sustained a loss that might be compensable under OPA, a Claimant must provide evidence documenting “the claimant’s profits or earnings in comparable period”²⁰ thereby establishing a baseline to determine the extent of the claimant’s alleged loss. Furthermore, any compensation potentially available to the Claimant must clearly reflect any payments the claimant has received as a result of the oil spill incident.²¹

In the year immediately prior to the oil spill, when the Claimant was working in the same position under the same employer, the Claimant earned \$25,348.25.²² Using this figure as a baseline, the Claimant’s earnings in 2010 and 2011 were down by \$11,371.73 and \$5,114.28, indicating that the \$35,596.00 previously paid to the Claimant has compensated the Claimant approximately \$19,109.99 in excess of any actual losses he might have incurred in 2010 and 2011.

Based on the foregoing, the Claimant has failed to provide evidence sufficient to demonstrate that he has sustained an uncompensated financial loss as a result of the Deepwater Horizon oil spill.

2. Failure to prove that alleged loss was caused by the Deepwater Horizon oil spill.

The Claimant has failed to provide evidence to prove that any loss of income he may have sustained was actually caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

In a phone conversation with the Claimant’s employer, a representative of the company informed the NPFC that the Claimant is regularly employed for particular periods of time, depending on the duration of certain contracts.²³ In 2009, 2010 and 2011, the Claimant has been employed by the company from March to June of each year.²⁴ Nowhere in this claim submission does the Claimant provide evidence that would indicate that his work schedule was actually altered, or

¹⁶ GCCF United States Coast Guard Report, 12 April 2012.

¹⁷ Email from the Claimant to the NPFC Staff, 25 April 2012.

¹⁸ 2008, 2009 W-2 Wage and Tax Statements.

¹⁹ 2010, 2011 W-2 Wage and Tax Statements.

²⁰ 33 C.F.R. § 136.233(c).

²¹ 33 C.F.R. § 136.235(a).

²² 2009 W-2 Wage and Tax Statement.

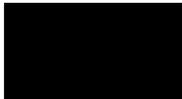
²³ PHONECON: NPFC Staff and IAP World Services representative, 18 April 2012.

²⁴ PHONECON: NPFC Staff and IAP World Services representative, 18 April 2012.

that he lost any particular employment as a result of the discharge of oil caused by the Deepwater Horizon oil spill.

Furthermore, the Claimant has failed to produce evidence to indicate whether or not changes in his employment resulted in the Claimant sustaining an actual loss of income. The Claimant has not provided complete income tax returns or other evidence documenting the extent of the Claimant's earnings from July to April of 2009, 2010 and 2011. Therefore, the evidence provided does not demonstrate how or to what extent any loss of income the Claimant may have sustained, actually affected his earnings.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained an uncompensated loss in the amount of \$25,000.00, and (2) 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 a discharge of oil.

Claim Supervisor: *NPFC Claims Adjudication Division* 

Date of Supervisor's Review: *5/14/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: