

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: 202-493-6937

CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4666 7836

5890/DWHZ
26 August 2011

David Wynne
c/o Gerard B. Schneller, Esq.
Holland Groves Schneller-Stolze, LLC
300 North Tucker Boulevard, Suite 801
St. Louis, MO 63101

Re: Claim Number: N10036-1208

Dear Mr. Schneller:

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 N10036-1208 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. If, however 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 N10036-1208.

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

Copy: David Wynne
1323 Lee Avenue
Baker, FL USPS Certified Receipt: 7011 1150 0000 3212 3919
Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1208
Claimant	David Wynne
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$35,949.00

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 27 May 2011, Gerard B. Schneller, on behalf of David Wynne (collectively Claimant), presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$35,949.00 in loss of profits and impairment of earnings capacity that allegedly resulting from the Deepwater Horizon oil spill.

Claimant was employed by Hornbeck Offshore Operators LLC in Houston, Texas as a chief engineer for off shore supply boats^{1,2}. Hornbeck Offshore provides offshore supply vessels and other support services to the offshore oil and gas exploration and production industry.³ The Claimant asserted that as a result of the Deepwater Horizon oil spill, Hornbeck Offshore terminated his employment⁴ and he has not since been able to locate other work.⁵

Claimant did not provide an explanation for his calculation of his sum certain of \$35,949.00.

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a). Damages include the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 U.S.C. §2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, 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. With certain exceptions a claim must first be presented to the responsible party. 33 U.S.C. § 2713(a). If the claim is either denied or not settled by any person by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. § 2713(c).

¹ Optional OSLTF Claim Form received 27 May 2011.

² IRS Form W-2 from Hornbeck Offshore Operators LLC.

³ [http:// www.hornbeckoffshore.com](http://www.hornbeckoffshore.com) (last accessed 18 August 2011).

⁴ Note from David Wynne regarding his claim signed 30 September 2010 (2)

⁵ Note from David Wynne regarding his claim signed 30 September 2010 (3)

Pursuant to the claims regulations, 33 C.F.R. § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

- (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

In support of his claim, Claimant presented the following documentation to the NPFC:

- Optional OSLTF Claim Form, received 27 May 2011;
- Letter from Gerald B. Schneller, Esq. to the NPFC declaring legal representation of Claimant's claim, dated 25 May 2011;
- Photocopies of Claimant's Florida Driver's license, Transportation Worker Identification Credential, U.S. Merchant Mariner's Document and Social Security Card;
- Note from David Wynne regarding his claim, signed 30 September 2010 (1);
- Note from David Wynne regarding his claim, signed 30 September 2010 (2);
- Note from David Wynne regarding his claim, signed 30 September 2010 (3);
- Performance Evaluations from Hornbeck Offshore for dates: 24 May 2008, 26 May 2008, 02 June 2008, 01 December 2008, 21 June 2009, 07 July 2009;
- 2010 W-2 from Hornbeck Offshore Operators LLC;
- 2010 W-2 from Orgeron Sea Mar Settlement Fund;
- 2010 W-2 from L & M Botruc Rental Inc.;
- 2010 Form 1099-R from Fidelity Investments Institutional Operations Co.;
- 2009 Form 1040 Individual Federal Tax Return;

- 2008 Form 1040 Individual Federal Tax Return; and
- GCCF Denial Letter dated 23 October 2010.

Prior to presenting this Claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) Six Month claim with the GCCF on 15 September 2010 in the amount of \$100,657.20.⁶ He was assigned Claimant ID # 3015882 and Claim # 68194. The EAP claim was denied by the GCCF on 23 October 2010.⁷ Additionally, the Claimant filed an Interim Payment Claim Quarter I 2011 (ICQ12011) on 26 January 2011 in the amount of \$35,949.00.⁸ The ICQ12011 claim was also denied by the GCCF.⁹ Lastly, the Claimant filed a Full Review Final (FRF) Payment Claim on 26 May 2011 in the amount of \$35,949.00.¹⁰ This FRF claim was denied as well.¹¹

Based upon the evidence provided by the Claimant, it appears that the subject matter for Claimant's GCCF claims are the same as the subject matter of his claim before the NPFC, i.e., that he lost earnings when he was laid off due to the Deepwater Horizon oil spill. The NPFC deems that Claimant's GCCF claims were properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1208 considers and addresses the earnings claimed in the claims presented to the responsible party up to \$35,949.00, specifically; GCCF Claim #'s 68194 (EAP), 9250742 (ICQ12011) and 9389879 (FRF).

Claimant's Optional OSLTF Claim form indicates that the Claimant filed a claim in the multidistrict litigation now pending in the United States District Court for the Eastern District of Louisiana (MDL-2179 In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf Of Mexico, on April 20, 2010) against BP (the "MDL").¹² Although the NPFC may not approve and certify the payment of a claim during the pendency of an action by the person in court to recover costs which are the subject of the claim, the NPFC may adjudicate such a claim to determine whether it may be compensable.¹³ Where appropriate, such a claim may be denied.

NPFC Determination

This claim is denied. 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 documentation presented by the Claimant.

The claim is denied because the Claimant has not proven that he suffered a financial loss due to the Deepwater Horizon oil spill. The Claimant's documentation indicated that he earned wages of \$110,265.00¹⁴ in 2008 and \$106,101.00¹⁵ in 2009. The Claimant's W-2's for 2010 indicated he earned at least \$116,119.90¹⁶, thus he earned more in 2010 than he had during the two prior years.

Moreover, even if the Claimant could prove that he suffered a financial loss, the Claimant failed to provide a connection between his purported loss and the Deepwater Horizon oil spill. In his submission

⁶ Report from the GCCF dated 22 August 2011.

⁷ GCCF Denial Letter dated 23 October 2010.

⁸ Report from the GCCF dated 22 August 2011.

⁹ Report from the GCCF dated 22 August 2011.

¹⁰ Report from the GCCF dated 22 August 2011.

¹¹ Report from the GCCF dated 22 August 2011.

¹² Optional OSLTF Claim form received 27 May 2011

¹³ See 33 C.F.R. § 136.103 (d)

¹⁴ 2008 Form 1040 Individual Federal Tax Return

¹⁵ 2009 1040 Individual Federal Tax Return

¹⁶ Claimant's 2010 W-2's from Hornbeck Offshore and L & M Botruc Rental Inc

to the NPFC discussing his departure from Hornbeck Offshore, the Claimant stated that, "I was terminated from Hornbeck offshore on July 27th 2010 when the company was stacking vessels even the newest vessels were tied up because of the moratorium that was set by the Government. [. . .] It is my understanding that the moratorium is the reason for such a termination from Hornbeck offshore."¹⁷ Accordingly, the Claimant failed to show his alleged loss occurred as the direct result of the Deepwater Horizon oil spill.

This claim is denied because Claimant failed to meet his burden to demonstrate (1) that there was an alleged loss in the amount claimed, 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: *8/26/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

¹⁷ Note from David Wynne regarding his claim signed 30 September 2010 (2).