

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  
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED  
Number: 7011 1570 0001 4802 7668

5890/DWHZ  
22 November 2011

Heather Ward  


Re: Claim Number: N10036-1387

Dear Ms. Ward:

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 your claim number N10036-1387 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 N10036-1387.

Mail reconsideration requests to:

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

Sincerely,

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

Enclosures: (1) Claim Summary/Determination Form

## CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1387
Claimant	Heather Ward
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity, Loss of Subsistence Use, Removal Costs, and Real or Personal Property Damages
Amount Requested	\$38,483.47

### ***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 09 September 2011, Heather Ward (Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$33,100.00 in loss of profits and impairment of earnings capacity, \$4,575.68 in loss of subsistence use, \$741.57 in removal costs, and \$66.22 in real or personal property damages, for a total of \$38,483.47 in damages that allegedly resulted from the Deepwater Horizon oil spill.

At the time of the Deepwater Horizon oil spill, the Claimant worked as a bartender for Twisted Palm/Club Overboard in Destin, FL.<sup>1</sup> The Claimant asserted that business at Twisted Palm/Club Overboard depended solely on the tourist industry and, due to the Deepwater Horizon oil spill; tourists found other vacation spots to visit.<sup>2</sup> Consequently, the Claimant asserted that business at Twisted Palm/Club Overboard became very slow and she experienced a reduction in shifts and tips.<sup>3</sup> The Claimant further asserted that Twisted Palm/Club Overboard filed for bankruptcy in December of 2010 and she has been out of work since that time.<sup>4</sup> The Claimant provided no specific description of the damages regarding her claims for loss of subsistence use, removal costs, and real or personal property damages.

### ***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

<sup>1</sup> Letter of claim explanation from Claimant to "Whom It may Concern," dated 20 July 2011.

<sup>2</sup> Letter of claim explanation from Claimant to "Whom It may Concern," dated 20 July 2011.

<sup>3</sup> Letter of claim explanation from Claimant to "Whom It may Concern," dated 20 July 2011.

<sup>4</sup> Letter of claim explanation from Claimant to "Whom It may Concern," dated 20 July 2011.

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).

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 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 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 her claim, the Claimant presented the following documentation to the NPFC:

- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form, dated 29 August 2011;
- GCCF Interim Payment Claim Form;
- Letter of claim explanation from Claimant to "Whom It may Concern," dated 20 July 2011;
- Letter of claim explanation from Claimant to "Whom It may Concern," dated 15 September 2010;
- Monthly calculation of expenses and loss from November 2010 through June 2011;
- Letter from Twisted Palm to "Whom It May Concern," undated;
- Letter from Total Employee Leasing to the Claimant, dated 14 December 2010;
- Written notice of early termination from rental lease, dated 10 December 2010;
- Various receipts for expenses;

- 2008 Federal Income Tax Return Form 1040EZ, including Form W-2's from Staffsource and Ordes of England Greenwood, Inc.;
- 2009 Federal Income Tax Return Form 1040EZ, including Form W-2's from Total Leasing Company, Staffsource, Aramark, and Total LC II, Inc.;
- Claimant's payroll records for Twisted Palm, LLC from 01 January 2010 through 31 December 2010;
- Unemployment earnings statement from 5 February 2011 through 25 June 2011;
- GCCF Re-Review Determination Letter on Final Payment Claim, dated 15 August 2011; and
- GCCF Determination Letter on Interim Payment/Final Payment Claim, dated 1 August 2011.

Prior to presenting this Claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) claim with the GCCF on 17 September 2010 in the amount of \$21,000.00 for loss of earnings.<sup>5</sup> The Claimant was assigned Claimant ID # 1097052 and Claim # 71317. The Claimant received payment in the amount of \$21,000.00 for this claim.<sup>6</sup> Additionally, the Claimant filed an Interim III (ICQ32011) claim with the GCCF on 26 July 2011 in the amount of \$60,068.15 for loss of earnings.<sup>7</sup> The Claimant was assigned Claim # 9425253. The Claimant accepted Final Payment in the amount of \$5,000.00 on 31 October 2011.<sup>8</sup>

### **NPFC Determination**

The 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.

This claim is denied because, (1) the Claimant has not presented certain damages to the responsible party, (2) the Claimant has accepted Final Payment from the GCCF, waiving any rights she may have to recover damages from the OSLTF regarding this incident, and (3) the Claimant has not demonstrated she has experienced an uncompensated loss due to the Deepwater Horizon oil spill.

#### **1. Improper Presentment**

Under 33 C.F.R. § 136.103(a), the Claimant may present a claim to the NPFC only if that claim has first been presented to the responsible party.<sup>9</sup> The Claimant presented two claims to the GCCF, (1) an EAP claim for loss of earnings, and (2) an Interim III claim for loss of earnings. Therefore, the only damages presented to the NPFC that have been properly presented are the Claimant's damages for loss of profits and impairment of earnings capacity. As a result, the Claimant's damages regarding loss of subsistence use, removal costs, and real or personal property damages are all denied for lack of proper presentment to the responsible party.

#### **2. Release of Rights to the GCCF**

Information available to the NPFC indicates that the Claimant accepted Final Payment in the amount of \$5,000.00 and that the GCCF issued Final Payment on this claim.<sup>10</sup> The RP/GCCF requires that a Claimant execute a Release and Covenant Not to Sue in return for the issuance of Final Payment. Because the Claimant has accepted Final Payment for her claim with the GCCF and signed a Release and

<sup>5</sup> Report from the GCCF, dated 02 November 2011.

<sup>6</sup> Notice of Determination Emergency Advance Payment.

<sup>7</sup> Report from the GCCF, dated 02 November 2011.

<sup>8</sup> GCCF Claimant Status Page.

<sup>9</sup> There are limited exceptions not applicable to the Claimant.

<sup>10</sup> GCCF Claimant Status Page.

Covenant Not to Sue, the Claimant has released any rights to additional recovery regarding this injury to the RP/GCCF.<sup>11</sup>

Any payment from the Oil Spill Liability Trust Fund (the Fund) requires the acquisition of rights from the RP. Because these rights have been released by the Claimant to the RP/GCCF, the Claimant cannot also recover from the Fund.

If the Claimant believes that payments received from the RP/GCCF are for damages other than those that are the subject of this claim, the Claimant must explain this in her request for reconsideration.<sup>12</sup> The Claimant must also include copies of any and all waivers and covenants signed by the Claimant regarding injuries related to the Deepwater

### 3. No Evidence of an Uncompensated Loss

The supporting documentation provided by the Claimant indicates that the Claimant has already been fully compensated for all potential losses from the Deepwater Horizon oil spill related to a loss of earnings. The GCCF paid the Claimant \$31,000.00, which exceeds the potential losses for the Claimant as calculated by the NPFC. Notably, the Claimant exaggerated the amount of earnings missed out on by the loss of her job at the Twisted Palm/Club Overboard. The Claimant stated that she would have earned \$8,750.00 in March of 2011;<sup>13</sup> however, the Claimant's payroll records from 2010 indicate that she earned a total of \$2,155.69 in March of 2010.<sup>14</sup> Likewise, the Claimant stated she would have earned \$2500.00 in both January and February of 2011<sup>15</sup>, while the Claimant's payroll records indicate earnings of \$895.67 in January of 2010 and \$804.50 in February of 2010.<sup>16</sup>

This claim is denied because (1) the Claimant failed to make proper presentment of some of the damages claimed to the NPFC pursuant to 33 C.F.R. § 136.103(a), (2) the Claimant accepted Final Payment from the GCCF, releasing her rights regarding losses related to the Deepwater Horizon oil spill to the RP/GCCF, and (3) the Claimant failed to demonstrate that she has suffered an uncompensated loss due to the injury, destruction or loss of property or natural resource 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: *11/22/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

<sup>11</sup> Standard GCCF Notice of Final Payment Claim Determination.

<sup>12</sup> 33 C.F.R. § 136.115.

<sup>13</sup> Letter of claim explanation from Claimant to "Whom It may Concern," dated 20 July 2011.

<sup>14</sup> Claimant's payroll records for Twisted Palm, LLC from 01 January 2010 through 31 December 2010.

<sup>15</sup> Letter of claim explanation from Claimant to "Whom It may Concern," dated 20 July 2011.

<sup>16</sup> Claimant's payroll records for Twisted Palm, LLC from 01 January 2010 through 31 December 2010.