

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
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4636 3127

5890/DWHZ
31 October 2011

Primerica Financial Services
Attn: Kirby F. Rhodes III
153 Quebec Street
Houma, Louisiana 70364

Re: Claim Number: N10036-1405

Dear Mr. Rhodes:

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 N10036-1405 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 N10036-1405.

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

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number N10036-1405
Claimant Primerica Financial Services
Type of Claimant Business
Type of Claim Loss of Profits and Impairment of Earnings 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 14 September 2011, Kirby F. Rhodes III, on behalf of Primerica Financial Services, (collectively, the Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$25,000.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant operates a Primerica insurance branch operating in the Houma, Louisiana region.¹ The Claimant asserted a loss of income from the Deepwater Horizon oil spill because residents in the region ceased purchasing and renewing insurance plans due to job related income loss.² The Claimant indicated that he is issued a charge-back fee each time a client drops their insurance policy.³ Further, the Claimant asserted a loss of income because he lost seven full-time agents including his top producer for the last two years due to the Deepwater Horizon oil spill.⁴

The Claimant provided the following explanation regarding the calculation of his sum certain: the Claimant totaled his losses from May 2010-October 2010 as being \$19,786.00⁵ and added \$5,000.00⁶ to represent the cost of losing the services of his top agent for a total of \$24,786.00.⁷ The Claimant then rounded this number up to \$25,000.00.⁸

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).

¹ Letter from the Claimant dated 07 September 2011.

² Letter from the Claimant dated 07 September 2011.

³ Letter from the Claimant dated 07 September 2011.

⁴ Letter from the Claimant dated 07 September 2011.

⁵ Letter from the Claimant dated 07 September 2011.

⁶ Letter from the Claimant dated 07 September 2011.

⁷ Letter from the Claimant dated 07 September 2011.

⁸ Optional OSLTF Claim Form received 14 September 2011.

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).

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

The Claimant's Submission to the OSLTF

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

- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form, received 14 September 2011;
- Letter from the Claimant dated 07 September 2011;
- GCCF Denial Letter dated 22 April 2011;
- Trend Track Report for Kirby Rhodes and Socorro Bernard;
- Letter from the Claimant discussing his claim;
- Photocopies of the Claimant's Louisiana Personal Driver License (unreadable) and Social Security card;
- 2008 Form 1040 Federal Tax Return (incomplete);
- 2009 Form 1040 Federal Tax Return (incomplete);

- 2010 Form 1040 Federal Tax Return.

Prior to presenting his claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) claim with the GCCF for loss of earnings on 10 November 2010 in the amount of \$24,000.00.⁹ The Claimant was assigned Claimant ID # 3379540 and Claim # 446668. The EAP claim was denied on 30 November 2010.¹⁰ Additionally, the Claimant filed a Full Review Final (FRF) claim with the GCCF for loss of earnings on 2 December 2010 in the amount of \$40,000.00.¹¹ The Claimant was assigned Claim # 9063047. The FRF claim was denied by the GCCF on 22 April 2011.¹²

Based upon the evidence provided by the Claimant, it appears that the subject matter for the GCCF claims is the same as the subject matter of his claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the Claimant lost clients as well as fellow agents and by extension income from his insurance business. The NPFC deems the Claimant's denied GCCF claims to be properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1405 considers and addresses the earnings claimed in the Claimant's claim presented to the responsible party, specifically; GCCF Claim #'s 446668 (EAP) and 9063047 (FRF).

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.

Under 33 C.F.R. § 136.103(a), all claims for removal costs or damages must be presented first to the responsible party (RP). The Claimant presented an Emergency Advance Payment (EAP) claim with the GCCF for loss of earnings on 10 November 2010 in the amount of \$24,000.00.¹³ The Claimant's EAP claim to the GCCF included a sum certain of \$24,000.00.¹⁴ The Claimant presented a Full Review Final (FRF) Claim for loss of profits and impairment of earnings capacity to the GCCF on 2 December 2010.¹⁵ The Claimant's FRF claim to the GCCF included a sum certain of \$24,000.00.¹⁶ The Claimant then presented a claim for loss of profits and impairment of earnings capacity in the amount of \$24,000.00 to the NPFC.¹⁷ Any claimed amount of damages exceeding \$24,000.00 was not properly presented to the RP/GCCF pursuant to 33 C.F.R. § 136.103(a) and is therefore denied.

This claim is denied because the Claimant failed to prove that he suffered a financial loss due to the Deepwater Horizon oil spill. The Claimant asserted that, due to the Deepwater Horizon oil spill, his insurance business lost income as local residents ceased purchasing insurance policies and discontinued existing policies, forcing the Claimant to pay charge-back fees.¹⁸ Additionally, the Claimant asserted that he lost seven full-time agents at his Primerica branch, including his most effective employee, due to the oil spill.¹⁹ The Claimant, however, failed to provide sufficient evidence to connect his alleged loss to the Deepwater Horizon oil spill.

The Claimant did not provide documentation to prove that any existing clients cancelled previously purchased insurance plans due to the Deepwater Horizon oil spill. In regards to providing proof of policy

⁹ Report from the GCCF, dated 6 October 2011.

¹⁰ GCCF Denial Letter, dated 30 November 2010.

¹¹ Report from the GCCF, dated 6 October 2011.

¹² GCCF Denial Letter dated 22 April 2011.

¹³ Report from the GCCF, dated 6 October 2011.

¹⁴ Report from the GCCF, dated 6 October 2011.

¹⁵ Report from the GCCF, dated 6 October 2011.

¹⁶ Report from the GCCF, dated 6 October 2011.

¹⁷ Optional OSLTF Claim Form received 19 September 2011.

¹⁸ Letter from the Claimant dated 07 September 2011.

¹⁹ Letter from the Claimant dated 07 September 2011.

cancellations due to the oil spill, the Claimant stated that “I was asked to provide documentation showing specific clients that canceled their services so that they would have proof of loss.²⁰ I am expressly prohibited from sharing any personal information with any non-affiliated company or institution, so I cannot do that or I would violate my client’s privacy as well as my contractual agreement with my company.”²¹ However, any contractual restrictions between the Claimant and its clients has no effect on the evidentiary burden imposed by 33 C.F.R. § 136.105(a) and 136.105(e)(6) for claims against the OSLTF. As well, the Claimant failed to provide documentation proving that any potential clients declined to purchase insurance policies due to the Deepwater Horizon oil spill; thus, all losses regarding potential clients are speculative and not compensable under OPA pursuant to the governing claim regulations at 33 C.F.R. § 136.235. Consequently, the Claimant has not shown that any alleged losses are due to the Deepwater Horizon oil spill as opposed to other factors such as cost-cutting decisions by existing or potential clients to reduce expenses or generally declining market conditions which has adversely affected them.

The financial documentation submitted by the Claimant in his submission to the NPFC also indicated the business was already struggling prior to the Deepwater Horizon oil spill. The Claimant’s business income went from \$22,096.00²² in 2008 and reduced to \$13,785.00²³ in 2009. This pattern of a reduction in earnings continued into 2010 as the business income again fell to \$10,548.00.²⁴ This three year declination in business income shows year to year decreases of \$8,311.00 from 2008-2009 and \$3,237.00 from 2009-2010, with the smaller annual decrease occurring from 2009-2010. Thus, the Claimant failed to isolate a reduction in business income specifically due to the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that there was an alleged loss in the amount claimed, (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, and (3) that \$25,000.00 as claimed had been properly presented first to the RP/GCCF pursuant to 33 CFR 136.103(a) therefore all amounts in excess of \$24,000.00 are denied accordingly.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Review: *10/29/11*

Supervisor’s Actions: *Denial approved*

Supervisor’s Comments:

²⁰ Letter from the Claimant dated 07 September 2011.

²¹ Letter from the Claimant dated 07 September 2011.

²² 2008 Form 1040 Federal Tax Return.

²³ 2009 Form 1040 Federal Tax Return.

²⁴ 2010 Form 1040 Federal Tax Return.