

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

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CERTIFIED MAIL - RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4636 2960

5890/DWHZ
05 October 2011

Mark Spencer
[REDACTED]

RE: Claim Number: N10036-1420

Dear Mr. Spencer:

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 N10036-1420 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. 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 N10036-1420.

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	N10036-1420
Claimant	Mark Spencer
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$20,000.00

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 claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 12 September 2011, Mark Spencer (Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$20,000.00 for loss of profits and impairment of earnings capacity to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill.

The Claimant worked as an oil response cleanup worker for USA Environmental from 15 May 2010 to 16 August 2010.¹ The Claimant alleged damages resulting from the premature ending of his employment. The Claimant is alleging damages due to a skin rash and other personal injury suffered because of contact with the oil precluding him from finding other employment.

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 Section 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.

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

¹ GCCF Full Review Final payment Claim Form.

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 his claim, Claimant submitted

- 1) Optional OSLTF claim form dated 12 September 2011
- 2) GCCF Full Review Final payment Claim Form
- 3) Copies of Texas drivers license, TWIC card, and other contractor identification
- 4) Employee earning report from 21 May 2010 to 27 August 2010
- 5) Statement of Unemployment Benefits from Texas Workforce Commission
- 6) Various doctors visits and medical data
- 7) US District Court, Eastern District of Louisiana MDL Direct Filing Short Form

Claimant seeks lost profits and impairment of earnings capacity in the amount of \$20,000.00.

Claimant's Optional OSLTF Claim form indicated that 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") on 20 April 2011. Although under the statute 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. Where appropriate, such a claim may be denied.

Prior to presenting his claim to the NPFC, Claimant filed Full Review Final claim (FRF) with the GCCF and was assigned Claimant ID #3507702 and claim #9331240.² This claim was denied on 20 June 2011.³ Based upon the evidence provided by the Claimant, it appears that the subject matter for each of the GCCF claims is the same as the subject matter of his claim before the NPFC, i.e., that he had impairment of earnings and physical injury as a result of the Deepwater Horizon oil spill. The NPFC has not been able to confirm the amount of the FRF as of the date of this determination. The NPFC deems the GCCF claim to be properly presented to the Responsible Party and to the extent the amount of the claim presented to the RP is equal to or greater than the amount currently presented to the NPFC, the subject claim is properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1420 considers and addresses the loss of earnings up to the amount of \$20,000.00 for the claim presented to the Responsible Party.

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 or destruction or loss of real or personal property or 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. The NPFC considered all the documentation submitted by the Claimant.

The Claimant worked as an oil spill response worker after the oil spill from 15 May 2010 to 16 August 2010.⁴ This portion of his claim is denied because but for the oil spill, he would not have been employed doing oil spill response work. The Claimant gained employment and earnings as a result of the oil spill as opposed to incurring impairment to his earnings as alleged. The Claimant has provided no documentation to substantiate his alleged loss of profits and impairment of earnings capacity or to show that his alleged loss of earnings was due to the Deepwater Horizon oil spill.

The remaining portion of the Claimant's submission alleged physical injury and damages as a result of the physical injury i.e. doctors visits, prescriptions, and loss of work. This portion of the claim is denied because physical injury is not compensable under the Oil Pollution Act.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he has an alleged loss in the amount claimed, and (2) that his 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: *10/5/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

² GCCF Online Filing Process Status Page.

³ GCCF Denial Letter dated 20 June 2011.

⁴ GCCF Full Review Final payment Claim Form.