

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 1570 0001 4802 7743

5890/DWHZ
21 December 2011

Jeffery Smith
[REDACTED]

Re: Claim Number: N10036-1438

Dear Mr. Smith:

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 N10036-1438 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 N10036-1438.

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	N10036-1438
Claimant	Jeffery Smith
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$8,000.00

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 23 September 2011, Jeffery Smith, (the Claimant), presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$8,000.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

At the time of the Deepwater Horizon oil spill, the Claimant worked as a distributor of Hostess¹ products in the Gulf of Mexico region; specifically, in areas such as Orange Beach, Gulf Shores, Loxley, and Perdido Key.² The Claimant supplied approximately 39 stores with Hostess products and stated that he earned 10% commission on all sales.³ The Claimant asserted that, due to the Deepwater Horizon oil spill, there was a drastic reduction in sales of Hostess products at these locations.⁴ The Claimant explained that his sales territory was heavily influenced by the tourism and construction industries, which were negatively impacted by the Deepwater Horizon oil spill.⁵ Furthermore, the Claimant asserted that there was a price increase for the products he sold in 2010, which would have resulted in the Claimant earning even more than he did in 2009 had it not been for the Deepwater Horizon oil spill.⁶

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

¹ The NPFC notes that Interstate Brands Corporation, which is the Claimant's titled employer on his paystubs and Form W-2's, is an alter ego of Hostess.

² PHONECON between the Claimant and the NPFC on 23 September 2011.

³ PHONECON between the Claimant and the NPFC on 23 September 2011.

⁴ PHONECON between the Claimant and the NPFC on 23 September 2011.

⁵ PHONECON between the Claimant and the NPFC on 23 September 2011.

⁶ PHONECON between the Claimant and the NPFC on 23 September 2011.

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 OSLTF Claim Form, dated 19 September 2011;
- Article from Wikipedia titled 'Hostess Brands';
- 2010 W-2 Wage and Tax Statement from Interstate Brands Corporation;
- 2009 W-2 Wage and Tax Statement from Interstate Brands Corporation;
- 2008 W-2 Wage and Tax Statement from Interstate Brands Corporation;
- Pay stubs from Interstate Brands Corporation with the following pay dates: 28 November 2008, 05 December 2008-26 December 2008, 02 January 2009-30 January 2009, 18 September 2009-30 October 2009, 11 December 2009-24 December 2009, 08 January 2010-29 January 2010, 26

February 2010-30 December 2010, 07 January 2011-28 January 2011, 22 April 2011, 13 May 2011;

- Letter from the Claimant titled 'Definition of Work Description', undated;
- IBC Sales Corporation Invoice # 445100008974, dated 08 January 2011;
- IBC Sales Corporation Invoice # 445100008973, dated 08 January 2011;
- Photocopies of the Claimant's Social Security card and Alabama Driver License;
- Letter of claim explanation from Cliff Moe, undated;
- IBC Sales Corporation Invoice # 445100307222, dated 03 November 2010;
- IBC Sales Corporation Invoice # 445100177675, dated 26 June 2010;
- IBC Sales Corporation Order Report, dated 09 April 2011;
- IBC Sales Corporation Customer Orders For Saturday - 04/16, dated 09 April 2011; and
- IBC Sales Corporation Customer Info-Tuesday, dated 12 April 2011.

Prior to presenting this Claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) claim with the GCCF for loss of earnings on 19 October 2010 in the amount of \$10,800.00.⁷ The Claimant was assigned Claimant ID # 3232406 and Claim # 287575. This claim was denied by the GCCF on 12 November 2010.⁸ The Claimant also filed a Full Review Final (FRF) claim with the GCCF for loss of earnings on 17 November 2010 in the amount of \$55,000.00.⁹ The Claimant was assigned Claim # 9049250. The FRF claim was denied by the GCCF on 16 April 2011.¹⁰

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claim 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 experienced reduced sales and earnings from Hostess products. The NPFC deems that the Claimant's GCCF claims were properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1438 considers and addresses the earnings claimed in the claims presented to the responsible party, specifically; GCCF Claim #'s 287575 and 9049250.

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 the Claimant failed to prove he suffered a financial loss due to the Deepwater Horizon oil spill. The Claimant asserted that he experienced a reduction in sales of Hostess products due to the Deepwater Horizon oil spill. In his submission to the NPFC, the Claimant provided FormW-2's from 2008-2010, partial paystubs from 2008-2010, limited sales invoices from 2010-2011, and a letter from the Claimant's former manager at Hostess. The NPFC contacted the Claimant's manager (who no longer works for Hostess); he verified writing the letter on behalf of the Claimant and confirmed his belief that the Claimant suffered a loss in sales of Hostess products due to the Deepwater Horizon oil spill.¹¹

In order to further evaluate the Claimant's assertions and establish that he suffered a financial loss due to the Deepwater Horizon oil spill, the NPFC sent the Claimant a letter on 19 October 2011 requesting additional information. The NPFC requested that the Claimant provide, among other things, complete tax returns from 2008-2010, all pay stubs from 2008-2010, documentation of contracts for Hostess products

⁷ Report from the GCCF, dated 21 November 2011.

⁸ Denial Letter from the GCCF, dated 12 November 2010.

⁹ Report from the GCCF, dated 21 November 2011.

¹⁰ Denial Letter on Interim Payment/Final Payment Claim, dated 16 April 2011.

¹¹ PHONECON between the NPFC and Cliff Moe on 23 September 2011.

that were cancelled or modified due to the Deepwater Horizon oil spill, and all invoices for Hostess sales in 2010.¹² On 08 November 2011, the Claimant called the NPFC and requested that the NPFC grant him an extension for the return of the additional information requested by the NPFC. The NPFC informed the Claimant that the extension would be granted if the Claimant formally requested an extension in writing via fax or email.¹³ The Claimant stated that he would request the extension on that same day.¹⁴ Although the Claimant never formally requested this extension, the NPFC allowed the Claimant further time to respond to the request for additional information.

On 02 December 2010, after not receiving any response from the Claimant, the NPFC contacted the Claimant concerning its request for additional information. The Claimant stated that he still planned on submitting additional information to the NPFC, but he needed more time.¹⁵ On 6 December 2010, the Claimant formally requested another extension of time to provide the requested documentation.¹⁶ The NPFC again granted the Claimant additional time to respond to the request; however, the NPFC explicitly informed the Claimant that the Claimant should provide all documentation by the close of business on 20 December 2011.¹⁷ To date, the NPFC has not received any further information or contact from the Claimant. Consequently, the Claimant has failed to provide sufficient evidence to prove that he suffered a financial loss 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, 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: *12/21/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

¹² Letter from the NPFC to the Claimant, dated 19 October 2011.

¹³ PHONECON between the NPFC and the Claimant on 8 November 2011.

¹⁴ PHONECON between the NPFC and the Claimant on 8 November 2011.

¹⁵ PHONECON between the NPFC and the Claimant on 2 December 2011.

¹⁶ Fax from the Claimant to the NPFC, dated 05 December 2011.

¹⁷ Email from the NPFC to the Claimant, dated 06 December 2011.