

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 5060

5890/DWHZ
20 October 2011

Ms. Delania Falgout
[REDACTED]

Re: Claim Number: N10036-1480

Dear Ms. Falgout:

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 the claim number N10036-1480 involving the Deepwater Horizon oil spill. Please see the attached 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 N10036-1480.

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 | N10036-1480 |
| Claimant | Ms. Delania Falgout |
| Type of Claimant | Private (US) |
| Type of Claim | Loss of Profits and Impairment of Earning Capacity |
| Amount Requested | \$66,867.27 |

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 11 October 2011, Ms. Delania Falgout (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$66,867.27 in loss of profits and impairment of earnings capacity allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant began working at Eastway Seafood-West in Houma, Louisiana in October 2009.² The restaurant was sold on 13 April 2010, and the Claimant was promoted by the new management in June 2010 and then again in October 2010.³ However, the Claimant alleged that the oil spill caused a loss of business at the restaurant, which caused the Claimant's pay to be reduced in December of 2010, and eventually resulted in her lay off in March of 2011.⁴

The Claimant calculated her losses by taking the average of her weekly gross pay check and multiplying by 52, to calculate a yearly expected income of \$13,373.45.⁵ The Claimant then multiplied this number by five, to claim a five year loss in the amount of \$66,867.27.⁶

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:

¹ Optional OSLTF Claim Form, dated 19 September 2011.

² Document, "Time Line Statement."

³ Document, "Personal Statement."

⁴ Document, "Time Line Statement."

⁵ Spreadsheet showing working hours, pay rate, gross pay, 4/16/2010 – 3/22/2011.

⁶ Spreadsheet showing working hours, pay rate, gross pay, 4/16/2010 – 3/22/2011.

- (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

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, dated 19 September 2011;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 16 April 2011;
- Letter from Matt Folsie regarding effects of the oil spill on the Claimant's income, 10 December 2010;
- Unemployment application, submitted on 20 March 2011;
- Document, "Time Line Statement;"
- Document, "Personal Statement," 9 September 2011;
- Eastway Seafood West, Inc. Payroll Summary, 4/1/2010 – 4/30/2010;
- Spreadsheet showing working hours, pay rate, gross pay, 4/16/2010 – 3/22/2011;
- Employee Pay Stubs, 2010, 2011;
- 2008 Federal/State Tax Return Receipt;
- 2008 Form 8879, showing adjusted gross income of \$13,573.00;
- 2009 W-2 Wage and Tax Statement, showing earnings of \$1,696.48;
- 2000 W-2 Wage and Tax Statement, showing earnings of \$8,976.00;
- 2000 Form 8453, showing adjusted gross income of \$8,977.00;
- 2001 Form 8453, showing adjusted gross income of \$10,097.00.

Prior to presentment to the NPFC, the Claimant presented a Full Review Final (FRF) claim to the RP/GCCF, seeking loss of profits and wages.⁷ The Claimant was assigned Claimant ID 3485152 and the FRF claim was assigned Claim # 9201730.⁸ This claim was denied on 16 April 2011.⁹

On 11 October 2011, the Claimant presented this claim to the NPFC, seeking loss of profits and impairment of earnings capacity in the amount of \$66,867.27.¹⁰ The NPFC may properly adjudicate this claim to the extent that these damages have been presented to the GCCF in the Claimant's FRF Claim # 9201730. Any damage amount now before the NPFC, which was not first presented to the RP/GCCF, is denied for failure to make proper presentment.¹¹

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, 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 this claim.

In order to prove lost profits or impairment of earnings, the Claimant must demonstrate (1) that she sustained a loss or reduction in wages, and (2) that the loss or reduction was a result of the discharge or substantial threat of discharge of oil, caused by the Deepwater Horizon oil spill.

As an initial matter, only actual losses incurred, and not future losses, are compensable under OPA. 33 C.F.R. § 136.235 specifically states that "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* (emphasis added)." Therefore, any damages presented in this claim, which represent future losses, are denied. The remainder of this determination addresses losses incurred from the date of the oil spill, to the date that this claim was presented to the NPFC on 11 October 2011.

The Claimant alleged that she sustained a pay reduction in December of 2010, and was laid off in March of 2011 due to effects of the oil spill. However, in the months following the oil spill, the Claimant's earnings were significantly higher than her pre-oil spill earnings. Prior to the oil spill, the Claimant was earning \$7.25/hour and working approximately 27 hours each week.¹² In June of 2010, following the oil spill, the Claimant was earning \$7.65/hour, and her working hours had increased to approximately 38 hours per week.¹³ In October 2010, the Claimant again received a pay raise, and began earning a weekly salary of \$369.23.¹⁴

The Claimant's pay did not begin to decrease until December of 2010, at which point, the Claimant's pay had returned to a level that was approximately equal to what the Claimant was earning prior to the oil spill.¹⁵ Based on this information, the Claimant has not demonstrated that

⁷ GCCF Claimant Status, accessed on 17 October 2011.

⁸ GCCF Claimant Status, accessed on 17 October 2011.

⁹ GCCF Denial Letter on Interim Payment/Final Payment Claim, 16 April 2011.

¹⁰ Optional OSLTF Claim Form, dated 19 September 2011.

¹¹ 33 C.F.R. § 136.103(a).

¹² Document, "Time Line Statement."

¹³ Document, "Time Line Statement."

¹⁴ Document, "Time Line Statement."

¹⁵ The Claimant alleged to have earned \$199.00 weekly prior to the spill, and \$192.00 following a pay reduction in

she sustained an actual loss of earnings until the point when the Claimant was let go from her position in March of 2011.

Furthermore, the Claimant has not provided any evidence to demonstrate that losses allegedly incurred by Eastway Seafood-West, were caused by effects of the Deepwater Horizon oil spill. Therefore, the Claimant has not established a causal link between her losses and the Deepwater Horizon oil spill.

According to the Claimant, the original owners of Eastway Seafood-West sold the restaurant in April of 2010.¹⁶ The Claimant has not provided documentation to show that the restaurant was actually profitable at the time it was sold; therefore it is not possible for the NPFC to determine that the restaurant only began to incur losses after the oil spill. Should the Claimant pursue this claim on reconsideration, the Claimant should present evidence to demonstrate that the restaurant did not actually begin to lose revenues until the months following the Deepwater Horizon oil spill and that such losses were a direct result of the oil spill as opposed to other economic factors.

Furthermore, because this restaurant was under new ownership at the time of the oil spill, the Claimant should provide documentation to show that the losses incurred by the restaurant were due to effects of the spill, and were not associated with actions taken by new restaurant management.

Based on the information available to the NPFC, the Claimant has failed to demonstrate that any losses she incurred due to the loss of her position in March of 2011 were caused by the effects of the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet her burden to prove (1) that she sustained a financial loss in the amount of \$66,867.27, 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: *10/20/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁶ Document, "Time Line Statement."