

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1542
Claimant	: Hermeen Jacobson
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$106,360.66

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 03 November 2011, Hermeen Jacobson (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$106,360.66 for loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.

The Claimant worked as a bartender for Castaways Beachside Restaurant and Raw Bar (Castaways) in Pensacola, Florida. Castaways opened for business for the first time 02 April 2010.¹ The Claimant worked for Castaways until it closed December 31, 2010.² The Claimant states she lost potential earnings at Castaways due to the oil spill.³ The loss of earnings is from May 2010 to August 2011.⁴

Claimant's Optional OSLTF Claim form indicates 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.

On 07 November 2011 the NPFC sent the Claimant a letter requesting additional information in order to evaluate the claim. On 28 November 2011 the Claimant responded to the request.

Before presenting the claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) with the GCCF on 07 September 2010 in the amount of \$33,090.00.⁵ The claim was

¹ Letter written by the Claimant dated 30 August 2011 explaining the claim

² Letter written by the Claimant dated 30 August 2011 explaining the claim

³ OSLTF Claim Form signed by Claimant 30 August 2011

⁴ Lost Earning Capacity Worksheet May 2010 to August 2011

⁵ Report from the GCCF dated 21 November 2011

assigned Claimant ID #1067322 and claim #55750.⁶ The EAP claim was paid \$33,100.00 on 13 October 2010.⁷ Additionally, Claimant filed an Interim Payment (ICQ12011) claim with the GCCF on 23 February 2011 in the amount of \$90,747.00.⁸ The claim was assigned claim #9301056.⁹ On 10 May 2011 the GCCF made the Claimant a Final Payment Offer of \$5,000.00.¹⁰ Additionally, BP paid the Claimant \$18,664.06 on 07 June 2010.¹¹

REQUEST FOR RECONSIDERATION:

On February 2, 2012, the Claimant sent a request for reconsideration to the NPFC stating she would like the NPFC to reconsider her claim. The Claimant requested reconsideration which was received by the NPFC on February 2, 2012. The Claimant sent in a two-page typed letter along with a news article from the Pensacola New Journal that discusses the future of Castaways prior to the oil spill. The Claimant sent the article in order to understand what the establishment Castaways was “slated and destined to become (without the oil spill)”¹².

The Claimant provided the contact information for Mr. Jimmy Wiltcher who was the Operations Manager of Castaway’s during the Claimant’s employment. The Claimant also provided the names and phone numbers of two other individuals that she states had firsthand knowledge of similar businesses that previously operated in the same location.

The NPFC denied the claim originally on December 6, 2011. The NPFC determined that since Castaways Beachside Restaurant and Raw Bar (Castaways) opened for business 02 April 2010 just before the oil spill, the Claimant does not have sufficient historical data on which to base her loss of earnings as a bartender at Castaways. The Claimant based her estimated lost earnings on three estimates from persons in the restaurant business.¹³ The estimates are not based on historical data. NPFC wanted to contact the general manager at Castaway as part of its due diligence to corroborate her claim. However, the Claimant stated she was unable to locate him.¹⁴ The NPFC was unable to corroborate the causation of the alleged losses based on the documentation provided.

This claim was denied because the Claimant failed to meet the burden to demonstrate (1) that there was an alleged loss in the amount claimed, and (2) that the alleged loss was 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.

RECONSIDERATION CLAIM ANALYSIS:

Under 33 CFR 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

⁶ GCCF On-Line Claim Status

⁷ GCCF Notice of Determination dated 13 October 2011

⁸ Report from the GCCF dated 21 November 2011

⁹ GCCF On-Line Claim Status

¹⁰ GCCF Determination Letter dated 10 May 2011

¹¹ Report from the GCCF dated 21 November 2011 and GCCF Determination Letter dated 10 May 2011

¹² Claimant’s January 15, 2012 letter in response to her denial determination from the NPFC.

¹³ Jimmy Wiltcher, general manager at Castaways’, estimated \$75,000.00. Mary Karen Carli, previous bartender at The Reef in Perdido Key, Florida, estimated \$112,875.00. Marty McGreavy, a hospitality consultant, estimated \$113,300.00. Also see Lost Earning Capacity Worksheet May 2010 to August 2011

¹⁴ Claimant’s e-mail of 03 December 2011 describes her attempts to contact Jimmy Wiltcher, General Manager at Castaways.

support the claim. Under 33 CFR § 136.233, a claimant must establish loss of profits or impairment of earning capacity and that the loss was due to the destruction or injury to real or personal property or natural resources. The NPFC considered all the documentation submitted by the Claimant. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a *de novo* review of the entire claim submission upon reconsideration.

Upon review of all of the Claimant's information, the Claimant did not produce sufficient documentation that would persuade the NPFC to change its original denial determination. While the Claimant has provided the names of two individuals that could attest to the existence of two like businesses that existed in the same physical building prior to the Castaways and provided a contact number for Mr. Wiltcher, she has not provided any information associated with the financial stability of the business or its projected revenues or how it was directly impacted by the oil spill. Additionally, the Claimant has not demonstrated that her calculation for arriving at her alleged loss is reasonable or based on useful information.

On February 13, 2012, the NPFC spoke with Mr. Jimmy Wiltcher, previous Operations Manager at Castaways. He explained that he did write two letters in support of the Claimant and that he has been in the industry for many years and states that business at Castaways was affected by the oil spill and also that projected income levels never materialized. The NPFC asked whether or not Castaways filed a claim and if he would be willing to produce the financial data to support his assertions regarding business losses.

Mr. Wiltcher advised that he does not have access to any of the financial data and that he was released from Castaways by the current Management. Mr. Wiltcher stated the NPFC could contact Mr. Mike Jenkins who is currently employed by Castaways to see if he would be willing to provide aid to assist the Claimant in proving her alleged losses based on projected business income and actual income. The NPFC has contacted the number provided for Mr. Jenkins and has not been able to speak with him or receive a return call in order to obtain financial information about Castaways that would corroborate the Claimant's assertions and alleged loss.

During the NPFC's conversation with Mr. Wiltcher, he was asked about a document the Claimant produced in her claim package that depicted a daily record of tips during her employment at Castaways and signed by Mr. Wiltcher. He affirmed that he signed the document. Upon confirmation, the NPFC inquired as to why the Claimant's W-2 did not match up with what she asserted to have earned at Castaways. The NPFC informed him that there was more than a 50% difference of what the company reported she earned in 2010 on her W-2 vice what the Claimant asserts she made which is what she used in calculating her alleged losses. The NPFC expressed concern over the validity of assertions based on the noted discrepancy. Mr. Wiltcher told the NPFC that it appears that some "shady" financial business may be going on with Castaways but could not elaborate further and stated if we did reach Mr. Jenkins, he wasn't sure they would be willing to provide anything.

Mr. Wiltcher informed the NPFC that he did file a claim with the GCCF as an individual and was paid and that his income structure was salary which is how his losses were calculated. He

did not offer to provide any further details. In closing, Mr. Wiltcher advised that he was just trying to help the Claimant as he feels she is entitled to some type of compensation.

Upon further review of the claim, the Claimant submits that her income taxes for 2008 and 2009 are irrelevant to the issue at hand and as such, has not produced such documentation. Additionally, it appears based on statements made in the Claimant's submission, she recently returned to the work force in 2010. While the Claimant has obtained statements from individuals in the local area familiar with the industry she had been working in, they gave their opinions on what they estimate bartender income to be at other establishments in the vicinity of where Castaways was located.

In consideration of the Claimant just becoming a bartender at Castaways immediately preceding the oil spill, coupled with no historical financial data for Castaways since it was a new business, uncertainty on the wages earned by the Claimant as reported on her W-2 for Castaways vice what she asserts to have made, the fact that she received \$52,000.00 between payments made by BP and GCCF, and the fact that the Claimant's calculation of her alleged losses are not supported by the record, the NPFC is unable to determine that the Claimant has experienced a loss that was 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 or that her alleged loss is in fact \$106,360.66 as claimed. Based on the evidence presented, it appears the Claimant made more in 2010 than she had since at least prior to 2008.

Based on the foregoing information, this claim is denied upon reconsideration.

Claim Supervisor: *Thomas Morrison*

Date of Supervisor's review: *3/14/12*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments:

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

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5890
3/14/12

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 6609

Hermeen Jacobson
[REDACTED]

RE: Claim Number: N10036-1542

Dear Ms. Jacobson:

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 N10036-1542 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

Disposition of this reconsideration constitutes final agency action.

Sincerely,

Thomas S. Morrison
Chief, Claims Adjudication Division
U.S. Coast Guard

Encl: Claim Summary / Determination Form