

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 8740

5890/DWHZ
10 February 2012

Mr. Brad Davenport



Re: Claim Number: N10036-1613

Dear Mr. Davenport:

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 N10036-1613 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 N10036-1613.

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 | N10036-1613 |
| Claimant | Mr. Brad Davenport |
| Type of Claimant | Private (US) |
| 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 19 December, 2011, Brad Davenport (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$25,000.00 in loss of profits and impairment of earnings capacity damages that allegedly resulted from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was employed with the Boston Beer Garden Restaurants located in Naples, FL.² The Claimant alleged that he sustained a loss of wages totaling \$25,000.00, due to a significant reduction in the number of customers patronizing the restaurant following the Deepwater Horizon oil spill.³

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 § 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 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.

¹ Optional OSLTF Claim Form, NPFC received 19 December 2011.

² Optional OSLTF Claim Form, NPFC received 19 December 2011.

³ Optional OSLTF Claim Form, NPFC received 19 December 2011.

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 initially submitted the following documentation:

- Optional OSLTF Claim Form, NPFC received 19 December 2011.
- Copy of GCCF Denial Letter dated 22 April 2011.
- Copy of Claimant's e-mail dated 16 December 2011.

Subsequent to receipt of the above information, in a letter dated 20 December 2011, the NPFC requested the Claimant provide additional information to further evaluate his claim.⁴ The following additional documentation was submitted:

- Employer letter stating impact of Deepwater Horizon oil spill on restaurant's clientele.
- Claimant's personal statement in response to request for additional information.
- Copy of 2008 Form 1040A
- Copy of 2009 Form 1040
- Copy of 2009 W2 for JZ of Naples, Inc.
- Copy of 2009 W2 for Best Buy Stores, LP.
- Copy of 2010 W2 for Best Buy Stores LP.
- Copy of 2010 W2 for JZ of Naples, Inc.
- Copy of 2010 pay stub for period 30 August 2010 thru 5 September 2010.
- Copy of Best Buy Stores pay summary for 2008 thru 2011 dated 10 March 2011.

Prior to presentment to the NPFC, the Claimant asserts having presented a claim to the RP/GCCF, seeking loss of profits and impairment of earnings capacity damages.⁵ The Claimant was assigned GCCF Claimant ID # 3475561 and Claim # 9131420.⁶ The NPFC independently confirmed that the Claimant presented a Full Review Final (FRF) claim to the GCCF in the amount of \$25,000.00, for lost wages/earnings, and that his FRF claim was denied.⁷

On 19 December 2011, the Claimant presented this claim to the NPFC, seeking \$25,000.00 in loss of profits and impairment of earnings capacity damages.⁸ This NPFC determination addresses this claim in the amount of \$25,000.00, to the extent that amount was previously presented in the Claimant's IP/FRF claim.

⁴ NPFC letter requesting additional information dated 20 December 2011.

⁵ Optional OSLTF Claim Form, NPFC received 19 December 2011.

⁶ Denial Letter on Interim Payment/Final Payment Claim, 22 April 2011.

⁷ GCCF – USCG Report as of 23 January 2012.

⁸ Optional OSLTF Claim Form, NPFC received 19 December 2011.

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 a claim for loss of profits and impairment of earnings capacity damages a Claimant must demonstrate (1) that he sustained an actual loss or reduction in income, and (2) that any loss of income sustained by a Claimant was caused by effects of the Deepwater Horizon oil spill.

The Claimant asserted that he sustained a loss of income when his employer, Boston Beer Garden Restaurants, incurred business losses due to reduced patronage following the Deepwater Horizon oil spill.⁹ To support his assertion, the Claimant provided a letter from the owner of the restaurant indicating that the restaurant did incur a reduction in revenues and patronage due to the oil spill's impact on tourism and the local economy.¹⁰ However, the letter did not provide financial statements or empirical data to support the Claimant's assertion. The Claimant also provided payroll statements and W2s from the Boston Beer Garden Restaurants and Best Buy Stores. In addition, copies of Form 1040s for Tax Years 2010, 2009 and 2008 were provided. These documents indicate annual income increases from 2008 to 2009 and 2009 to 2010. However, the documents provided by the Claimant do not substantiate his assertion that he lost income because of a decrease in tourism in southwest Florida due to the discharge of oil resulting from the Deepwater Horizon oil spill.

To the contrary, independent research conducted by the NPFC discovered that Collier County tourism actually had a year over year increase in visitation from 2009 to 2010 (+3.3%) following a significant year over year decrease between 2008 and 2009 (-5.3%).¹¹ Further, to the extent that the Claimant's patrons worked in the service industry, Collier County statistics indicate that the number of tourism related jobs decreased between 2009 and 2010 by less than 1% (.6%) and there is no evidence indicating that the wages supported by that industry changed between 2009 and 2010.¹² This information is in direct contradiction to the assertions undergirding the Claimant's claim before the NPFC

Accordingly, this claim is denied because (1) the Claimant failed to meet his burden to prove that he sustained a loss in profits in the amount of \$25,000.00, and (2) the Claimant failed to prove 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: *2/10/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁹ Personal Statement attached to the Claimant's e-mail dated 2 January 2012.

¹⁰ Undated, unsigned letter from the owner of Boston Beer Garden Restaurants.

¹¹ Collier County 2010 Annual Visitor Profile and 2010 Tourism Impact Fast Facts retrieved 10 February 2010 from: http://www.paradisecoast.com/media_center/research.php

¹² Collier County 2010 Annual Visitor Profile and 2010 Tourism Impact Fast Facts retrieved 10 February 2010 from: http://www.paradisecoast.com/media_center/research.php