

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

NPFC CA MS 7100
US COAST GUARD
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Arlington, VA 20598-7100
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5890
2 March 2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 8832

Marcus Andrews
[REDACTED]

RE: Claim Number: N10036-1649

Dear Mr. Andrews:

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 N10036-1649 involving Deepwater Horizon. 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 N10036-1649.

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: (1) Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1649
Claimant	: Marcus Andrews
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$15,000.00

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 24 January 2012, Marcus Andrews, (referred to as “the Claimant”) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$15,000.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.¹

The Claimant is a carpenter in Mobile, Alabama, and stated that he worked for Safway LLC, a scaffolding company, and that the company lost business in Gulf Shores and other locations as a result of the Deepwater Horizon oil spill.² Claimant alleges that he was laid off due to the alleged loss of business experienced by his employer, Safway LLC.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.

¹ Optional OSLTF Claim Form signed and received 24 January 2012.

² Phone conversation between Claimant and NPFC Staff on 22 February 2012.

³ Phone conversation between Claimant and NPFC Staff on 22 February 2012.

- (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 presented the following documentation:

- Optional OSLTF Claim Form signed and received 24 January 2012.
- Termination Personnel Action Notice, effective 10 January 2011.
- Alabama Driver License issued 15 June 2009.
- Social Security Administration card issued 15 June 2009.
- IRS e-file Signature Authorization, Form 8879, dated 10 October 2011.
- W-2 Wage and Tax Statement from Safway Services, LLC, for 2010.
- Safway Services, LLC, pay statement dated 1 April 2010 (top and bottom with non-negotiable statement of earnings).
- Safway Services, LLC, pay statement dated 25 June 2010 (top half only).
- Safway Services, LLC, pay statement dated 7 January 2011 (top and bottom with non-negotiable statement of earnings).
- Undated pay record in the amount of \$987.74, by Ceridian Payroll Service.

Claimant presented two claims to the GCCF and was issued GCCF Claimant Identification # 3140497.⁴ The GCCF issued Claim # 195291 to his Emergency Advance Payment (EAP) Claim and GCCF Claim # 9283941 to his Full Review/Final (FRF) Claim.⁵ The NPFC also verified that the EAP Claim was presented on 11 October 2010, seeking damages of \$4,000.00, and that

⁴ GCCF – U.S. Coast Guard Report as of 16 February 2012.

⁵ GCCF – U.S. Coast Guard Report as of 16 February 2012.

his FRF Claim was presented on 5 April 2011, seeking damages of \$43,064.00.⁶ Both claims have been denied by the GCCF.⁷

Based upon the information provided by the Claimant and independent verification by the NPFC, this claim can be adjudicated in the full amount of damages presented to the NPFC—\$15,000.00. The subject matter of his EAP Claim does not appear to be based upon the same subject matter as the claim before the NPFC. The EAP Claim was presented to the GCCF on 11 October 2010⁸ and the damages claimed to the NPFC stem from the Claimant's termination on 10 January 2011. The termination occurred about three months after the EAP claim had been presented to the GCCF. Because the subject matter of the FRF Claim appears to be based upon the same subject matter as the claim before the NPFC and timing of the termination notice and the FRF Claim presentation are consistent, the NPFC deems this Claim Summary Determination as being outcome determinative for the FRF Claim.

The substance of the Claimant's documentation is that he had worked for Safway Services, LLC, in Mobile, Alabama,⁹ and was laid off from his job there on 10 January 2011 due to a lack of work, resulting from the oil spill and the economy.¹⁰ The Claimant states that his claim at the GCCF was denied.

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 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. The NPFC has considered all documentation provided by the Claimant.

This claim is denied because the Claimant has failed to prove (1) that he has incurred loss of profits or impairment of earnings capacity damages in the amount alleged and (2) that his alleged loss was due to the Deepwater Horizon spill.

(1) Failure to prove damages:

The first element a claimant must prove in a lost profits or impairment of earnings capacity claim is that the claimant has incurred the alleged damages. Here, the Claimant asserted to the NPFC 2011 damages in the amount of \$15,000.00. The Claimant presented minimal documentation of his employment history during 2010, specifically a W-2 Form and three paycheck stubs. The Claimant did not provide tax returns or other documentation showing overall compensation for 2011. The Claimant did not document the 2011 loss period, the specific amounts of pay received in 2010 that was earned in the comparable loss period and he did not adjust his damages for unemployment compensation or other income received.

⁶ GCCF – U.S. Coast Guard Report as of 16 February 2012.

⁷ GCCF – U.S. Coast Guard Report as of 16 February 2012.

⁸ GCCF – U.S. Coast Guard Report as of 16 February 2012.

⁹ 2010 W-2 Wage and Tax Statement from Safway Services, LLC, for 2010; pay statements dated 1 April 2010, 25 June 2010, and 7 January 2011 ;and Termination Personnel Action Notice, effective 10 January 2011.

¹⁰ Unsigned Termination Personnel Action Notice, effective 10 January 2011, and Optional OSLTF Claim Form signed on 24 January 2012 indicate that his damages were caused by the incident, which he describes as the Deepwater Horizon oil discharge into the ocean.

(2) Failure to prove causation:

The second element a claimant must prove in a lost profits or impairment of earnings capacity claim is that the alleged loss is due to the oil spill. In attempting to verify the alleged damages presented in this claim, the NPFC contacted the Claimant's former employer Safway LLC. Documentation provided by the Claimant indicates that the Claimant was terminated on 10 January 2011 due to a lack of work resulting from the oil spill and the economy.¹¹ The claim also states that the Deepwater Horizon incident, "... caused me to have wages/loss wages." The NPFC spoke with a representative of the employer, who stated that the Claimant was laid off on 10 January 2011 and that he returned to work in October 2011.¹² This representative could not confirm that the Claimant was or was not laid off due to the oil spill.¹³ Further, the employer indicated that the termination notice should have been signed by their management, so they could not confirm the authenticity of the termination notice provided to the NPFC.

Although the NPFC was unable to confirm authenticity of the termination notice, the notice nevertheless states that the termination was due to the oil spill and the Economy. It is the Claimant's responsibility to prove that the damages claimed were due to the oil spill and not other factors. If the termination notice is later confirmed to be valid, it still does not isolate the cause of damages as the Deepwater Horizon oil spill.

Accordingly, this claim is denied for the following reasons: (1) the Claimant has failed to sufficiently demonstrate that he incurred damages in the amount alleged and (2) the Claimant has failed to demonstrate that the alleged loss is due to injury or destruction or loss of real or personal property or a natural resource as a result of a discharge or a substantial threat of a discharge of oil.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *3/2/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹¹ Unsigned Termination Personnel Action Notice, effective 10 January 2011.
¹² Phone conversation, Safway Services with NPFC Staff on 23 February 2012.
¹³ Email from Safway Services, LLC, to NPFC on 23 February 2012.