

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
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5890/DWHZ
2 April 2012

[REDACTED]
C/O Law Offices of Michael R. Herron, Esq.
1745 West Fletcher Ave.
Tampa, FL 33612

Re: Claim Number: N10036-1659

Dear [REDACTED]

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 N10036-1659 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 N10036-1659.

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
Claimant: Kirk Milliren

[REDACTED]
CERTIFIED MAIL – RETURN RECEIPT REQUESTED: 7011 1570 0001 2446 2230

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1659
Claimant	[REDACTED]
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$14,125.02

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 26 January 2012 attorney Michael R. Herron, Esq., on behalf of Mr. Kirk Milliren, (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$14,125.02 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

From 28 November 1988 to present, the Claimant has been employed as a server at a Red Lobster franchise located in Hillsborough County, Florida.² The Claimant alleged that following the oil spill, “tourists avoided the area due to the threat of oil on the beaches,” and “people did not want to eat local seafood due to possibility of contamination.”³

The Claimant alleged to have lost \$4,708.34 in wages and tips in 2010 due to (1) a decrease in tourism in Hillsborough County, as well as (2) a general decline in business caused by the perception that seafood was contaminated by the oil spill. The Claimant calculated his damages by subtracting his 2010 earnings from his 2008 earnings, and then multiplying the difference by three in order to reach his sum certain amount of \$14,125.02.⁴

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.

¹ Optional OSLTF Claim Form, signed on 30 November 2011.

² Letter from the Claimant’s employer, confirming employment dates, 10 May 2011.

³ Optional OSLTF Claim Form, signed on 30 November 2011.

⁴ Optional OSLTF Claim Form, signed on 30 November 2011.

- (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, signed on 10 September 2011;
- Legal Representation Agreement;
- Letter from the Claimant's employer, verifying employment from 28 November 1988 to 10 May 2011;
- Letter from Adriana Urbina, 21 August 2011;
- Letter from Katrina Ooms, 22 August 2011;
- Letter from the Claimant, undated;
- 2010 W-2 Wage and Tax Statement, showing yearly earnings of \$23,742.30;
- 2008 W-2 Wage and Tax Statement, showing yearly earnings of \$28,450.64;
- Pay documentation, 6 May 2011;
- Pay Stubs, 2010;
- 2010 Form 1040, showing wages of \$23,742.00;
- 2010 Schedule E (Form 1040);
- 2010 Schedule F (Form 1040);
- 2010 Form 4562;
- Handwritten profit and loss statement regarding farming operations;
- 2008 Form 1040 showing earnings of 28,451.00;
- 2008 Schedule A (Form 1040);
- 2008 Schedule E (Form 1040);
- 2008 Schedule F (Form 1040);

- 2008 Form 4562;
- Oxford Economics, *Potential Impact of the Gulf Oil Spill on Tourism*;
- Cover letter, response to NPFC request for additional information, 15 March 2012;
- Letter regarding the Claimant's earnings in 2009;
- 2009 Form W-2 Wage and Tax Statement, showing earnings of \$24,835.04;
- 2009 Form 1040, showing wages of \$24,835.00;
- 2009 Schedule A (Form 1040);
- 2009 Schedule D (Form 1040);
- 2009 Schedule E (Form 1040);
- 2009 Schedule F (Form 1040);
- 2009 Form 4562;
- 2009 Schedule M (Form 1040A or 1040);
- Wage Compensation Report, 30 December 2007 – 25 December 2009.

On 8 February 2011, the Claimant presented a First Quarter Interim Claim (ICQ12011) to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$4,600.00.⁵ The Claimant was assigned Claimant ID # 3483729 and the ICQ12011 was assigned claim # 9186146.⁶ The RP/GCCF denied payment on this claim.

On 16 May 2011, the Claimant submitted a Full Review Final (FRF) claim to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$8,413.86.⁷ The FRF claim was assigned claim # 9186165 and was also denied.⁸ The total amount of damages previously presented by the Claimant to the RP/GCCF in the Claimant's ICQ12011 and FRF claims, total \$13,013.86.

On 26 January 2012, the Claimant submitted this claim to the NPFC, seeking \$14,125.00 in loss of profits and impairment of earning capacity damages.⁹ The NPFC may adjudicate this claim to the extent that these damages have first been presented to the RP/GCCF.¹⁰ Because the amount of damages now presented to the NPFC, exceeds the amount of damages presented to the RP/GCCF by \$1,111.16, this claim is initially denied in this amount.¹¹ Therefore, the remainder of this determination shall address this claim for \$13,013.86 in damages, as properly first presented to the RP/GCCF.

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 damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

⁵ GCCF United States Coast Guard Report, 16 February 2012.

⁶ GCCF United States Coast Guard Report, 16 February 2012.

⁷ GCCF United States Coast Guard Report, 16 February 2012.

⁸ GCCF United States Coast Guard Report, 16 February 2012.

⁹ Optional OSLTF Claim Form, signed on 30 November 2011.

¹⁰ 33 C.F.R. § 136.103(a).

¹¹ 33 C.F.R. § 136.103(a).

1. Failure to demonstrate an actual financial loss.

The Claimant alleged that due to the Deepwater Horizon oil spill, he sustained a loss of tips and wages totaling \$14,125.02.¹² The Claimant's alleged damage amount was computed by subtracting his 2010 earnings from his 2008 earnings and "multiplying by 3 for future damages."¹³ As noted above, \$1,111.16 of this claim is denied for improper presentment.¹⁴

As an initial matter, the NPFC notes that prospective future damages are not compensable under OPA's loss of profits damage category, which limits potentially available compensation to "the actual net reduction or loss of earnings or profits *suffered*" [emphasis added].¹⁵ Therefore, any amount of this claim that alleges future losses not actually incurred by the Claimant is denied. The remainder of this determination shall therefore address the actual difference between the Claimant's 2010 and 2008 income, of \$4,708.34.¹⁶

Regarding the Claimant's alleged actual losses in 2010, the Claimant has failed to demonstrate that in 2010, his wage and tip earnings were on track to match his 2008 earnings. Rather, according to the Claimant's pay stubs, his 2008 income from January to May 2008 was approximately 31% higher than his income from January to May 2010.¹⁷ Therefore, it appears that the Claimant's 2010 income in the months prior to the oil spill was already significantly reduced as compared to 2008 levels.

Furthermore, relative to the Claimant's pre-oil spill income in 2010, the Claimant's post-oil spill income more closely matched the levels it reached in 2008. Overall, the Claimant's yearly earnings in 2010 were only 20% off his 2008 earnings, indicating that his 2010 post-oil spill earnings were relatively improved as compared to 2010 pre-oil spill earnings.¹⁸

Because the Claimant's income does not appear to have dropped in the period following the oil spill, but instead, remained steadily lower than 2008 levels, the Claimant has not proven that he sustained an actual financial loss in 2010 following the oil spill.

2. Failure to prove loss due to Deepwater Horizon oil Spill.

The Claimant alleged that his loss of wages and tips in 2010 was caused by (1) decreased tourism in Hillsborough County following the oil spill, and (2) reduced seafood sales as a result of fear of seafood contamination due to the spill.¹⁹

However, tourism statistics for Hillsborough County fail to clearly indicate that tourism decreased in 2010 following the Deepwater Horizon oil spill. Furthermore, the Claimant has not provided any evidence to indicate if and to what extent this particular Red Lobster location actually depends on tourist customers.

Regarding tourism statistics for Hillsborough County, although the overall number of visitors to the county decreased by an estimated 7.4% in 2010 as compared to 2009, overall visitor spending

¹² Optional OSLTF Claim Form, signed on 30 November 2011.

¹³ Optional OSLTF Claim Form, signed on 30 November 2011.

¹⁴ 33 C.F.R. § 136.235.

¹⁵ 33 C.F.R. § 136.235.

¹⁶ In Claimant's response to NPFC's request for additional information dated 08 March 2012, Claimant requested that the NPFC review his losses in light of Claimant's 2008 earnings because Claimant "missed 7 weeks due to a non-work related injury" in 2009.

¹⁷ Pay stubs indicate that the Claimant earned approximately \$10,609.87 from Jan-May 2008 and \$8,076.75 from Jan-May 2010.

¹⁸ 2008, 2010 pay stubs provided by the Claimant.

¹⁹ Optional OSLTF Claim Form signed on 30 November 2011.

increased by 10.5%.²⁰ Furthermore, the number of overnight visitors staying in commercial lodging increased by 7.8% in 2010 over 2009.²¹ Although statistics indicate that 2010 saw an overall reduction in visitors, it also experienced an increase in the number of overnight visitors, as well as an increase in overall visitor spending. Therefore, county statistics fail to support the Claimant's assertion that Hillsborough County sustained an overall reduction in tourism which caused Red Lobster to sustain a loss of sales. The Claimant has also not provided evidence to link the alleged decrease in tourism to the Deepwater Horizon oil spill.

Furthermore, the Claimant has failed to provide any evidence that the Red Lobster location where the Claimant was employed indeed lost seafood sales in the period following the Deepwater Horizon oil spill. In a letter to the Claimant dated 8 March 2012, the NPFC requested that the Claimant provide documentation regarding the extent of the business losses allegedly incurred by the Claimant's employer as a result of the oil spill.²² The Claimant failed to adequately respond to this request, stating that [w]e were unable to attach a letter from the employer as it is their company policy not to write letters regarding oil spill losses."²³ The NPFC attempted to contact management personnel at the Red Lobster location where the Claimant was employed, in order to garner additional information regarding possible losses incurred by the restaurant. However, restaurant management was unresponsive and would not provide any information to support this claim.²⁴ Further, the letters allegedly written by fellow employees are unpersuasive in that they are unsigned, provide no information other than the same assertions made by the Claimant, and do not mention the Red Lobster restaurant.²⁵

Based on the foregoing, the Claimant has failed to demonstrate that the oil spill caused a reduction in sales at the Red Lobster where the Claimant was employed, which caused the Claimant to sustain a loss of tips and wages. Furthermore, the Claimant has failed to provide any documentation to prove that any alleged loss of sales was caused by the oil spill.

This claim therefore is denied because the Claimant has failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$14,125.02, 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: *4/2/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

²⁰ Analysis of 2010 Hillsborough County Visitor Key Findings, available at, <http://www.hillsboroughcounty.org/econdev/resources/publications/tourism/2010TourismVisitorStudySummary.pdf>. Accessed on 20 March 2010.

²¹ *Id.*

²² NPFC Request for additional information, 8 March 2012.

²³ Cover Letter, Response to NPFC Request for additional information, 15 March 2012.

²⁴ PHONECON: NPFC Staff and Red Lobster Management, 8 March 2012.

²⁵ Letter dated 21 August 2011 from A. U. and letter dated 22 August 2011 from K. O.