

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1680
Claimant	: Ricardo Orozco
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$33,674.76

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 09 February 2012, Ricardo Orozco (Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$33,674.76 for loss of profits and impairment of earnings capacity damages to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill.

The Claimant works as an assistant manager at a Denny's restaurant in Florida City, Florida.¹ The Claimant alleges that the oil spill caused declining sales at the restaurant thereby reducing his salary and income.² The supporting letters from his employers indicate that a lack of tourism to the restaurant caused a reduction in sales forcing the restaurant to cancel the Claimant's monthly bonus and annual salary increase.³ The letter further indicates that the declining sales since the oil spill caused his salary to be cut.⁴ For these reasons, the Claimant alleges that the oil spill caused his earnings to be reduced.⁵

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:

¹ December 23, 2010 letter from Aurelin Granum, General Manager.

² Optional OSLTF Claim Form.

³ December 23, 2010 letter from Aurelin Granum, General Manager.

⁴ January 11, 2011 memo from Alfonso Fernandez of A.F. Management.

⁵ Optional OSLTF claim form dated 20 January 2012.

- (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 his claim, Claimant submitted the following:

- Optional OSLTF Claim Form;
- GCCF denial letter on Interim Payment/Final Payment Claim;
- December 23, 2010 letter from Aurelin Granum, General Manager;
- January 11, 2011 memo from A.F. Management, Alfonso Fernandez;
- Florida City Wikipedia information;
- MDLNo. 2179 Plaintiff's Steering Committee document;
- 2010 and 2011 W2s;
- Employee earnings statements;
- April 20, 2012 Claimant response letter;
- Florida and Monroe County tourism research reports.

Claimant seeks lost profits and impairment of earnings capacity in the amount of \$33,674.76.

Prior to presenting his claim to the NPFC, Claimant filed claims with the GCCF and was issued Claimant ID# 3469685. He filed Full Review Final claims with the GCCF, Full Review Final (FRF1) Claim 1 with GCCF #9066750 and Full Review Final (FRF2) Claim 2 with Claim #9133047; one was filed on 10 December 2010 for \$14,000.00 and the other was filed on 24 December 2010 for \$14,175.00. These claims were denied on 29 July 2011.⁶

Based upon the evidence provided by the Claimant, it appears that the subject matter for each of the GCCF claims is the same as the subject matter of his claim before the NPFC, i.e., that lost earnings as a result of the Deepwater Horizon oil spill. The NPFC deems each of Claimant's two denied GCCF claims to be properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary determination for NPFC Claim N10036-1680 considers and addresses the earnings claimed in both of the claims presented to the responsible party, specifically; GCCF Claim #'s 9066750 (FRF1), and 9133047 (FRF2).

NPFC Determination

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 considered all the documentation submitted by the Claimant.

Under 33 C.F.R. § 136.103(a), all claims for removal costs or damages must be presented first to the responsible party (RP). The Claimant presented two Final Claims, the higher of which was in the amount of \$14,175.00 for loss of profits or impairment of earning capacity, to the GCCF. The Claimant then presented a claim for loss of profits and impairment of earning capacity in the amount of \$33,674.76 to the NPFC. Any claimed amount of damages exceeding \$14,175.00 was not properly presented first to the RP/GCCF pursuant to 33 C.F.R. § 136.103(a) and as such, \$19,499.76 is denied.

Based on the supporting documentation provided by the Claimant, his argument for payment from the OSLTF is that the oil spill in the northern part of the Gulf of Mexico affected tourism in the Florida Keys. Consequently, this resulted in diminished car travel by tourists heading to the Keys, which caused the Denny's restaurant in Florida City where he worked to lose customers and sales, thereby forcing the Claimant's employer to cut his income. While the Claimant's employer appears to agree that the oil spill caused a reduction to the Claimant's income, his employer has not provided any specific information which would support the Claimant's contention.⁷ The Claimant has provided no other evidence as to the causation of his alleged loss.

The Claimant has provided no documentation to substantiate that his loss of earnings was due to the Deepwater Horizon oil spill. The Claimant provided research reports from Monroe County, Florida (the Florida Keys are in Monroe County) relating to travel and tourism data.⁸ The data contradicts the Claimant's allegations that tourism in the Florida Keys diminished. The data shows that occupancy rates in Monroe County increased from 2008 through 2011, and included increases in January and February 2012 over the same period in 2011.⁹ Total estimated visitation to Monroe County increased in 2010 over 2009 for overnight guest stays overall and

⁶ GCCF Denial Letter dated July 29, 2011

⁷ In response to NPFC's request for information at document request #1, Claimant replied that his employer would not provide financial documentation.

⁸ Monroe County Tourist Development Council – Smith Travel Research, Monthly Overview & Tier Report dated 3/29/2012.

⁹ Monroe County Tourist Development Council – Smith Travel Research, Monthly Overview & Tier Report dated 3/29/2012.

for day trips.¹⁰ Additionally, tourism, recreation and retail taxable sales in Monroe County increased each month of each year from 2009 to 2011.¹¹

As such, the Claimant has not established by a preponderance of the evidence that his alleged loss of earnings was due to the oil spill. This claim is denied because (1) the Claimant failed to meet his burden to demonstrate that his alleged loss is due to the injury to or destruction or loss of property or natural resources as a result of a discharge or substantial threat of a discharge of oil into the navigable waters of the U.S, (2) the Claimant failed to prove his alleged loss in the amount claimed, and (3) the Claimant failed to properly present \$19,499.76 of his alleged loss first to the RP before presenting to the NPFC.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *5/14/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

¹⁰ Monroe County Tourist Development Council – 2009 and 2010 Florida Keys & Key West Visitor Estimates.

¹¹ Monroe County Sales Tax Data for 2004-2011 (<http://www.keywestchamber.org/pdf/trends.pdf>)

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
4200 Wilson Blvd. Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 1-800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

5890/DWHZ
14 May 2012

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2446 3503

Ricardo Orozco
[REDACTED]

RE: Claim Number: N10036-1680

Dear Mr. Orozco:

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 N10036-1680 involving the Deepwater Horizon oil spill. Please see the enclosed 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 N10036-1680.

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