

U.S. Department of
Homeland Security

**United States
Coast Guard**




Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 9594

5890/DWHZ
1 May 2012

Vance, Lotane & Bookhardt, P.A.


Re: Claim Number: N10036-1738

Dear Mr. Barksdale:

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 your claim number N10036-1738 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. If, however 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 N10036-1738.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,


U.S. Coast Guard

Copy: Felicia McMillian
4600 Twin Oaks Dr., Apt. 815
Pensacola, FL 32506

USPS Certified Receipt: 7011 1570 0001 4802 9600

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1738
Claimant	Felicia McMillian
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$33,435.79

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 28 March 2012, Arthur S. Barksdale IV, on behalf of Felicia McMillian (the Claimant), presented an optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$33,435.79 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant is employed as manager at Wendy's in Pensacola, Florida.¹ The Claimant asserted that, due to a reduction in business caused by the Deepwater Horizon oil spill, she experienced a reduction in hours and was forced to relocate to another Wendy's location further away from her house.² The Claimant indicated that she has lost 12 work hours a week since the Deepwater Horizon oil spill occurred and will continue to lose 12 hours a week in the future.³

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a). Damages include the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant. 33 U.S.C. § 2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, is available to pay claims for uncompensated damages pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136. With certain exceptions a claim must first be presented to the responsible party. 33 U.S.C. § 2713(a). If the claim is either denied or not settled by any person

¹ GCCF Full Review Final Payment Claim Form, 02 September 2011.

² GCCF Full Review Final Payment Claim Form, 02 September 2011.

³ Lost Earnings/Income Worksheet.

by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. § 2713(c).

Pursuant to the claims regulations, 33 C.F.R. § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

- (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 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 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

The Claimant's Submission to the OSLTF

In support of the claim, the Claimant presented the following documentation to the NPFC:

- Letter from Arthur S. Barksdale IV, Esq. to the NPFC, dated 27 March 2012;
- NPFC Authorization Agreement, signed by the Claimant on 13 March 2012;
- GCCF Full Review Final Payment Claim Form, 02 September 2011;
- Letter from the Claimant to "whom it may concern," dated 20 March 2012;
- Deficiency Letter on Interim Payment/Final Payment Claim, dated 22 February 2012;
- Lost Earnings/Income Worksheet;

- Letter of claim explanation from the Claimant, undated;
- Letter of claim explanation from the Claimant(2), undated;
- Paystubs from Wendco Corporation for the period: 10 October 2011 through 06 November 2011; and
- GCCF Client Authorization Form, signed by the Claimant on 02 September 2011.

Prior to presenting this claim to the NPFC, the Claimant filed a Full Review Final (FRF) claim with the GCCF for loss of earnings on 28 December 2011 in the amount of \$33,435.79.⁴ She was assigned Claimant ID # 1638764 and Claim # 9551324. This claim was denied by the GCCF.⁵

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claim is the same as the subject matter of the claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the Claimant lost earnings at Wendy's. The NPFC deems that the Claimant's GCCF claim was properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1738 considers and addresses the earnings claimed in the claims presented to the responsible, specifically; GCCF Claim # 9551324 (FRF).

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 documentation presented by the Claimant.

This claim is denied because (1) some of the Claimant's alleged damages are for future losses and not compensable under OPA, and (2) the Claimant failed to prove her alleged loss was due to the Deepwater Horizon oil spill.

Non-Compensable Damages

The Claimant indicated that her claimed damages to the NPFC included damages for a period of up to 60 months from the date of the Deepwater Horizon oil spill.⁶ However, under 33 CFR § 136.235, "the amount of compensation is limited to the actual net reduction or loss of earnings *suffered*."⁷ Therefore, the Claimant cannot be compensated for any prospective damages that might accrue in the future. Consequently, to the extent the losses claimed by the Claimant are for future losses, those damages are non-compensable under OPA and are therefore denied.

Failure to Prove Causation

The remainder of this claim is denied because the Claimant failed to prove she experienced a financial loss due to the Deepwater Horizon oil spill. The Claimant asserted that she lost hours at Wendy's and was relocated to a different restaurant location as a result of the Deepwater

⁴ Report from the GCCF dated 17 April 2012.

⁵ Report from the GCCF dated 17 April 2012.

⁶ Lost Earnings/Income Worksheet.

⁷ Emphasis added.

Horizon oil spill.⁸ The NPFC contacted Wendy's on 29 March 2012 to confirm the assertions made by the Claimant and to obtain further information linking the Claimant's loss to the oil spill. The NPFC was informed that neither of the Wendy's locations where the Claimant worked were impacted by the Deepwater Horizon oil spill.⁹ Further, the NPFC was informed that the Claimant's hours actually increased in 2010 after the Deepwater Horizon oil spill, averaging 70.8 hours per pay period prior to the oil spill and 77.8 hours a pay period during the period after the oil spill in 2010.¹⁰ Lastly, the NPFC was informed that the Claimant was not moved from her restaurant location until May of 2011 and that this decision had no connection to the Deepwater Horizon oil spill.¹¹

Based on the foregoing, the NPFC has concluded that this submission contains known misrepresentations of fact to support allegations contained in this claim.

Under 33 C.F.R. § 136.9, persons submitting false claims, or making false statements in connection with claims under this part, may be subject to prosecution under Federal law, including, but not limited to 18 U.S.C. §§ 287 and 1001. In addition, persons submitting written documentation in support of claims under this part, which they know or should know, is false may be subject to civil penalty for each claim.

This claim is denied because (1) some of the damages claimed are for future damages and not OPA compensable, (2) the Claimant failed to meet her burden to demonstrate that there was a loss in the amount claimed, (3) the Claimant failed to meet his burden to demonstrate 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, and (4) the Claimant has materially misrepresented elements of this claim in an attempt to falsely obtain funds from the Federal Government.

Claims Supervisor:  *NPFC Claims Adjudication Division*

Date of Supervisor's Review: **5/1/12**

Supervisor's Action: ***Denial approved***

Supervisor's Comments:

⁸ PHONECON between the NPFC and Wendy's on 29 March 2012.

⁹ PHONECON between the NPFC and Wendy's on 29 March 2012.

¹⁰ PHONECON between the NPFC and Wendy's on 29 March 2012.

¹¹ PHONECON between the NPFC and Wendy's on 29 March 2012.