

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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5890
22 May 2012

CERTIFIED MAIL-- RETURN RECEIPT REQUESTED

Number: 7011 1570 0001 2446 2636

Daniel Verl Feranda


RE: Claim Number: N10036-1759

Dear Mr. Feranda:

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 N10036-1759 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 N10036-1759.

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	: N10036-1759
Claimant	: Daniel Verl Feranda
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$60,960.00

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 7 March 2012, Daniel Verl Feranda (referred to as 'the Claimant') presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$60,960.00 for loss of profits and impairment of earning capacity resulting from the Deepwater Horizon oil spill.¹ The Claimant was employed as the head of security at a nightclub in D'Iberville, Florida, until April 2010. The Claimant asserts that he was laid off due to the oil spill; lost earnings in 2010, 2011 and 2012; and is still unemployed.²

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.

¹ Optional OSLTF Claim Form received on 28 March 2012 and Claimant letter dated 3 April 2012.

² Optional OSLTF Claim Form received on 28 March 2012 and Claimant letter to the GCCF dated 15 March 2012.

- (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 without sum certain, received 28 March 2012.
- Claimant's letter to the NPFC with sum certain, dated 3 April 2012/received 3 April 2012.
- Claimant's letter, 'To Whom It May Concern', dated 15 March 2012.
- Claimant's letter to Kenneth Feinberg dated 22 April 2011.
- Guitars & Cadillacs of D'Iberville, LLC pay stub dated 24 April 2009.
- Guitars & Cadillacs of D'Iberville, LLC pay stub dated 22 May 2009.
- Guitars & Cadillacs of D'Iberville, LLC pay stub dated 15 January 2010.
- 2009 Form 1099-Misc from Guitars & Cadillacs of D'Iberville.
- Claimant's notarized letter, 'To Whom It May Concern', dated 2 February 2011.
- 2009 Form 1040 Tax Return with Form 8862.
- 2008 Form 1040 Tax Return with Schedule IEC and Form 4684.
- Claimant's letter, '2010 Wage Summary', dated 8 February 2011.
- Kenny Davis, owner of Guitars & Cadillacs of D'Iberville, letter dated 6 May 2011.
- Claimant's letter, "To Whom It May Concern", dated 22 April 2011.

On 12 April 2012, the Claimant presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$60,960.00 for loss of profits and impairment of earning capacity resulting from the Deepwater Horizon oil spill.³ The Claimant was employed as the head of security at a nightclub

³ Optional OSLTF Claim Form without sum certain, received on 28 March 2012 and Claimant letter to NPFC with sum certain, dated 3 April 2012/received 3 April 2012.

in D'Iberville, Florida, until April 2010. The Claimant asserts that he was laid off due to the oil spill; lost earnings in 2010, 2011 and 2012; and is still unemployed.⁴ The Claimant calculated alleged losses in 2010 as \$20,000.00; in 2011 as 30,000.00; and in 2012 as \$10,000.00.⁵ The Claimant also calculated costs of looking for replacement work at \$960.00.⁶

The Claimant indicated that he submitted two claims to the GCCF: an Emergency Claim in September 2010 and a Full/Final Review Claim in February 2011. The Claimant states that he received \$15,600.00 for the Emergency Claim in October 2010. Further, the Claimant indicates that responsible party has denied his claim.⁷

The NPFC conducted an independent investigation of claim presentation and payments. The NPFC confirmed presentment to the GCCF of an Emergency Action Payment (EAP) Claim on 29 September 2010 in the amount of \$15,600.00 and a Full Review Final Payment (FRP) Claim on 21 April 2011 in the amount of \$62,600.00. The NPFC also confirmed that the GCCF applied Claimant Identification No. 3022698 to both of those claims; Claim No. 102259 to the EAP Claim; and Claim No. 9298421 to the FRF Claim. Finally, the NPFC confirmed that the GCCF had paid \$15,600.00 on the EAP Claim and had denied the FRF Claim.⁸ Based upon the information provided and independent verification by the NPFC, this claim can be adjudicated in the full amount of damages presented to the NPFC, \$60,960.00.

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 of the documentation presented by the Claimant.

This claim is denied because the Claimant failed (1) to prove that he incurred damages in the amount alleged, and (2) he failed to prove that the alleged loss was due to the Deepwater Horizon oil spill.

(1) Failure to Prove Loss of Earnings

The Claimant asserted that his loss in income is due to a loss of earnings in 2010, 2011 and 2012 as a result of being laid off due to the Deepwater Horizon oil spill.⁹ The Claimant provided 2008 and 2009 federal tax returns.¹⁰ The Claimant also provided a 2009 Form 1099-Misc,¹¹ the income for which is not included in the Claimant's 2009 federal tax return.

For 2010, the Claimant indicates having made \$5,770.82 in wages and tax refund, as well as having received \$15,600.00 in EAP Claim payment.¹² The Claimant also provided a notarized statement that he had no other income for 1 May 2010 until 31 December 2010.¹³ These

⁴ Optional OSLTF Claim Form without sum certain received on 28 March 2012 and Claimant letter to the GCCF dated 15 March 2012.

⁵ Claimant's letter to the NPFC with sum certain, dated 3 April 2012/received 3 April 2012.

⁶ Claimant's letter to the NPFC with sum certain, dated 3 April 2012/received 3 April 2012.

⁷ Optional OSLTF Claim Form without sum certain, received 28 March 2012.

⁸ Transition Program – U.S. Coast Guard Report as of 1 May 2012.

⁹ Claimant's signed, but undated letter, "To Whom It May Concern", describing her claim and GCCF Full Review Final Payment Claim dated 25 August 2011.

¹⁰ 2008 and 2009 Forms 1040.

¹¹ 2009 Form 1099-Misc from Guitars & Cadillacs of D'Iberville.

¹² Claimant's letter, '2010 Wage Summary', dated 8 February 2011.

¹³ Claimant's notarized letter, 'To Whom It May Concern', dated 2 February 2011.

amounts total \$21,370.82 for 2010, which exceeds the Claimants documented 2009 income of \$13,264.16.¹⁴

No income tax returns or official records of income were provided for the period of the alleged loss: 2010, 2011 or through April 2012. Additionally, the Claimant indicates having temporary work from time to time,¹⁵ but no records of income from temporary employment have been provided. The Claimant has not provided substantive financial documentation on which his alleged loss can reasonably be measured. Without financial documentation, the alleged losses are not proven.

Failure to Prove Causation

The Claimant asserts that his loss of employment is due to the oil spill. The NPFC will not presume causation or lack thereof based upon business type or location. Causation is an element of every claim that must be proven the Claimant.

The Claimant states, "After April 2010 I became unemployed when my employer, Guitars & Cadillacs Nightclub, closed because the owner began working for the [Deepwater] Horizon Oil Spill Cleanup program Vessels of Opportunity."¹⁶ The Claimant also indicated that the nightclub closed the last week in April 2010.¹⁷

In addition, the Guitars & Cadillacs' owner provided a letter stating, "The Nightclub was already struggling because it was a new business and when the Oil Spill occurred the patronage attendance decreased considerably and it was necessary for me to close the bar and go to work for the oil spill..."¹⁸

The NPFC notes that the oil spill had only spread as far north as the southern tip of the Chadeleur Island chain, off of Louisiana, by 1 May 2010 and did not reach Horn Island, off of Biloxi, until 12 June 2010. The NPFC is not convinced that the proximity of oil spill impacts caused patronage to decrease during April 2010.¹⁹

The NPFC also notes that, following stabbings in the parking lot days before,²⁰ the Commanding Officer of NCBC (Naval Construction Battalion Center) Gulfport had declared that Guitars and Cadillacs to be off limits to military personnel.²¹ The NPFC believes this may have had significant impact on the nightclub's attendance and profitability.

Finally, the NPFC notes that the nightclub owner had indicated that the Nightclub was already struggling before the oil spill.²² The NPFC has verified that the nightclub owner was in federal

¹⁴ 2009 Form 1099-Misc from Guitars & Cadillacs of D'Iberville.

¹⁵ Claimant's letter, 'To Whom It May Concern', dated 15 March 2012.

¹⁶ Claimant's letter, 'To Whom It May Concern', dated 15 March 2012, and restated in Optional OSLTF Claim Form without sum certain received on 28 March 2012.

¹⁷ Claimant's notarized letter, 'To Whom It May Concern', dated 2 February 2011

¹⁸ Kenny Davis, owner of Guitars & Cadillacs of D'Iberville, letter dated 6 May 2011.

¹⁹ NOAA Oil Spill Forecast for 1 May 2010 and NOAA Nearshore Surface Oil Forecast for 12 June 2010.

²⁰ WLOX-13 news report "2 arrested, 3 still wanted for D'Iberville stabbing", posted 15 December 2009 by Steve Phillips.

²¹ Commanding Officer, Naval Construction Battalion Center letter dated 17 December 2009, Subject: Notice of Off-Limits Establishment.

²² Kenny Davis, owner of Guitars & Cadillacs of D'Iberville, letter dated 6 May 2011.

bankruptcy court on 28 April 2010.²³ This indicates that other factors, not the oil spill, had already affected the income and profitability of Guitars and Cadillacs.

The Claimant has not proven that the Deepwater Horizon oil spill was the cause of his losing his job.

This claim is denied for the following reasons: (1) the Claimant has failed to demonstrate his alleged loss through financial documentation; and (2) the Claimant has failed to demonstrate that his 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 (i.e., the Deepwater Horizon oil spill).

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *5/22/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

²³ Memorandum Opinion and Order Denying Motion to Strike Pleadings and Dismiss Adversary with Prejudice, United States Bankruptcy Court, Southern District of Mississippi, Adv. Proc. No. 10-05046-KMS, last accessed 16 May 2012 at www.mssb.uscourts.gov/media/50130/10-05046.