

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
Number: 7011 1570 0001 4803 9661

5890/DWHZ
6 August 2012

Mr. Charles R. Ibele


Re: Claim Number: N10036-1809

Dear Mr. Ibele:

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 N10036-1809 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

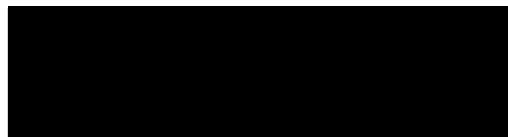
You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you 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 N10036-1809.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1809
Claimant	Mr. Charles R. Ibele
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$312,000.00

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 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.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 16 May 2012, Mr. Charles R. Ibele (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$312,000.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.¹

At the time of the Deepwater Horizon incident, the Claimant served as General Manager for the Biloxi office of Action Restoration, Inc., an environmental restoration company based out of Port Arthur, TX.² The Claimant alleges that Action Restoration's Biloxi office suffered declining revenues as a result of the Deepwater Horizon incident.³ These declining revenues caused Action Restoration to close the Biloxi office and terminate the Claimant's employment.⁴

The Claimant filed this claim seeking \$312,000.00 in loss of profits and impairment of earning capacity damages as a result of his termination.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

¹ Optional OSLTF Claim Form, signed on 16 April 2012.

² Hardship Letter, dated 13 April 2012.

³ Hardship Letter, dated 13 April 2012.

⁴ Hardship Letter, dated 13 April 2012.

⁵ Optional OSLTF Claim Form, signed on 16 April 2012.

water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

The OSLTF 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. 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; and
- (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.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring, by subrogation, all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, signed 16 April 2012;
- Hardship Letter, dated 13 April 2012;

- Action Restoration Proposal, dated 16 July 2011;
- Gulf Coast Claims Facility (GCCF) Notice of Determination—Emergency Advance Payment, authorizing \$104,300.00 in payment, dated 23 November 2010;
- Letter initiating an interim payment claim, dated 12 January 2011;
- Identification Documents—Social Security Card and Sportsman License;
- 2008 Form W-2, showing \$171,769.00 in wages;
- 2009 Form W-2, showing \$155,549.70 in wages;
- 2010 Form W-2, showing \$49,878.52 in wages;
- 2011 Form W-2, showing \$1,500 in wages;
- 2011 Form 1099-G, showing \$7,755 in unemployment compensation;
- 2011 Form 1099-MISC, showing \$18,900 in rents and \$9,290 in nonemployee compensation;
- 2010 Action Restoration Payroll Details, showing \$49,878.52 in total pay;
- Intercompany Memorandum, on Action Restoration letterhead, dated 30 November 2010;
- Final pay stub, payment date 20 December 2010;
- Portions of a GCCF Interim Payment Claim Form, undated;
- GCCF Denial Letter on Interim Payment Claim, dated 8 November 2011;
- 2008 federal and state income tax returns, including schedules;
- 2009 federal and state income tax returns, including schedules;
- 2010 federal and state income tax returns, including schedules;
- 2011 federal and state income tax returns, including schedules;
- Letter granting NPFC permission to access the Claimant’s GCCF file;
- Response to NPFC Request for Additional Information, response dated 05 June 2012;
- Google search results for “action restoration biloxi ms,” dated 05 June 2012;
- Google search results for “charlie ibele action restoration,” dated 05 June 2012;
- Explanation of Business Practices at the Biloxi, MS Office of Action Restoration, undated;
- Authorization to retrieve GCCF File, date 04 June 2012;
- Explanation re: unemployment compensation hearing;
- Mississippi Department of Employment Security Unemployment Verification, dated 04 June 2012;
- Mississippi Department of Employment Security Unemployment Insurance Policy/Benefit Rights Summary;
- Mississippi Department of Employment Security Notice of Monetary Benefit Determination, dated 11 January 2011;
- Mississippi Department of Employment Security Notice of Nonmonetary Benefit Determination, dated 16 February 2011; and
- Mississippi Department of Employment Security Notice of Monetary Benefit Determination, dated 20 July 2011.

Prior to presenting this claim to the NPFC, the Claimant presented an Emergency Advance Payment Claim (EAP) and First Quarter Interim Payment (ICQ12011) claim to the GCCF. The GCCF assigned Claimant ID # 3315752 to the Claimant, and assigned the EAP claim # 373038, and the ICQ12011 claim # 9221714.⁶ The GCCF issued a \$104,300 in payment on the EAP,⁷ but denied the ICQ12011 claim.⁸

⁶ GCCF Notice of Determination, Emergency Advance Payment, dated 23 November 2010; GCCF Denial Letter, dated 08 November 2011.

⁷ GCCF Notice of Determination, Emergency Advance Payment, dated 23 November 2010.

⁸ GCCF Denial Letter, dated 08 November 2011.

On 16 May 2012, the Claimant presented this claim to the NPFC, seeking \$312,000 in loss of profits and impairment of earning capacity damages.⁹ Based upon the Claimant's submissions, it appears that the subject matter for the RP/GCCF claim is identical to the claim now before the NPFC—i.e., that because of the Deepwater Horizon incident, the Claimant's employer closed his office, and terminated his employment. The NPFC deems each of the Claimant's prior claims with the RP/GCCF to satisfy OPA presentation requirements.¹⁰ Accordingly, this Claim Summary and Determination addresses the damages claimed in the Claimant's prior submission to the RP/GCCF. Any damages sought by the Claimant that were not first presented to the RP/GCCF are denied for improper presentment.

On 04 June 2012, the Claimant authorized the NPFC to obtain the file associated with his RP/GCCF claim. As of 04 June 2012, the CSSP began processing claims, and as a result, the GCCF is no longer in operation. Attempts to retrieve documentation submitted in support of the Claimant's RP/GCCF claim have been unsuccessful to date. Ultimately, it is the Claimant's responsibility to provide all documentation in support of an OSLTF claim. As efforts to obtain the Claimant's RP/GCCF claim file have been unsuccessful, the NPFC will adjudicate this claim on the evidence actually provided by the Claimant to the NPFC.

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).

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 all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

As an initial matter, it appears that the Claimant is a member of the economic damages class of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate rights to the NPFC.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that he is a member of the economic damages class of the E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in his request for reconsideration of this claim.

Furthermore, this claim for loss of profits and impairment of earning capacity damages is denied on its merits, as the Claimant has failed to establish that he has sustained a financial loss as a result of the Deepwater Horizon incident. In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficiently proving (1) that the claimant sustained an

⁹ Optional OSLTF Claim Form, signed 16 April 2012.

¹⁰ 33 C.F.R. § 136.103(a).

actual financial loss, and (2) that the discharge of oil resulting from the Deepwater Horizon oil spill caused that loss.

1. Financial Loss

The Claimant has failed to establish that he has suffered a financial loss in the amount alleged. The Claimant filed this claim seeking \$312,000.00 in loss of profits and impairment of earning capacity damages.¹¹ The Claimant appears to have reached this figure after being “informed by an attorney [that the proper amount to claim] would be three (3) times the emergency payment [the Claimant] received.”¹²

The Claimant stated that he is seeking compensation “from loss of employment date . . . to present.”¹³ The Claimant has not provided documentation establishing the extent of any financial loss that he may have suffered year-to-date in 2012, but based on his 2011 tax documents, it appears that he has established a financial loss of, at most, \$116,730.00¹⁴

Accordingly, the difference between the amount claimed and the financial loss that the Claimant has plausibly established—\$195,26.00—is denied, as the Claimant has failed to establish that he in fact suffered that financial loss.

2. Material Misrepresentation and Failure to Prove Deepwater Horizon Incident Caused Alleged Losses

The Claimant has materially misrepresented substantial elements of this claim. Claimants submitting false claims or making false statements in connection with those claims risk prosecution under Federal law, including but not limited to 18 U.S.C. §§ 287 and 1001.¹⁵ Additionally, those submitting written documentation supporting their claim that they know or should know is false may be subject to a civil penalty for each claim.

The Claimant submitted a number of documents in support of his claim. Among these documents is an “Intercompany Memorandum,” appearing on Action Restoration letterhead, ostensibly notifying the Claimant that Action Restoration plans to close the Biloxi office. The memo states that the reason for the closure is “the economic impact in conjunction with the Gulf Oil Spill which occurred in early April, 2010.”¹⁶ On its face, the memo would seem to be the keystone to the Claimant’s allegations—it appears to prove that the Claimant was terminated as a direct result of the Deepwater Horizon incident.

In the course of reviewing this claim, the NPFC contacted Action Restoration to verify the source and substance of the memo. In speaking with a company representative, the NPFC learned that the memo was in fact not written by Action Restoration.¹⁷ The representative verified that Action Restoration had indeed closed the Biloxi office, but stated that the reason

¹¹ Optional OSLTF Claim Form, signed 16 April 2012.

¹² Response to NPFC Request for Additional Information, dated 05 June 2012.

¹³ Response to NPFC Request for Additional Information, dated 05 June 2012.

¹⁴ The GCCF fully compensated the Claimant’s 2010 losses, issuing a \$104,300 payment to supplement his \$49,879 in 2010 earnings. GCCF Notice of Determination, Emergency Advance Payment. The Claimant’s tax documentation for 2011 show earnings totaling \$37,440. 2011 Form W-2 from Action Restoration (showing \$1,500 in wages); 2011 Form 1099-MISC for Carothers Construction, Inc. (showing \$18,900 in rents and \$9,290 in nonemployee compensation; and 2011 Form 1099-G from Mississippi Department of Employment Security (showing \$7,755 in unemployment benefits). The difference in total income between these two years totals \$116,739.

¹⁵ 33 C.F.R. § 136.9.

¹⁶ Intercompany Memorandum, dated 30 November 2010.

¹⁷ PHONECON: NPFC Staff and Action Restoration, Inc., 22 May 2012 JBH.

was not the Deepwater Horizon incident; the office closed for reasons entirely unrelated to the Deepwater Horizon incident.¹⁸ Accordingly, the Claimant has failed to provide reliable documentation that the Deepwater Horizon incident caused his alleged losses.

Furthermore, the Claimant's own statements suggest that the Deepwater Horizon incident did not cause his financial loss. In responding to the NPFC's request for additional information, the Claimant indicated that Action Restoration's Biloxi office's revenues began falling in 2009 and continued into 2010.¹⁹ The Claimant alleged that the revenues dropped precipitously after the Deepwater Horizon incident, but has not provided any evidence supporting that allegation. Further, the Claimant stated that "[t]he ultimate reason for [the Claimant's] termination with Action Restoration was due to [his] not being able to make the company money they were accustomed to."²⁰

The Claimant has not provided evidence establishing that the Deepwater Horizon incident and not other factors caused reductions in Action Restoration's revenues in 2009 was the cause of the company's loss of revenue in 2010. Accordingly, Claimant has failed to establish that the Deepwater Horizon incident caused any financial loss that he may have incurred.²¹

This claim of \$312,000.00 is denied in its entirety because the Claimant has materially misrepresented substantial elements of his claim in an attempt to falsely obtain funds from the Federal government. In addition, the Claimant has not demonstrated (1) a financial loss in the amount alleged, 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. Finally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement, and is therefore not eligible for OSLTF compensation.

Claim Supervisor: NPFC Claims Administration Division

Date of Supervisor's Review: 8/6/12

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁸ PHONECON: NPFC Staff and Action Restoration, Inc., 22 May 2012 JBH.

¹⁹ Response to NPFC Request for Additional Information, Attachment E.

²⁰ Response to NPFC Request for Additional Information, Attachment E.

²¹ The Claimant also noted that "Action Restoration's off shore [*sic*] work and oil rig work in the Gulf also was shut down." Response to NPFC Request for Additional Information, Attachment E. It is not clear whether the Claimant intended to reference the drilling and permitting restrictions as a cause of the Biloxi office's closure. If the Claimant intended to suggest this, the claim would also be denied on the grounds that losses incurred as a result of the moratorium and subsequent drilling and permitting restrictions are not losses caused by the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.