

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
12 September 2012

Mr. Rusty Ann Mitchell


Re: Claim Number: N10036-1843

Dear Mr. Mitchell:

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 N10036-1843 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 N10036-1843.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1843
Claimant	Mr. Rusty Ann Mitchell
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$30,000.00

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 14 June 2012, Mr. Rusty Ann Mitchell (the Claimant) submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$30,000.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.¹

The Claimant's submissions indicate that he worked at a restaurant owned by Darden Restaurants, Inc., although in what capacity is not clear. The Claimant alleges that the Deepwater Horizon incident caused a "[l]ack of confidence in the seafood industry due to the oil spill" and "declined tourism."² As a result, the Claimant filed this claim seeking \$30,000.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.³

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 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.

¹ Optional OSLTF Claim Form, dated 30 May 2012.

² Optional OSLTF Claim Form, dated 30 May 2012.

³ Optional OSLTF Claim Form, dated 30 May 2012.

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 NPFC

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

- Optional OSLTF Form, signed 30 May 2012;
- Authorization to retrieve RP/GCCF claim file;
- 2008 Form W-2, showing \$15,746.26 in wages;
- 2009 Form W-2, showing \$17,478.39 in wages;
- 2010 Form W-2, showing \$19,740.25 in wages; and
- Wage Compensation Report from Darden Restaurants, Inc., for 24 December 2007 through 11 October 2011.

On 14 June 2012, the Claimant presented this claim to the NPFC, seeking \$30,000.00 in loss of profits and impairment of earning capacity damages.⁴ The Claimant stated that prior to presenting this claim to the NPFC; he presented a claim to the RP/GCCF.⁵ The Claimant indicates that he received an “insufficient offer” from the RP/GCCF, but has not indicated whether he has accepted that offer and received final payment.

It appears that the subject matter for the RP/GCCF claim is identical to the claim now before the NPFC—i.e., that a lack of confidence in the seafood industry and a drop in tourism, caused by the Deepwater Horizon incident, resulted in reduced wages for the Claimant. Accordingly, the NPFC concludes that the Claimant has satisfied OPA presentation requirements.

On 30 July 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. To date, attempts to retrieve documentation submitted in support of the Claimant’s RP/GCCF claim have been unsuccessful. Ultimately, it is the Claimant’s responsibility to provide all documentation in support of an OSLTF claim.⁶ 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 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 a 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 either a financial loss or that his alleged loss is the 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

⁴ Optional OSLTF Claim Form, signed 30 May 2012.

⁵ Optional OSLTF Claim Form, signed 30 May 2012.

⁶ 33 C.F.R. §§ 136.105(a), (e)(6).

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

The Claimant filed this claim seeking \$30,000.00 in loss of profits and impairment of earning capacity damages.⁷ In a letter dated 18 June 2012, the NPFC requested that the Claimant provide supporting documentation and answers to questions in order to substantiate his alleged loss.⁸ The Claimant responded with W-2 forms for 2008 through 2010 and payroll history for 24 December 2007 through 11 October 2011, but did not answer any of the questions asked.

The Claimant's submissions do not indicate how he calculated the financial loss alleged. According to the Claimant's Optional OSLTF Claim Form, it appears that this figure is meant to reflect the Claimant's "loss of wages."⁹ The Claimant's wage and earning submissions, however, do not establish a financial loss in the first instance. The Claimant's financial documentation show his earnings (both wages and tips) for 2010 and 2011 increased significantly from 2009 levels.¹⁰

The Claimant has also failed to prove that the Deepwater Horizon incident caused any financial loss that the Claimant alleges he has suffered. The Claimant has not provided evidence linking the Deepwater Horizon incident with his alleged losses except for an allegation that the Deepwater Horizon incident caused a drop in tourism, thereby reducing his wages.¹¹

Additionally, tourism statistics for the Tampa, Florida, area indicate that tourism did not decrease in the period following the oil spill. The 2010 Annual Visitors Profile for Pinellas County—where the Claimant resides—indicates that the number of visitors to the county for May through August 2010 actually increased compared to those same months in 2009.¹² Likewise, visitor expenditures remained constant over that same timeframe.¹³ The same is true for Hillsborough County—a county neighboring Pinellas County—where the total number of overnight visitors increased slightly, as did overall total expenditures.¹⁴

It appears, then, that the Deepwater Horizon incident did not dissuade tourists from visiting the Tampa, Florida, area. Absent direct evidence that the Claimant's wages were affected by the Deepwater Horizon incident, the Claimant has not provided sufficient evidence to establish that his losses were indeed caused by the Deepwater Horizon incident.

Accordingly, the Claimant's request for \$30,000.00 in lost wages is denied in its entirety because the Claimant has failed to demonstrate (1) a financial loss in the amount claimed, 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 discharge of oil. Additionally, this claim is considered to have

⁷ Optional OSLTF Claim Form, signed 30 May 2012.

⁸ NPFC Request for Additional Information, dated 18 June 2012.

⁹ Optional OSLTF Claim Form, signed 30 May 2012.

¹⁰ The Claimant's submissions show that he earned \$15,746.26 (\$3,784.96 in wages, \$11,961.30 in tips) in 2008, \$17,478.39 (\$4,380.55 in wages, \$13,097.84 in tips) in 2009, and \$19,740.25 (\$5,283.47 in wages, \$14,456.78 in tips) in 2010. 2008 Form W-2; 2009 Form W-2; 2010 Form W-2. While the Claimant did not provide full earnings data for 2011, his earnings through October 2011 had already surpassed his 2009 earnings by more than \$1,000. 2009 Form W-2; Wage Compensation Report from Darden Restaurants, Inc., pages 53-66.

¹¹ Optional OSLTF Claim Form, signed 30 May 2012.

¹² St. Petersburg/Clearwater Convention and Visitors Bureau Annual 2010 Visitor Profile, page 6, *available at* <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, accessed 04 September 2012.

¹³ St. Petersburg/Clearwater Convention and Visitors Bureau Annual 2010 Visitor Profile, page 7, *available at* <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, accessed 04 September 2012.

¹⁴ Key Findings, Analysis of the 2010 Hillsborough County Visitor, page 2, *available at* <http://www.visittampabay.com/includes/media/docs/2010-Research-Synopsis.pdf>, accessed 04 September 2012.

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 Adjudication Division*

Date of Supervisor's Review: *9/12/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments: