

U.S. Department of
Homeland Security

**United States
Coast Guard**



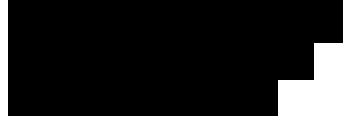
Director
National Pollution Funds Center
United States Coast Guard

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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7012 2210 0001 7214 9821

5890/DWHZ
19 July 2013

Aylstock, Witkin Kreis & Overholtz



Re: Claim Number: N10036-1954

Dear Mr. Barger,

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 N10036-1954 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 N10036-1954.

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
cc: Tamir Ilcafass
5303 Falling Star Road
Tallahassee, FL 32303

By Certified Mail:
No. 7012 2210 0001 7214 9814

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1954
Claimant	Tamir Ilcafass
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$75,000.00

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 5 June 2013, Mr. James Barger, on behalf of Mr. Tamir Ilcafass, (collectively, "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$75,000.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was employed as a poker dealer at the Pensacola Greyhound Track. Records from the Florida Division of Pari-Mutuel Wagering, indicates that the card room at the Track opened for business on 27 January 2010.² The Claimant appears to have been employed there throughout 2010 and 2011. In his explanation as to how the oil spill caused him to sustain financial loss, the Claimant stated that he "worked on a low base hourly wage and tips, because of the spill people were unable to afford these extra luxuries, which reduced the income of the [Claimant] [sic]."³

The Claimant does not specify the time period in which he sustained a loss or reduction in income, but alleges to have lost \$75,000.00 in earnings as a result of the Deepwater Horizon oil spill.

¹ Optional OSLTF Claim Form, signed on 1 July 2013.

² See, Division of Pari-Mutuel

Wagering <http://www.myfloridalicense.com/dbpr/pmwd/documents/AnnualReport2009-2010--79th--revised2013-05-16.pdf>. Accessed on 17 July 2013.

³ Optional OSLTF Form, signed on 28 May 2013.

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.

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

The Claimant submitted the following documentation in support of this claim:

- Optional OSLTF Claim Form, signed on 28 May 2013;
- Claim Cover letter, signed by attorney, James D. Barger, 4 June 2013;
- 2010 Form 1040, showing adjusted gross income of \$37,818.00;
- 2010 Schedule A;
- 2010 Form 5329;
- 2010 Form 3903;
- 2010 Schedule M (Form 1040A or 1040);
- 2008 Form 1040EZ, showing adjusted gross income of \$33,139.00;
- 2008 Federal Carryover worksheet;
- 2009 Form 1040EZ, showing adjusted gross income of \$33,452.00;
- 2011 Form 1040, showing adjusted gross income of \$33,818.00;
- Letter from Sheila Kenney stating that the Claimant should expect income of \$65,000.00;
- Payroll check history report, 1/1/10 – 12/31/10;
- Payroll check history report, 1/1/11 – 12/31/11;
- Earning Statements, 2009.

The Claimant alleged that this claim was first presented to the Responsible Party on 18 January 2013, and that the RP denied payment on this claim.⁴

On 5 June 2013, the Claimant submitted this claim to the NPFC seeking \$75,000.00 in loss of profits or impairment of earning capacity damages. The NPFC does not have evidence sufficient to verify that the same amount of damages was first presented to and denied by the RP. However, the NPFC will adjudicate the claim to the extent that presentment requirements have been satisfied. Any amount of damages now before the NPFC, which were not first presented to the RP, are denied for improper presentment.⁵

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.

For the reasons explained below, this claim is not compensable under OPA.

1. The claim is currently the subject of an action in court by the Claimant to recover the same damages as now before the NPFC.

In accordance with OPA's implementing regulations, the NPFC may not make payment on a claim "during the pendency of an action by the person in court to recover costs which are the subject of the claim."⁶ The Claimant indicates that a Complaint has been filed in the U.S. District Court for the Eastern District of Louisiana, in which the Claimant is attempting to recover the

⁴ Optional OSLTF Claim Form, signed on 28 May 2013.

⁵ 33 C.F.R. § 136.103.

⁶ 33 C.F.R. § 136.103(d).

same damages as now before the NPFC. As such, the NPFC would be precluded from making a payment on this claim.

The remainder of this determination addresses the substantive reasons for denial.

In order to prove a claim for loss of profits damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the financial loss was caused by damage to real property or natural resources resulting from the discharge of oil caused by the Deepwater Horizon oil spill.

As a result of the oil spill, the Claimant alleged to have lost \$75,000.00 in wages and tips, working as a poker dealer at the Pensacola Greyhound Track. The Claimant does not specifically indicate how the oil spill caused his earnings to decrease other than to state that he lost earnings due to “the decline of the economy in the Gulf Coast area, from the Oil Spill.”⁷

Financial records provided by the Claimant fail to indicate that he lost income in any amount in 2010 following the Deepwater Horizon oil spill. Rather, the Claimant’s income appears to have fluctuated substantially across pay periods, with no identifiable decrease in the period following the Deepwater Horizon oil spill. From May to December of 2010 and 2011, the Claimant’s earnings statements indicate that he earned \$10,796.34 in 2010 and \$11,293.30 in 2011. The 4.6% increase in the Claimant’s earnings in 2011, does not indicate that the Claimant lost earnings in 2010. Furthermore, the Claimant has not provided evidence to indicate how he calculated his losses to arrive at his claimed loss amount of \$75,000.00.

With regards to causation, research conducted by the NPFC indicates that there was no significant correlation between Pensacola tourism rates and card room revenue at the Track. Information provided by the Pensacola Bay Area Chamber of Commerce indicates that Pensacola tourism revenue during June and July of 2011 was at an all-time high.⁸ However, earnings in the card room at the Track did not see the same increase, and were actually lower in the summer of 2011 than they had been in the summer of 2010, shortly after the opening of the card room in late January of 2010.⁹ Therefore, because the Claimant has not provided evidence to prove that his earnings decreased as a result tourism decreases or other effects of the Deepwater Horizon oil spill, and because public records indicate that the card room revenue does not seem to depend on tourism, the Claimant has failed to prove that his earnings were somehow affected by the Deepwater Horizon oil spill.

⁷ Optional OSLTF Claim Form, 28 May 2013.

⁸ Pensacola Bay Area Chamber of Commerce, *Pensacola Bay Area Chamber of Commerce Sets Tourism Records*, 2 September 2011, available at, www.pensacolachamber.com/TheChamber/PR-chamber/2011/pr-chamber-tourism-records.html, Accessed on 3 November 2011.

⁹ Florida Department of Business and Professional Regulations, Division of Pari-Mutuel Wagering, 2010, 2011, available at, www.myfloridalicense.com/dbpr/pmw/PMW-Statistics.html, Accessed on 3 November 2011.

This claim is therefore denied because the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a financial loss in the amount \$75,000.00, or (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. Furthermore, had the Claimant met his burden of proof, the NPFC could not compensate the Claimant as these damages are the subject of ongoing litigation.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/16/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: