

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: 7012 2210 0001 7214 9722

5890/DWHZ
15 July 2013

Carol L. Way


Re: Claim Number: N10036-1959

Dear Ms. Way:

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 N10036-1959 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 N10036-1959.

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	N10036-1959
Claimant	Carol Way
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$9,500.00

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 18 June 2013, Ms. Carol Way ("the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$9,500.00 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 working as a waitress at an Olive Garden in Pensacola, Florida.² The Claimant alleged that "tourist season [in Pensacola] was reduced [due] to oil on the beach" thereby causing fewer customers to visit the restaurant, and causing the Claimant to lose earnings.³

The Claimant seeks to recover \$9,500.00 in losses allegedly incurred as a result of decreases in tourism caused by the Deepwater Horizon oil spill.

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.

¹ Optional OSLTF Claim Form, unsigned.

² PHONECON: NPFC Staff and the Claimant, 11 July 2013.

³ Optional OSLTF Claim Form, unsigned.

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, unsigned;
- 2009 Federal Income Tax Return, showing wages of \$12,451.00;
- 2010 Federal Income Tax Return, showing wages of \$8,163.15;
- Letter from Jackson Hewitt, 14 January 2011;
- 2011 Federal Income Tax Return.

Prior to presenting this claim the NPFC, the Claimant received "a small amount" through the GCCF.⁴ A claim status report provided to the NPFC by the RP indicates that the Claimant received an Emergency Advance Payment (EAP) from the GCCF of \$9,300.00 and also signed a Quick Release Final Payment in exchange for payment of \$5,000.00 for total payment of \$14,300.00.⁵

On 18 June 2013, the Claimant presented this claim to the NPFC, seeking \$9,500.00 in loss of profit and impairment of earning capacity damages.⁶ After accepting a final payment from the GCCF, the Claimant attempted to recover additional losses through the BP Claims Program and through the CSSP. These later submitted claims were denied.

Furthermore, evidence in this claim submission indicates that the Claimant is likely a member of the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement).⁷

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 Class. 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 the NPFC to those rights.

Furthermore, a routinely generated claim status report submitted to the NPFC by the RP indicates that the Claimant has accepted a final payment from the GCCF, thereby settling her claim. The Claimant has not provided the NPFC with a copy of the Quick Pay Final Release form, but the standard GCCF Quick Pay Final Release Form includes the following language:

[r]eleased Parties means anyone who is or could be responsible or liable in any way for the Incident or any damages related thereto, whether a person, company or governmental entity, including . . . the federal Oil Spill Liability Trust Fund . . .

As stated above, any payment from the OSLTF requires the acquisition of rights from the RP. Because these rights have been released by the Claimant to the RP/GCCF, the Claimant cannot also recover from the Fund. The subrogation of the Claimant's rights to BP is made clear in the release by the following language:

[t]his Release is not intended to prevent any of the Released Parties from exercising their respective rights of contribution, subrogation, or indemnity under the Oil Pollution Act of 1990 ("OPA") or any other law. As this Release is fully and completely resolving, together with all other Claims, Claimant's claim under

⁴ Optional OSLTF Claim Form, unsigned.

⁵ Response to 20 June 2013 RP Notification Letter.

⁶ Optional OSLTF Claim Form, unsigned.

⁷ At the time of the oil spill, the Claimant was working as a waitress in Pensacola, Florida.

OPA, BP is hereby subrogated to any and all rights that Claimant has arising from the Incident.

Furthermore, even if the Claimant was not included in the Settlement Class and had not signed a Release in exchange for final payment, this claim is also denied on its merits. In order to prove a claim for loss of profits damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained an uncompensated loss or reduction in income, and (2) that the financial loss was caused by damage to real property or natural resources caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant has received payments of at least \$14,300.00 from the GCCF, which exceeds the amount of income the Claimant earned in 2009, 2010 or 2011. The NPFC can only make payments on losses which are uncompensated. In this instance, it appears that any loss the Claimant may have sustained would have been fully compensated by payments previously made to the Claimant by the RP.

Additionally, the Claimant has not provided evidence sufficient to prove that her income was adversely affected by damage to real property or natural resources caused by the oil spill. The Claimant indicates that the tourist season in Pensacola, Florida was weak in 2010 as a result of the Deepwater Horizon oil spill, thereby causing her to sustain income losses. The Claimant was working as a waitress at the time of the oil spill, but does not provide any evidence to indicate that the restaurant in which she was working relied on tourism to generate business.

Furthermore, the Claimant has not provided pay stubs or other evidence to indicate when her losses began or how long they continued. The Claimant has therefore failed to prove that her alleged loss of income was a result of a reduction in tourism caused by the Deepwater Horizon oil spill. This is particularly true considering that it appears as though the Claimant's income remained low in 2011 in spite of the fact that 2011 was a strong year for tourism in Pensacola.⁸

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that she sustained an uncompensated financial loss in the amount of \$9,500.00, 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. Additionally, this claim is considered to have been settled by virtue of the Claimant having accepted final payment from the GCCF and also belonging to the E&PD Settlement.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/15/2013*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

⁸ See e.g., 2011 Record Year For Tourism, [visitpensacola.com](http://www.visitpensacola.com). Available at <http://www.visitpensacola.com/professional/media/news/numbers-are-2011-record-year-tourism>. Accessed on 11 July 2013.