

U.S. Department of
Homeland Security

**United States
Coast Guard**

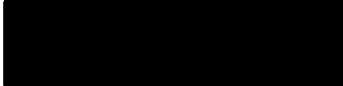


Director
National Pollution Funds Center
United States Coast Guard

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: art-pf-npfcclaimsinfo@uscg.mil
Fax: 703-872-6113

CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2445 1869

5890/DWHZ
20 Aug 2013

Degan, Blanchard & Nash


Re: Claim Number: N10036-1979

Dear Mr. Degan:

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 N10036-1979 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 N10036-1982.

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

Copy to: Commerce & Industry Insurance Company


CERTIFIED NUMBER: 7011 1570 0001 2445 1876

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1979
Claimant	Commerce and Industry Insurance Company
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$2,498,126.36

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 8 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 9 August 2013, Mr. Sidney Degan III of Degan, Blanchard & Nash ("Degan"), on behalf of the Commerce and Industry Insurance Company, an affiliate of AIG/Chartis Insurance (collectively, "the Claimant"), submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$2,498,126.36 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant insured Parsons Technology Group, Inc. (Parsons), which was under a Hazardous Work Contract between itself and BP American Production Company (BP).² The Claimant also states that it issued various policies of insurance, including workers' compensation policies, to different companies that employed workers in various capacities in the Gulf following the oil spill.³ As a result of claims arising out of the oil spill, Parsons and the Claimant paid worker compensation costs to employees who were injured while working via this contract. Pursuant to the terms of the contract, the Claimant states they presented costs to BP, but were subsequently denied.⁴

In total, the Claimant estimated to have lost \$2,498,126.36 in medical and indemnity payments made to its policyholders as a result of workers' compensation claims from the same.

¹ Optional OSLTF Claim Form signed on 1 August 2013.

² See Letter from Mr. Sidney Degan III, Degan, to the NPFC, dated 7 August 2013.

³ See Claim Submission Attachment A, received with the claim package by the NPFC on 9 August 2013.

⁴ See Letter from Mr. Sidney Degan III, Degan, to the NPFC, dated 8 August 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 1 August 2013;
- Claim Cover Letter, dated 7 August 2013;
- Claim Exhibit A, Answers to Optional OSLTF Claim Form Questions 9-11
- Claim Exhibit B1-B137, Charts of individuals receiving Medical or Indemnity payments with payment totals.

The Claimant alleged that this claim was first presented to the Responsible Party and that the RP denied payment on this claim.⁵

On 9 August 2013, the Claimant submitted this claim to the NPFC, seeking to recover \$2,498,125.36 in loss of profits or impairment of earning capacity damages due to personal injury and workers' compensation claims paid out.⁶ 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.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 to, destruction of, 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.

This claim is denied for the reasons explained below:

1. Personal Injury claims are not OPA compensable costs.

Under 33 U.S.C. § 2702(b)(1-2), the only types of claims payable under OPA are oil removal and /or damage claims. Furthermore, "Damages" as explained under 33 U.S.C. § 2702(b)(2) are defined as: natural resources; real or personal property; subsistence use; revenues; profits and earning capacity; and public services. Therefore, in accordance with OPA's implementing regulations, the NPFC may not make payment on a claim resulting from personal or bodily injury insurance compensation. The Claimant has elected to submit its claim to the NPFC as a loss of profits and earning capacity claim, however, bodily or personal injury claims are not covered under "Profits and Earning Capacity" as defined under OPA in 33 U.S.C. § 2702(b)(2)(E):

Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

Therefore, the claim as presented is not compensable under OPA.

⁵ Optional OSLTF Claim Form, signed on 1 August 2013.

⁶ Optional OSLTF Claim Form, signed on 1 August 2013.

⁷ 33 C.F.R. § 136.103.

2. Documentation provided is not sufficient to support its claim.

The Claimant provided charts for each policyholder who filed a claim as a result of the spill, along with the type and amounts of compensation for each. If NPFC were to determine that claims resulting from personal injury were compensable under OPA, the documentation submitted would not be sufficient to prove its losses. No policies between the individuals and the Claimant have been produced, nor was there an itemization of costs paid by the Claimant to its insured. Without these, the NPFC would be unable to determine what costs, if any, would be compensable under OPA. Furthermore, the Claimant has not provided documentation to show that it presented its claim in the amount of \$2,498,126.36 to the RP, and that the RP denied it without compensation.

Based on the foregoing, this claim is denied because (1) the Claimant has failed to provide evidence sufficient to show how the claim costs were calculated and how it arrived at its claimed amount, (2) the Claimant has failed to demonstrate that its 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), and (3) bodily and/or personal injury damages are not compensable under OPA.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/20/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: