

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

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
5890

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22 May 2012

Vance, Lotane & Bookhardt, P.A.


RE: Claim Number: N10036-1710

Dear Mr. Barksdale:

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 N10036-1710 involving Deepwater Horizon. 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 N10036-1710.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100


Signature

Claims Adjudication Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: (1) Claim Summary / Determination Form
(2) Documentation Provided by the Claimant

Copy to: Yvette Burleson


CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1710
Claimant	: Yvette Burleson
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$39,692.32

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 was 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.

CLAIM AND CLAIMANT

On 7 March 2012, Arthur S. Barksdale IV, Esquire, on behalf of Yvette Burleson (jointly referred to as 'the Claimant') presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$39,692.32 for loss of profits and impairment of earning capacity resulting from the Deepwater Horizon oil spill.¹ The Claimant is a waitress at a café/restaurant in Pensacola, Florida. The Claimant asserts lost earnings during 2010 and 2011 from being laid off, loss of tips and from working variable, sometimes reduced hours due to the oil spill.²

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

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. 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.
- (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.

¹ Letter dated 7 March 2012 from the Claimant's attorney to the NPFC.

² Claimant's signed, but undated letter, "To Whom It May Concern", describing her claim and GCCF Full Review Final Payment Claim dated 25 August 2011.

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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant presented the documentation listed in Enclosure (2).

On 7 March 2012, the Claimant presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$39,692.32 for loss of profits and impairment of earning capacity resulting from the Deepwater Horizon oil spill.³ The Claimant is a waitress at a café/restaurant in Pensacola, Florida, who asserts lost earnings because of the oil spill. The Claimant's alleged losses are for loss of tips and work hours soon after the oil spill, loss of income from being laid off for about six months, and for additional loss of work hours after returning to work.⁴ Based on W-2s and tax returns, the Claimant calculated alleged losses in 2010 and 2011 at \$17,886.87.⁵ Based on a 24-month industry effect multiplier, the Claimant also calculated additional, future losses of \$21,464.24.⁶

The Claimant indicated that she submitted a claim the GCCF and that the claim was denied.⁷

The NPFC conducted an independent investigation of claim presentation and payments. The NPFC confirmed presentment to the GCCF of a Full Review Final Payment (FRP) Claim on 10 October 2011 in the amount of \$39,692.32. The NPFC also confirmed that the GCCF applied Claimant Identification No. 1635934 and Claim No. 9523399 to the FRF Claim. Finally, the NPFC confirmed that the GCCF had denied the claim.⁸ Based upon the information provided and independent verification by the NPFC, this claim can be adjudicated in the full amount of damages presented to the NPFC, \$39,692.32.

NPFC Determination

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. After an initial review, the NPFC sent the Claimant a letter requesting additional information

³ Letter dated 7 March 2012 from the Claimant's attorney to the NPFC and Deepwater Horizon Oil Spill Worksheet of Lost Earnings/Income dated 12 February 2012.

⁴ Claimant's signed, but undated letter, "To Whom It May Concern", describing her claim and GCCF Full Review Final Payment Claim dated 25 August 2011.

⁵ 2009 Tax Form 1040EZ; 2009 Form W-2 from Allstates Employer Services, II Inc.; 2010 Form W-2 from Allstates Employer Services, II Inc., 2011 Form W-2 from Payday, Inc; and Deepwater Horizon Oil Spill Worksheet of Lost Earnings/Income dated 12 February 2012.

⁶ Deepwater Horizon Oil Spill Worksheet of Lost Earnings/Income dated 12 February 2012.

⁷ Letter dated 7 March 2012 from the Claimant's attorney to the NPFC, Claimant's Full Review Final/Review Payment Claim Form dated 25 August 2011, and GCCF Denial Letter on Interim Payment/Final Payment Claim dated 18 January 2012.

⁸ Transition Program – U.S. Coast Guard Report as of 1 May 2012.

to further evaluate the claim. The letter requested, among other things, additional financial documentation to support that the Claimant sustained lost profits & earnings, as well as other documentation supporting and explaining how the Deepwater Horizon oil spill caused the Claimant's losses. The Claimant was given 14 days to respond to the letter, dated 16 April 2012.⁹ An extension was granted for the Claimant to respond by 8 May 2012.¹⁰ To date, no response has been received. The NPFC considered all of the documentation presented by the Claimant.

Of the damages claimed, \$21,464.24 is for future losses that have not been incurred.¹¹ Prospective, future damages are not compensable under OPA's loss of profits damage category, which limits potentially available compensation to "the actual net reduction or loss of earnings or profits suffered" [emphasis added].¹² Therefore, \$21,464.24 of the amount claimed is denied as damages that have not been incurred.

The remainder of this claim is denied because the Claimant failed (1) to prove that she incurred damages in the amount alleged, and (2) to prove that the alleged loss was due to the Deepwater Horizon oil spill.

(1) Failure to Prove Loss of Earnings

The Claimant asserted that her loss in income was due to a loss of earnings in 2010 and 2011 as a result of being laid off, from lost tips, and from working variable, sometimes reduced hours due to the Deepwater Horizon oil spill.¹³ The Claimant provided 2008 and 2009 federal tax returns,¹⁴ as well as the Claimant's 2008, 2009, 2010 and 2011 W-2 Forms.¹⁵

The 2009 and 2010 W-2 forms show reduced income in 2010 when compared to 2009. While this documentation supports the Claimant's general assertion that her income was down in 2010, the Claimant has not provided a layoff notice or specific financial documentation, such as pay stubs¹⁶ or pay summary information for 2009, 2010 and 2011, that supports the assertion that her hours were reduced and that she did not work at the café /restaurant during the summer and fall layoff period claimed.

If the Claimant submits a request for Reconsideration to the NPFC, verifiable financial evidence showing the amount of losses that are linked to the Deepwater Horizon oil spill must be submitted in order for this claim to be successful.

Failure to Prove Causation

The NPFC requested that the Claimant provide evidence or documentation that would indicate that damages claimed were caused by the Deepwater Horizon oil spill.¹⁷ The NPFC will not presume causation or lack thereof based upon business type or location. Causation is an element of every claim that must be proven by the Claimant.

Here, the Claimant asserted that her loss in income was due to reductions at the café/restaurant caused by the Deepwater Horizon oil spill.¹⁸ The Claimant has not provided documentation showing that the

⁹ NPFC letter dated 16 April 2012.

¹⁰ Phone conversation between Claimant's attorney and NPFC Staff on 1 May 2012.

¹¹ Lost Earnings/Income Worksheet, dated 2 October 2011.

¹² 33 C.F.R. § 136.325.

¹³ Claimant's signed, but undated letter, "To Whom It May Concern", describing her claim and GCCF Full Review Final Payment Claim dated 25 August 2011.

¹⁴ 2008 and 2009 Forms 1040EZ.

¹⁵ 2008 Form W-2 from the Crazy Horse Café; 2008, 2009 and 2010 Forms W-2 from Allstates Employer Services II, Inc. on behalf of previous owners; and 2011 Form W-2 from Pay Day on behalf of Ronald D. Burch, new owner of the Crazy Horse Café.

¹⁶ Claimant did provide three pay stub records for late 2011, but those do not show the picture of the entire year.

¹⁷ NPFC letter dated 27 March 2012.

¹⁸ Claimant's signed, but undated letter, "To Whom It May Concern", describing her claim and GCCF Full Review Final Payment Claim dated 25 August 2011.

café/restaurant contained a number of seafood items on their menu¹⁹ or other evidence that the café/restaurant's sales were down as a result of the oil spill. The Claimant did provide a letter from the café/restaurant which indicated that the Claimant would be brought back when "business picks up and seafood prices get back in line."²⁰ This letter did not specifically mention the oil spill and the Claimant has not provided documentation that proves the Deepwater Horizon oil spill was the cause of the losses asserted.

Statements without supporting documentation are not satisfactory to prove that the alleged loss was caused by the oil spill. If the Claimant submits a request for Reconsideration to the NPFC, evidence linking her loss and the loss of her employer to the Deepwater Horizon oil spill must be submitted in order for this claim to be successful.

This claim is denied for the following reasons: (1) future damages are not compensable under OPA, (2) the Claimant has failed to demonstrate her alleged loss through financial documentation; and (3) the Claimant has failed to demonstrate that her 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).

Claim Supervisor: *NPFC Claims Administration Division*

Date of Supervisor's Review: *5/22/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁹ Claimant's signed, but undated letter, "To Whom It May Concern", describing her claim asserts that '... we have a lot of seafood items, etc.'

²⁰ Unsigned letter from Ronald D. Burch, "To Whom It may Concern", dated 29 August 2011.

Enclosure (2)
Documentation Provided by the Claimant
N10036-1710

Below is a list of documentation that we have received to date in support of Yvette Burleson's claim:

- Unsigned claim letter received 7 March 2012.
- Copy of Claimant's authorization dated 29 February 2012 for Vance, Lotane & Bookhardt, PA, to act on her behalf concerning claim at the NPFC.
- Claimant's Florida Driver License, issued 06-08-2007.
- Claimant's signed, but undated letter, "To Whom It May Concern", describing her claim.
- Unsigned letter from Ronald D. Burch, "To Whom It May Concern", dated 29 August 2011.
- 2008 Form W-2 from Allstates Employer Services, Inc. II.
- 2008 Form W-2 from Crazy Horse Cafe.
- 2008 Form 1040EZ
- 2009 Form W-2 from Allstates Employer Services, II Inc.
- 2009 Form 1040EZ.
- 2010 Form W-2 from Allstates Employer Services, II Inc.
- 2011 Form W-2 from Payday, Inc.
- GCCF Client Authorization Form, signed 25 August 2011, naming Troy R. Lotane of Vance, Lotane & Bookhardt, P.A.
- GCCF Full Review/Final Payment Claim Form signed 25 August 2011.
- Email 7 March 2012 from VLBClaims to NPFC.
- GCCF Determination Letter dated 1 December 2011.
- Lost Earnings/Income Worksheet, dated 2 October 2011, for Yvette Burleson.
- Ronald D. Burch pay check information dated 23 December 2011.
- Ronald D. Burch pay check information dated 16 December 2011.
- Ronald D. Burch pay check information dated 11 November 2011.