

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: 1-800-280-7118
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 2446 3794

5890/DWHZ
22 May 2012

Vance, Lotane & Bookhardt, P.A.


Re: Claim Number: N10036-1729

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 your claim number N10036-1729 involving the Deepwater Horizon oil spill. Please see the enclosed 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. If, however 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 N10036-1729.

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

Copy: Bruce Van Zile


USPS Certified Receipt: 7011 1570 001 2446 3800

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1729
Claimant	Bruce Van Zile/J and B Manufacturing, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$166,731.20

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 27 March 2012, Arthur S. Barksdale IV, Esq., on behalf of Bruce Van Zile/J and B Manufacturing, Inc. (collectively, the Claimant), presented an optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$166,731.20 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant is a machine shop in Fort Walton Beach, Florida that specializes in making parts for local businesses.¹ That Claimant indicated that customers of the shop include, but are not limited to, marinas, parasailing companies, and Okaloosa County offices.² The Claimant asserted that, due to the Deepwater Horizon oil spill, there was a decrease in tourism in the area and companies were unable to afford the Claimant's maintenance or repair services.³

APPLICABLE LAW

The Oil Pollution Act of 1990 (OPA) provides that each responsible party for a vessel or facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or exclusive economic zone is liable for removal costs and damages. 33 U.S.C. § 2702(a). Damages include 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. 33 U.S.C. §2702(b)(2)(E).

The OSLTF, which is administered by the NPFC, 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. With certain exceptions a claim must first be presented to the responsible party. 33 U.S.C. § 2713(a). If the claim is either denied or not settled by any person

¹ GCCF Full Review Final Payment Claim Form, dated 28 September 2011.

² GCCF Full Review Final Payment Claim Form, dated 28 September 2011.

³ GCCF Full Review Final Payment Claim Form, dated 28 September 2011.

by payment within 90 days after the date on which it was presented, the claimant may elect to commence an action in court or present the claim to the OSLTF. 33 U.S.C. § 2713(c).

Pursuant to the claims regulations, 33 C.F.R. § 136.233, a claimant must establish the following to prove loss of profits or impairment of earning capacity:

- (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.

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 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

The Claimant's Submission to the OSLTF

In support of the claim, the Claimant presented the following documentation to the NPFC:

- Letter from Arthur S. Barksdale IV, Esq. to the NPFC, dated 26 March 2012;
- NPFC Authorization Agreement, signed by the Claimant on 19 March 2012;
- Denial Letter on Interim Payment/Final Payment Claim, dated 25 February 2012;
- Monthly Profit and Loss Statements from J AND B Manufacturing, Inc. for the period: January 2008 through October 2011;
- 2009 Deposit Detail from J AND B Manufacturing, Inc.;
- GCCF Full Review Final Payment Claim Form, dated 28 September 2011;

- Lost Earnings/Income Worksheet;
- Copy of Florida Driver's License and Fort Walton Beach Business License;
- Letter of claim explanation from the Claimant to "B.P. Claims Office," dated 02 November 2010;
- Form 1120S, U.S. Income Tax Return for an S Corporation from 2008, 2009, and 2010;
- GCCF Client Authorization Form, signed by the Claimant on 28 September 2011.

Prior to presenting this claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) claim with the GCCF for loss of earnings in the amount of \$7,000.00 on 04 November 2010.⁴ The Claimant was assigned Claimant ID # 3352038 and Claim # 412767. The Claimant also filed a Full Review Final Claim (FRF) claim with the GCCF for loss of earnings in the amount of \$166,731.24 on 14 December 2011; he was assigned Claim # 9548270.⁵ Both of these claims were denied by the GCCF.⁶

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claim is the same as the subject matter of the claim before the NPFC, i.e., that the Claimant lost machinery business due to a decrease in tourism caused by the Deepwater Horizon oil spill. The NPFC deems that the Claimant's GCCF claims were properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1729 considers and addresses the earnings claimed in the claims presented to the responsible, specifically; GCCF Claim #'s 412767 (EAP) and 9548270 (FRF).

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. The NPFC considered all documentation presented by the Claimant.

This claim is denied because (1) some of the Claimant's alleged damages are for future losses and are not compensable under OPA, and (2) the Claimant failed to prove it experienced a loss due to the Deepwater Horizon oil spill.

Non-Compensable Damages

The Claimant indicated that the claimed damages to the NPFC included damages for a period up to 60 months from the date of the Deepwater Horizon oil spill.⁷ However, under 33 CFR § 136.235, "the amount of compensation is limited to the actual net reduction or loss of earnings suffered."⁸ Therefore, the Claimant cannot be compensated for any prospective damages that might accrue in the future. Consequently, to the extent the losses claimed by the Claimant are for future losses, those damages are non-compensable under OPA and are therefore denied.

⁴ Report from the Transition Program, dated 01 May 2012.

⁵ Report from the Transition Program, dated 01 May 2012.

⁶ Report from the Transition Program, dated 01 May 2012.

⁷ Lost Earnings/Income Worksheet.

⁸ Emphasis added.

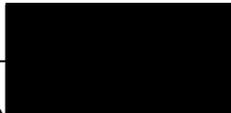
Failure to Prove Loss

The Claimant asserted a loss of earnings due to a decrease in tourism caused by the Deepwater Horizon oil spill. Yet, the NPFC notes that the Claimant had business income of \$2,800.00⁹ in 2010, compared to business income of -12,961.00¹⁰ in 2009 and -8,072.00¹¹ in 2008. While the Claimant allowed for decreased cost of goods in its calculation of damages,¹² under 33 C.F.R. § 136.235 (d), the Claimant must allow for all saved expenses in the calculation of loss. Therefore, the Claimant must consider other decreased costs; most prominently for the Claimant was a significant decrease in employee salaries. The Claimant cut employee salary costs from \$17,550.00¹³ in 2009 to \$3,510.00¹⁴ in 2010. Accordingly, after all saved expenses are considered, the Claimant failed to prove a financial loss for the business in 2010.

The Claimant also asserted continuing damages through 2011. While the Claimant did not provide a 2011 tax return, it did provide monthly profit and loss statements through October of 2011. Based on this documentation, the Claimant had business income of \$17,640.55¹⁵ in less than a year's span. Considering the sizable losses incurred by the business in prior years, as specified above, the Claimant's financial documentation does not indicate the Claimant experienced a financial loss in 2011.

Furthermore, the Claimant did not present to the NPFC any evidence providing a link between the alleged loss of income and the Deepwater Horizon oil spill. While the Claimant referenced a general decrease in tourism in Fort Walton Beach, Florida affecting its business, the Claimant did not provide the NPFC any information connecting specific losses incurred by the Claimant to the Deepwater Horizon oil spill.

Based on the foregoing, this claim is denied because (1) some of the damages claimed are for future damages and are not OPA compensable, and (2) the Claimant failed to demonstrate that it experienced a loss in the amount claimed due to the injury, destruction or loss of property or natural resources as a result of a discharge or substantial threat of a discharge of oil.

Claim Supervisor:  *NPFC Claims Adjudication Division*

Date of Review: *5/22/12*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

⁹ 2010 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹⁰ 2009 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹¹ 2008 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹² Lost Earnings/Income Worksheet.

¹³ 2009 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹⁴ 2010 Form 1120S, U.S. Income Tax Return for an S Corporation.

¹⁵ Monthly Profit and Loss Statements from J AND B Manufacturing, Inc. for the period: January 2011 through October 2011.