

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
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5890/DWHZ
06 June 2012

Ms. Irenique Minor



Re: Claim Number: N10036-1787

Dear Ms. Minor:

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 N10036-1787 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 N10036-1787.

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 Form

CLAIM SUMMARY/DETERMINATION FORM

| | |
|------------------|--|
| Claim Number | N10036-1787 |
| Claimant | Irenique Minor |
| Type of Claimant | Private (US) |
| Type of Claim | Loss of Profits and Impairment of Earning Capacity |
| Amount Requested | \$2,000.00 |

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 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 3 May 2012, Irenique Minor (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$2,000.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was working as a waitress at Harrah's Casino in New Orleans, Louisiana.² The Claimant alleged that "[a]s a tipped employee my earnings were decreased due to the lack of tourism in the city"³ as a result of the Deepwater Horizon oil spill. The Claimant further stated that reductions in her income continued through 2011, prompting her to relocate to Houston, Texas in late April of that year, in order to pursue other employment opportunities.⁴

The Claimant seeks \$2,000.00 to compensate for tip income allegedly lost a result of decreased 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 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.

¹ Optional OSLTF Claim Form, signed on 3 May 2012.

² Optional OSLTF Claim Form, signed on 3 May 2012.

³ Letter from the Claimant describing losses, 3 May 2012.

⁴ Letter from the Claimant describing losses, 3 May 2012.

- (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 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 submitted the following documentation:

- Optional OSLTF Claim Form, signed on 3 May 2012;
- Fax Cover Sheet, undated;
- Letter from the Claimant to the NPFC, explaining losses, 3 May 2012;
- Pay Stub, 12/30/2010, showing YTD gross earnings of \$17,483.39;
- Pay Stub, 12/31/2009, showing YTD gross earnings of \$15,046.42;
- 2008 Form 1040, showing wages of \$12,123.00;
- 2008 Schedule EIC (Form 1040A or 1040);
- 2008 Form 8812;
- 2008 Louisiana Resident Tax Forms;
- 2009 Form 1040, showing wages of \$14,651.00;
- 2009 Schedule M (Form 1040A or 1040);
- 2009 Form 4137;
- 2009 Form 8812;
- Supplementary Statements, for 2009, "All tip was report to employer";
- 2009 Louisiana Resident Tax Forms;
- Document identifying witnesses;
- Nola.com, *How the Gulf of Mexico Oil Spill Happened: A Graphic Presentation*, 7 May 2010;
- Nola.com, *BP Settlement Wins Preliminary Approval From Federal Judge*, 2 May 2012;

On 28 September 2010, the Claimant submitted an Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$4,000.00.⁵ The Claimant was assigned Claimant ID 3042506 and the EAP claim was assigned claim # 98558. The RP/GCCF denied payment on this claim.⁶

On 11 January 2012, the Claimant presented a Full Review Final (FRF) claim to the RP/GCCF, seeking \$8,000.00 in loss of profits and wages damages. The FRF was assigned claim # 9556041 and was also denied.⁷

On 3 May 2012, the Claimant submitted this claim to the NPFC, seeking loss of profits and impairment of earning capacity damages in the amount of \$2,000.00.⁸ According to OPA, a claim must be presented first to the RP/GCCF, prior to presentment to the NPFC. Should the RP/GCCF deny payment on the claim, or fail to issue payment within 90 days of presentment, the Claimant may present the claim to the NPFC.⁹ Information available to the NPFC indicates that the GCCF has denied the Claimant's EAP and has failed to issue payment on the Claimant's FRF within the 90 day period prescribed by OPA. Therefore, the NPFC may properly adjudicate this claim for \$2,000.00 in loss of profits and impairment of earning capacity damages.

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 to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

Here, in order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss within the meaning of OPA, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

1. Failure to demonstrate an actual financial loss.

The Claimant alleged to have lost \$2,000.00 in tips that she would have earned in 2010 and 2011, had the oil spill not occurred. In order to prove that a claimant has sustained a financial loss under OPA, a claimant must provide evidence sufficient to prove "that the claimant's income was reduced"¹⁰ as a result of the oil spill. As a baseline to measure to the extent of a reduction in the Claimant's income, the NPFC must consider "the amount of the Claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered."¹¹

Financial documentation provided by the Claimant indicates that the Claimant earned taxable wages of \$16,287.39 in 2010, as compared to \$14,474.42 in 2009.¹² The Claimant alleged that although her income increased in 2010, her wage and tip earnings actually decreased. The overall increase in income, according to the Claimant, is a result of the Claimant receiving reimbursement from her employer for child care expenses.¹³ However, this distinction is irrelevant under OPA, which

⁵ Transition Program, United States Coast Guard Report, 13 May 2012.

⁶ Transition Program, United States Coast Guard Report, 13 May 2012.

⁷ Transition Program, United States Coast Guard Report, 13 May 2012.

⁸ Optional OSLTF Claim Form, signed on 3 May 2012.

⁹ 33 C.F.R. § 136.133(c)(2).

¹⁰ 33 C.F.R. § 136.233(b).

¹¹ 33 C.F.R. § 136.233(c).

¹² YTD Earning Statements, 2009, 2010.

¹³ Response to NPFC request for additional information,

requires a showing, that a Claimant's *income*— not necessarily a Claimant's salary or tip earnings— was reduced. Because the Claimant's income did not decrease in the period following the oil spill, she has failed to prove that she sustained an actual financial loss within the meaning of OPA.

Moreover, even considering only the Claimant's wage and tip earnings, the Claimant has failed to provide documentation that would prove that she specifically lost wages and tips in the period following the oil spill. In a letter from the NPFC dated 23 May 2012, the NPFC requested that the Claimant provide certain additional documentation in support of this claim, including pay stubs for the period prior to and following the oil spill, which would demonstrate how the Claimant's earnings may have fluctuated over the course of her employment with the casino. The Claimant responded to the NPFC letter on 31 May 2012, but failed to respond to this particular request, thereby failing to provide evidence indicating if, and to what extent, her income may have fluctuated in the months following the oil spill.

Based on the foregoing, the Claimant has failed to prove that she sustained a loss of income in the period following the Deepwater Horizon oil spill.

2. Failure to prove loss due to Deepwater Horizon oil Spill.

The Claimant alleged that the oil spill caused a decrease in tourism in New Orleans, which caused the Claimant's tip-reliant salary to decrease in 2010 and 2011. However, the Claimant has failed to provide evidence that might indicate that tourism in New Orleans was indeed affected by the oil spill, or to prove that any lack in tourism caused a reduction in patronage to the casino, and therefore a reduction in her salary.¹⁴

The NPFC requested that the Claimant provide certain evidence that the oil spill caused the Claimant to sustain losses in income, including, proof that the oil spill caused a reduction tourism in New Orleans, or that the oil spill specifically caused a reduction in patronage at Harrah's Casino.¹⁵ The Claimant responded to this request on 31 May 2012, stating that "tourism records show that tourism increased, by my income was never the same." However, the Claimant failed to provide any evidence that might show that her income was somehow affected by the Deepwater Horizon oil spill.

This claim is therefore denied because the Claimant failed to meet her burden to demonstrate (1) that she sustained a loss in the amount of \$2,000.00, and (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 a discharge of oil.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *6/6/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁴ Publicly available tourism statistics indicate that 2010 was a very strong tourist season for the city of New Orleans. See, e.g., Press Release, New Orleans Convention and Visitors Bureau, *New Orleans Achieves Major Tourism Milestone, 8.3 Million Visitors in 2010, Spent 5.3 Billion Dollars, the Most Visitor Spending in History*, 14 April 2011, Available at, <http://www.neworleansonline.com/pr/releases/releases/New%20Orleans%20Achieves%20Major%20Tourism%20Milestone.pdf>.

¹⁵ NPFC Request for additional information, 23 May 2012.