

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: 7011 1570 0001 2445 2323

5890/DWHZ
20 September 2012

Ms. Lair Feliciano


Re: Claim Number: N10036-1800

Dear Ms. Feliciano:

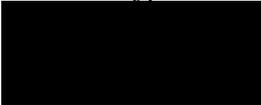
The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1800 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination 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 N10036-1800.

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	N10036-1800
Claimant	Ms. Lair Feliciano
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$6,054.00

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 09 May 2012, Ms. Lair Feliciano (the Claimant) submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$6,054.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.¹

At the time of the Deepwater Horizon incident, the Claimant worked as a server at Boizao Steakhouse in Tampa, Florida.² The Claimant alleges that the Deepwater Horizon incident caused a severe drop in tourism, to the point that "[her] co-workers from the restaurant complained that they have not seen business so slow ever."³ The Claimant alleges that the drop in tourism caused a financial hardship on her employer, who was forced to lay her off for six months, beginning in late November 2010, thereby reducing her 2011 earnings.⁴

As a result, the Claimant filed this claim seeking \$6,054.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon incident.⁵

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.

¹ Optional OSLTF Claim Form, signed 09 May 2012.

² Second Hardship Letter, undated; Employment Verification Letter, undated.

³ First Hardship Letter, undated.

⁴ First Hardship Letter, undated; Second Hardship Letter, undated.

⁵ Optional OSLTF Claim Form, signed 09 May 2012.

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

To support this claim, the Claimant submitted the following documentation:

- Optional OSLTF Claim Form, received 09 May 2012;
- First Hardship Letter, undated;
- Second Hardship Letter, undated;
- Employment Verification Letter, undated;

- 2008 U.S. Individual Income Tax Return;
- 2009 U.S. Individual Income Tax Return;
- 2010 U.S. Individual Income Tax Return;
- 2011 U.S. Individual Income Tax Return;
- 2008 Form W-2;
- 2009 Form W-2;
- 2009 Form 1099G;
- 2010 Form W-2;
- 2011 Form W-2;
- 2011 Employee Earnings Record; and
- Copies of correspondence with the South Carolina Department of Employment and Workforce.

The Claimant's employer also supplied the following documentation in support of the Claimant's claim:

- 2009 U.S. Return of Partnership Income for BZO.1, LLOC;
- 2010 U.S. Return of Partnership Income for BZO.1, LLOC;
- 2011 U.S. Return of Partnership Income for BZO.1, LLOC;
- 2009 Profit & Loss Statement;
- 2010 Profit & Loss Statement;
- 2011 Profit & Loss Statement;
- 2012 (year-to-date) Profit & Loss Statement; and
- Copies of all letters sent on Boizao Steakhouse's behalf to the GCCF.

On 09 May 2012, the Claimant presented this claim to the NPFC, seeking \$6,054.00 in loss of profits and impairment of earning capacity damages.⁶ The Claimant stated that prior to presenting this claim to the NPFC; she presented a claim to the RP/GCCF.⁷ Based upon the information provided, the NPFC presumes that the subject matter for the RP/GCCF claim is identical to the claim now before the NPFC—i.e., that a drop in tourism, caused by the Deepwater Horizon incident, resulted in reduced wages and tips for the Claimant. Any damages not first presented to the RP/GCCF are denied for improper presentment.⁸

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).

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. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds

⁶ Optional OSLTF Claim Form, signed 09 May 2012.

⁷ Optional OSLTF Claim Form, signed 09 May 2012.

⁸ 33 C.F.R. § 136.103(a).

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 rights to the NPFC.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that she is a member of the economic damages class of the E&PD Settlement, she should submit evidence to indicate that she has either opted out or is excluded from the E&PD Settlement in a request for reconsideration of this claim.

Furthermore, this claim for loss of profits and impairment of earning capacity damages is denied on its merits, as the Claimant has failed to establish that her alleged financial loss is the result of the Deepwater Horizon incident. In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficiently proving (1) that the claimant sustained an actual financial loss, and (2) that the discharge of oil resulting from the Deepwater Horizon oil spill caused that loss.

1. Financial Loss

The Claimant filed this claim seeking \$6,054.00 in loss of profits and impairment of earning capacity damages.⁹ The Claimant indicated that she reached this number by calculating the difference between wages claimed on her 2010 and 2011 tax returns.¹⁰

The actual extent of the Claimant's financial loss is unclear. The difference in the wages claimed on the Claimant's 2010 and 2011 tax returns indeed approximates \$6,054.00.¹¹ The Claimant, however, indicated that during the period in which she was laid off, she received unemployment.¹² Other submissions also indicate that she was deemed eligible for unemployment compensation in January 2011, with benefits beginning on the date of her termination.¹³ Her 2011 tax returns, however, do not reflect how much unemployment compensation she received, if any.¹⁴

Under OPA, recovery for a loss of profits and impairment of earning capacity damages "is limited to the actual net reduction or loss of earnings or profits suffered."¹⁵ Any unemployment compensation received during the timeframe in question—December 2010 through May 2011—would partially offset any lost wages while unemployed. Therefore, the portion of this claim equal to the amount of unemployment compensation that the Claimant received—an amount indeterminable from the record—is denied for failure to establish a financial loss.

⁹ Optional OSLTF Claim Form, dated 09 May 2012.

¹⁰ Response to NPFC Request for Additional Information, dated 12 June 2012.

¹¹ Response to NPFC Request for Additional Information, dated 12 June 2012.

¹² Response to NPFC Request for Additional Information, dated 12 June 2012.

¹³ Determination by Claims Adjudicator on Claim for Benefits, South Carolina Department of Employment and Workforce, dated 07 January 2011.

¹⁴ 2011 U.S. Individual Income Tax Return.

¹⁵ 33 C.F.R. § 136.235.

2. *Material Misrepresentation and Failure to Prove Deepwater Horizon Incident Caused Alleged Loss*

The Claimant and her employer have materially misrepresented substantial elements of this claim. Claimants submitting false claims or making false statements in connection with those claims risk prosecution under Federal law, including but not limited to 18 U.S.C. §§ 287 and 1001.¹⁶ Additionally, those submitting written documentation supporting their claim that they know or should know is false may be subject to a civil penalty for each claim.

The Claimant alleged that she was laid off due to her employer's financial hardship resulting from the Deepwater Horizon incident, and her employer substantially supports this allegation. The Claimant's documentation, however, contradicts this assertion. Among the Claimant's submissions is an unemployment determination from the South Carolina¹⁷ Department of Employment and Workforce (SC DEW) citing the Claimant's "failing to report to work as scheduled" as the reason for her termination.¹⁸ The SC DEW—a determination made contemporaneously with the Claimant's termination—points to the Claimant's own actions, and not a financial hardship induced by the Deepwater Horizon incident, as the cause of her termination.

Moreover, the Claimant's submissions, even taken at face value, do not establish that the Deepwater Horizon incident caused her alleged financial loss. The Claimant has not provided evidence linking the Deepwater Horizon incident with her alleged losses except for an allegation (echoed by her employer) that the Deepwater Horizon incident caused a drop in tourism, thereby reducing patronage at the restaurant where she worked.¹⁹ The Claimant has not provided any documentation linking her alleged losses to the Deepwater Horizon incident.

The Boizao's financial documentation does not support the allegation that the Deepwater Horizon imposed a sudden, discreet financial hardship on the restaurant. Quite to the contrary, Boizao profit and loss statements show year-over-year increases in revenues for 2009 through 2011, and an almost directly-proportional increase in Boizao's bottom line. In 2009, Boizao's revenues were \$3,548,785, and suffered a loss of \$815,104.²⁰ In 2010, business had improved, however, with Boizao seeing revenues of \$3,716,476, and a loss of \$512,288.²¹ By 2011, Boizao's financial situation improved even more, with revenues totaling \$4,202,752, and actually turning a profit of \$106,656.²²

As these numbers show, Boizao had been suffering losses at least since 2009—well before the Deepwater Horizon incident occurred, and long before any effects could plausibly have been felt. Neither the Claimant nor Boizao has provided any evidence suggesting that the factors causing Boizao's 2009 losses had abated by the time the Deepwater Horizon incident occurred. Further,

¹⁶ 33 C.F.R. § 136.9.

¹⁷ It appears that the Claimant had moved to Tampa, Florida, for employment, but retained her South Carolina address as her permanent address. First Hardship Letter, undated.

¹⁸ Determination by Claims Adjudicator on Claim for Benefits, South Carolina Department of Employment and Workforce, dated 07 January 2011. The determination stated, "Unavoidable circumstances prevented [the Claimant] from reporting to work. Even though it was an inconvenience to the employer, [the Claimant] did try to notify [her] employer in a reasonably prudent manner." This suggests that it was the Claimant's own actions—whether outside of her control or not—that led Boizao to terminate the Claimant's employment. Determination by Claims Adjudicator on Claim for Benefits, South Carolina Department of Employment and Workforce, dated 07 January 2011.

¹⁹ First Hardship Letter, undated; Second Hardship Letter, undated.

²⁰ 2009 Profit & Loss Statement.

²¹ 2010 Profit & Loss Statement.

²² 2011 Profit & Loss Statement.

neither the Claimant nor Boizao has demonstrated that the Deepwater Horizon incident exacerbated these factors, as Boizao found itself in a markedly improved financial situation by the end of 2010, when the Claimant and Boizao allege that the effects of the Deepwater Horizon incident had become particularly acute.

Tourism statistics for the Tampa, Florida, area further undercut the Claimant's allegations, as these statistics indicate that tourism did not decrease in the period following the oil spill. The 2010 Annual Visitors Profile for Pinellas County indicates that the number of visitors to the county for May through August 2010 actually increased by 0.2 percent compared to those same months in 2009.²³ Likewise, visitor expenditures remained constant over that same timeframe.²⁴ The remainder of the year saw more improvement, with 2.6 percent more visitors in September through December 2010 than those same months in 2009, and a 3.2 percent increase in tourist expenditures over that same time.²⁵

This claim of \$6,054.00 is denied in its entirety because the Claimant and her employer have materially misrepresented substantial elements of this claim in an attempt to obtain funds from the OSLTF. In addition, the Claimant has not demonstrated (1) a financial loss in the amount alleged, 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. Finally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement, and is therefore not eligible for OSLTF compensation.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *9/20/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

²³ St. Petersburg/Clearwater Convention and Visitors Bureau Annual 2010 Visitor Profile, page 6, *available at* <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, accessed on 17 September 2012.

²⁴ St. Petersburg/Clearwater Convention and Visitors Bureau Annual 2010 Visitor Profile, page 7, *available at* <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, accessed on 17 September 2012.

²⁵ St. Petersburg/Clearwater Convention and Visitors Bureau Annual 2010 Visitor Profile, pages 9-10, *available at* <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, accessed on 17 September 2012.