

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
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 9227

5890/DWHZ
28 June 2012

Brenda Otto



Re: Claim Number: N10036-1819

Dear Ms. Otto:

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 N10036-1819 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 N10036-1819.

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

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1819
Claimant	Brenda Otto
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$66,952.00

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 24 May 2012, Brenda G. Otto (the Claimant), presented an optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$66,952.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

At the time of the Deepwater Horizon oil spill, the Claimant was employed in Miramar Beach, Florida as the Store Manager for J. Jill, a women's clothing store.¹ The Claimant asserted that, because of a decrease in tourism caused by the Deepwater Horizon oil spill, the store experienced a decrease in sales volume in 2010.² Further, because of the store's decreased sales in 2010, the Claimant stated that she was forced to resign from her position at J. Jill on 19 February 2011.³ The Claimant's asserted damages include loss of wages, increased medical costs because of lost employment benefits, and lost bonus earnings.⁴

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

¹ Letter of claim explanation from the Claimant to the GCCF, dated 16 April 2012.

² Letter of claim explanation from the Claimant to the GCCF, dated 16 April 2012.

³ Letter of claim explanation from the Claimant to the GCCF, dated 16 April 2012.

⁴ Letter of claim explanation from the Claimant to the GCCF, dated 16 April 2012.

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 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 her claim, the Claimant presented the following documentation to the NPFC:

- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form, dated 15 May 2012;
- Denial Letter on Interim Payment/Final Payment Claim, dated 28 April 2012;
- Letter of claim explanation from the Claimant to the GCCF, dated 16 April 2012;
- Health Benefits Statements from Sentinel Group, dated 9 March 2011 and 26 May 2011;

- 2008 Form 1040 U.S. Individual Income Tax Return;
- 2008 Form W-2 Wage and Tax Statement from J.Jill LLC;
- 2009 Form 1040 U.S. Individual Income Tax Return;
- 2009 Form W-2 Wage and Tax Statements from J.Jill LLC and Jill Acquisition LLC;
- 2010 Form 1040 U.S. Individual Income Tax Return;
- 2010 Form W-2 Wage and Tax Statement from Jill Acquisition LLC;
- 2011 Form W-2 Wage and Tax Statement from Jill Acquisition LLC;
- Email from the Claimant to Mailaka Chehab (J. Jill HR), dated 26 January 2011;
- Sales and Payroll Plans from J.Jill Store # 3229 for the period March – September 2010.

Prior to presenting this claim to the NPFC, the Claimant filed a claim with the GCCF. The Claimant was assigned Claimant ID # 3584493 and Claim # 9589065.⁵ This claim was denied by the GCCF on 28 April 2012.⁶

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 due to the Deepwater Horizon oil spill, the Claimant was forced to resign from J. Jill, resulting in a loss of earnings. The NPFC deems that the Claimant's GCCF claim was properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1819 considers and addresses the earnings claimed in the claim presented to the responsible party, specifically; GCCF Claim # 9589065.

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.

1. 2011 and 2012 Losses

The Claimant asserted that she was forced to resign from her position as Store Manager at J. Jill in February of 2011 due to decreased sales caused by the Deepwater Horizon oil spill. However, in an email to J. Jill Human Resources, the Claimant herself states that she was told her job performance was unsatisfactory "based on overall leadership skills."⁷ Furthermore, the NPFC contacted J. Jill on 31 May 2012 to confirm the circumstances regarding the cessation of the Claimant's employment at J. Jill. The NPFC was informed by J. Jill that the company did not request the Claimant's resignation and that the Claimant voluntarily left the company for personal family reasons.⁸ As well, when asked if the Claimant lost any earnings due to the Deepwater Horizon oil spill, J. Jill stated that, since the Claimant was a salaried employee, she would not have been affected by any fluctuations in business.⁹ Consequently, the Claimant failed to prove that her loss of employment, and the resulting loss of earnings, potential bonus, and health benefits in 2011 and 2012, occurred as a result of the Deepwater Horizon oil spill.

⁵ Denial Letter on Interim Payment/Final Payment Claim, dated 28 April 2012.

⁶ Denial Letter on Interim Payment/Final Payment Claim, dated 28 April 2012.

⁷ Email from the Claimant to Mailaka Chehab (J. Jill HR), dated 26 January 2011.

⁸ PHONECON between the NPFC and J. Jill on 31 May 2012.

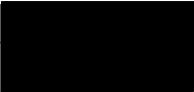
⁹ PHONECON between the NPFC and J. Jill on 31 May 2012.

2. 2010 Losses

The Claimant also asserted that she experienced losses in 2010 while still employed at J. Jill. As noted earlier, J. Jill stated that since the Claimant was salaried, she would not have experienced a loss in normal earnings.¹⁰ Consequently, the Claimant's only potential loss in 2010 would have been a reduction in bonus money. However, when compared to the Claimant's earnings from J. Jill in 2008 and 2009, the Claimant's earnings were practically identical to those in 2010. The Claimant's earnings in 2010 (\$50,503.00)¹¹ were minutely smaller than those in 2009 (\$50,658.00),¹² yet her 2010 earnings were slightly more than those in 2008 (\$50,191.00).¹³ Accordingly, there is no clear loss in 2010 based on the Claimant's prior earnings at J. Jill.

Furthermore, since bonuses are generally granted on a discretionary basis and are not guaranteed income, this alleged loss is speculative. Speculative losses of discretionary income are not compensable under OPA, which provides compensation for "*actual* net reductions or loss of earnings or profits suffered" (emphasis added).¹⁴ As well, the Claimant did not provide the NPFC any financial statements, paystubs, or employment contracts that document the receipt of bonuses in the past, the amount of these alleged bonuses, and how the bonuses are calculated and what specific criteria must be met for the awarding of a bonus. Accordingly, the Claimant failed to prove that she experienced a loss of earnings in 2010 as a result of the Deepwater Horizon oil spill.

This claim is denied because (1) the Claimant failed to meet his burden to demonstrate that there was a loss in the amount claimed, and (2) the Claimant failed to meet his burden to demonstrate 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.


Claims Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *6/28/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁰ PHONECON between the NPFC and J. Jill on 31 May 2012.

¹¹ 2010 Form W-2 Wage and Tax Statement from Jill Acquisition LLC.

¹² 2009 Form W-2 Wage and Tax Statements from J. Jill LLC and Jill Acquisition LLC.

¹³ 2008 Form W-2 Wage and Tax Statement from J. Jill LLC.

¹⁴ 33 C.F.R. § 136.235