

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
27 August 2012

Danielle R. Moore


Re: Claim Number: N10036-1860

Dear Ms. Moore:

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 N10036-1860 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 N10036-1860.

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	N10036-1860
Claimant	Danielle R. Moore
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$8,557.00

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 16 July 2012, Ms. Danielle Moore (the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$8,557.00 in loss of profits or impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant began working as a server at a Chili's restaurant in Tampa, Florida, on 4 March 2010.² A letter from the Claimant's employer states that the restaurant "experienced a decline in customer counts and guest traffic due to the oil spill," noting that the restaurant "is located .4 miles from the Gulf of Mexico and .4 miles from the Tampa International Airport."³

As a result of the decreased tourist traffic, the Claimant alleged to have sustained a loss of \$8,557.00. In her loss calculation, the Claimant included \$5,000.00 for future losses, which the Claimant classified as a "final payment offer," as well as \$3,557.00 in losses allegedly sustained from May through December 2010.⁴

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.

¹ Optional OSLTF Claim Form dated 26 June 2012.

² Handwritten letter explaining loss, 12 March 2012.

³ Employment confirmation letter, 25 April 2011.

⁴ Loss calculation page, undated.

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.

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 OSLTF

To support this claim, Claimant submitted the following documentation:

- Optional OSLTF Claim Form, signed on 12 March 2012;
- Letter explaining losses, 12 March 2012;
- Employment verification Letter, 15 May 2012;
- Employment verification letter, 25 April 2011;
- 2010 Form W-2 Wage and Tax Statement, showing earnings of \$12,555.86;

- 2009 Form 1099-INT;
- 2009 Form W-2 Wage and Tax Statement, showing earnings of \$51,006.65;
- 2008 Form W-2 Wage and Tax Statement, showing earnings of \$78,803.00;
- Pay Stubs, beginning 3/4/2010, ending 1/05/2011 (missing period 4/29 – 5/12/2010);
- GCCF Determination Letter on Interim Payment/Final Payment Claim, 10 May 2011;
- GCCF Re-Review Determination Letter on Interim Payment/Final Payment Claim, 20 May 2011;
- Letter from Claimant, contesting GCCF loss calculation, undated.

On 27 April 2011, the Claimant submitted an Interim Payment/Final Payment claim to the RP/GCCF, seeking lost profits and earnings damages. The Claimant was assigned Claimant ID 3515067 and the claim was assigned claim # 9371615.⁵ The GCCF initially denied payment on this claim in a determination letter dated 10 May 2012. As of date of this claim submission, this claim was pending under re-review status with the RP/GCCF.⁶

On 16 July 2012, the Claimant submitted this claim to the NPFC, seeking \$8,557.00 in loss of profits or impairment of earning capacity damages.⁷ Documentation included in this claim submission indicates that claims previously presented by the Claimant to the GCCF, were concerning the same damages that are now presented to the NPFC. Therefore, OPA presentment requirements have been met, and the NPFC may properly adjudicate this claim.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 economic damages class of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds 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 the NPFC to those rights.

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 her request for reconsideration of this claim.

⁵ GCCF Determination Letter on Interim Payment/Final Payment Claim, 10 May 2012.

⁶ Optional OSLTF Claim Form, indicating that the claim has been under re-review for "well over 90 days."

⁷ Optional OSLTF Claim Form, signed on 12 March 2012.

⁸ 33 C.F.R. § 136.103(a).

However, even if this claim had not been settled, it is denied under OPA's loss of profits damage category because the Claimant has failed to prove that she sustained a financial loss as a result of the Deepwater Horizon oil spill. In order to prove a claim for loss of profits damages, a claimant must provide evidence sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

Furthermore, 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].⁹ Therefore, payment is initially denied on \$5,000.00 of this claim, which constitutes losses not allegedly incurred by the Claimant.

The remaining \$3,557.00 of this claim for losses allegedly incurred by the Claimant from May through December 2010 is also denied, as the Claimant has not proven that she sustained a loss in that amount, and has also not proven a causal link between her alleged loss and the oil spill.

1. Failure to prove a financial loss

The Claimant alleged that from May to December of 2010, she earned \$3,557.00 less than she would have, had the oil spill not occurred. The Claimant calculated this loss using the difference between her average daily income prior to and following the oil spill.

However, pay stubs provided by the Claimant fail to prove that the Claimant's earnings actually decreased in the period following the oil spill. Rather, it appears that the Claimant's income remained steady throughout 2010, and even slightly increased following the oil spill. For example, prior to the oil spill, the Claimant earned average wages of \$161.15 per pay period. Following the spill, the Claimant's average hourly earnings per pay period increased slightly to \$162.65.¹⁰

Likewise, the Claimant also did not experience a decrease in tip earnings in the period following the oil spill. Prior to the spill, the Claimant reporting collecting tips averaging \$240.59 per pay period, as compared average tip collection of \$279.84 following the spill.

Therefore, financial documentation provided by the Claimant fails to prove that the Claimant sustained an actual loss or reduction in income in the period following the Deepwater Horizon oil spill.

2. Failure to demonstrate a causal link between alleged loss and the oil spill.

In addition to failing to document a financial loss, the Claimant has not provided evidence to sufficiently prove that any alleged loss she sustained was caused by the Deepwater Horizon oil spill. The Claimant alleged that she sustained losses due to a decline in "customer count and guest traffic," citing the restaurant's proximity to the Tampa International Airport and the Gulf of Mexico.¹¹

However; Tampa tourism statistics fail to indicate an appreciable drop in traffic through the Tampa International Airport in 2010. From 2009 to 2010, the number of inbound passengers dropped from 8.5 million in 2009 to 8.2 million in 2010. This level of fluctuation is consistent

⁹ 33 C.F.R. § 136.235.

¹⁰ Paycheck stubs from March 4, 2010 thru January 5, 2011.

¹¹ Employment confirmation letter, 25 April 2011

and within the range of fluctuations in prior years. For example, from 2008 to 2009, the inbound passenger count decreased more significantly, from 9.1 to 8.5 million. A decrease from 8.5 million to 8.2 million, therefore, does not necessarily indicate that the oil spill affected tourism in the Tampa area. Additionally, although the overall number of visitors to Tampa in 2010 was slightly down from 2009 levels, visitor spending actually increased in 2010. Based on these statistics, it does not appear that the oil spill had an appreciable effect on tourist traffic and visitor spending in and around Tampa, Florida.¹²

Furthermore, regarding the restaurant specifically, the Claimant has not provided any evidence that might prove that customer traffic decreased after the oil spill, nor has she presented evidence to prove any alleged decrease in customer counts, was caused by the Deepwater Horizon oil spill.

This claim is therefore denied because the Claimant has failed to meet her burden to demonstrate (1) that she sustained an actual financial loss in the amount of \$8,557.00, 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. Furthermore, this claim is considered to have been settled by virtue of Claimant belonging to the economic damages class associated with the CSSP.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/27/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹² Analysis of the 2011 Hillsborough County Visitor, Key Findings, available at, <http://www.visittampabay.com/includes/media/docs/2011-Research-Synopsis.pdf>, accessed on 24 August 2012.