

U.S. Department of  
Homeland Security

**United States  
Coast Guard**



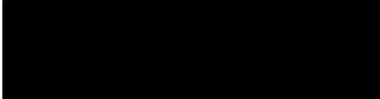
Director  
National Pollution Funds Center  
United States Coast Guard

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US COAST GUARD  
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 2000 0001 1246 7059

5890/DWHZ  
17 September 2013

Avlstock, Witkin, Kreis & Overholtz, PLLC



Re: Claim Number: N10036-1988

Dear Ms. Warner:

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 N10036-1988 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 N10036-1988.

Mail reconsideration requests to:

Director (ca)  
NPFC CA MS 7100  
US COAST GUARD  
4200 Wilson Blvd, Suite 1000  
Arlington, VA 20598-7100



Division  
National Pollution Funds Center  
U.S. Coast Guard

Enclosure: Claim Summary/Determination



By Certified Mail:  
No. 7011 2000 0001 1246 7066

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1988
Claimant	John Cain, Jr.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$5,500.00

***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 30 August 2013, Ms. Chelsie Warner, attorney for Mr. John Cain, Jr. ("the Claimant"), submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$5,500.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.<sup>1</sup>

At the time of the oil spill, the Claimant states he was working three days a week at his job, which appears to have been Pensacola Greyhound Racing, LLP. The Claimant states his hours were reduced because business decreased as a result of the 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 water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

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.

<sup>1</sup> Optional OSLF Claim Form, 9 May 2013.

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**

The Claimant submitted the following documentation in support of this claim:

- Claim Cover Letter, dated 29 August 2013
- Optional OSLTF Claim Form, signed on 21 June 2013;
- Claimant's Fact Reference Form;
- Payroll History Report from Pensacola Greyhound Racing, LLP for Claimant
- Various payroll stubs for Claimant;
- 2008 Form 1040 Income Tax Return for Claimant;

- 2009 Form 1040EZ Income Tax Return for Claimant;
- 2010 Form 1040 Income Tax Return for Claimant;
- 2008 Form W2 for Claimant;
- 2008 Form 1099 MISC for Claimant;
- 2009 Form W2s for Claimant;
- 2010 Form W2 for Claimant.

The Claimant alleged that this claim was first presented to the Responsible Party and that the RP denied payment on this claim.<sup>2</sup> On 21 July 2013, the Claimant presented this claim to the NPFC, seeking \$5,500.00 in loss of profits or impairment of earning capacity. The NPFC will adjudicate the claim to the extent presentment requirements have been satisfied. If any damages subject of this claim were not first presented to and denied by the RP, these damages are denied for improper presentment.<sup>3</sup>

Evidence in this claim submission indicates that the Claimant is a member of the Deepwater Horizon Economic and Property Damage Class Action Settlement (E&PD Settlement).<sup>4</sup>

### **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 Class. 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 he is a member of the economic damages class of the E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in his request for reconsideration of this claim.

Furthermore, even if the Claimant was not included in the Settlement Class, this claim is denied on its merits. In order to prove a claim for loss of profits or impairment of earning capacity damages, a claimant must provide evidence sufficient to prove (1) that the claimant sustained a loss or reduction in income, and (2) that the loss was caused by damage to real or personal property or natural resources caused by the discharge of oil during the Deepwater Horizon oil spill.

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<sup>2</sup> Optional OSLTF Claim Form, signed on 21 June 2013.

<sup>3</sup> 33 C.F.R. § 136.103(c)(2).

<sup>4</sup> At the time of the spill, the Claimant was living within the economic settlement loss zones.

The Claimant alleged that the company for which he worked lost business, and thus his hours were reduced as a result. However, he does not offer documentation to connect this reduction in hours to the oil spill. Rather, the Claimant's losses appear to have been caused by either a business decision made by his employer or from potential patrons wishing not to patronize the establishment. As such, these losses, which were not caused by "damage to real or personal property or natural resources" resulting from "the discharge or substantial threat of discharge of oil," are not ones that can be compensated by the OSLTF.

The Claimant was also asked how he calculated his claim sum certain. He based the claim amount on totals that could not be ascertained since he provides no explanation as to how the claim total was derived nor does he show the loss period for his alleged loss in the amount of \$5,500.00. Additionally, the W2s and tax returns for 2008, 2009 and 2010 show that he changed jobs multiple times and experienced an inconsistent income over that time period. In actuality, his income during the affected year, 2010, more than doubled from the year prior, 2009.

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that he sustained a financial loss in the amount of \$5,500.00, or (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 discharge of oil. Additionally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement and therefore not compensable by the OSLTF.

  
Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *9/17/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments: