

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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Arlington, VA 20598-7100
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7010 1060 0001 7082 8256

5890/DWHZ
Claim # N10036-1201
23 August 2011

Mr. Brett Simms


Re: Claim Number: N10036-1201

Dear Mr. Simms:

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 N10036-1201 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 N10036-1201.

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	N10036-1201
Claimant	Brett Simms
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$182,645.00

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 claims for certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 2 May 2011, Mr. Brett Simms (Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$182,645.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.¹

Claimant works as a commissioned sales professional for ADP Employer Services in the New Orleans Metro and Southeast Louisiana market.² Claimant alleged that his client base is comprised primarily of "maritime, oil and gas, industrial services, manufacturing/fabrication and hospitality services" corporations.³

Claimant alleged that "the spill resulted in a significant and immediate negative impact on [Claimant's] commission income due [to] the effects on [Claimant's] clients of drastically reduced employee counts and general business uncertainty with respect to the ability to continue operations."⁴ The Claimant seeks \$182,645.00 in alleged lost commissions as a result of the Deepwater Horizon oil spill.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 waters or adjoining shorelines or the exclusive economic zone, as described in Section 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.

¹ Optional OSLTF Claim Form, dated 27 April 2011.

² Letter from Claimant to NPFC, 27 April 2011.

³ Id

⁴ Letter from Claimant to NPFC, 27 April 2011.

⁵ Optional OSLTF Claim Form, dated 27 April 2011.

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.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, Claimant submitted the following documentation:

- Optional OSLTF Claim Form, 27 April 2011;
- Cover letter, noting attachments;
- Letter from Claimant to the NPFC, 27 April 2011;
- Email from Ron Lewis, Claimant's supervisor, to Claimant, 28 January 2011;
- Letter from Lisa Powell, HR Processing Specialist, ADP, stating Claimant's salary, 21 February 2011;
- 2009 W-2 Forms;
- 2010 W-2 Forms;
- ADP Corporate Overview.

On 28 January 2011,⁶ the Claimant presented a First Quarter Interim Payment Claim (ICQ12011) to the RP/GCCF, and was assigned Claimant ID 3493428. ICQ21011 was assigned claim number 9254788 and was denied on 5 May 2011.

⁶ Optional OSLTF Claim Form, 27 April 2011.

On 2 May 2011, Claimant presented this claim for loss of profits and earning capacity in the amount of \$182,645.00.⁷ This summary determination shall address the subject matter addressed in Claimant's ICQ21011 in the amount of \$182,645.00, to the extent that this amount was previously presented to the RP/GCCF.⁸ Any claimed damages now before the NPFC, which were not previously presented to the RP/GCCF are denied.

Claimant's Optional OSLTF Claim form indicated that the Claimant filed a claim in the multidistrict litigation now pending in the United States District Court for the Eastern District of Louisiana (MDL-2179 In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf Of Mexico, on April 20, 2010) against BP (the "MDL") on 20 April 2011.⁹ Although under the statute, the NPFC may not approve and certify the payment of a claim during the pendency of an action by the person in court to recover costs which are the subject of the claim, the NPFC may adjudicate such a claim to determine whether it may be compensable. Where appropriate, such a claim may be denied.

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a Claimant must prove that his 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 his claim. In order to prove a claim for lost profits, the Claimant must demonstrate (1) that he incurred a financial loss, and (2) that the loss was a result of the Deepwater Horizon oil spill.

At the time of the oil spill, the Claimant worked as a commissioned sales professional for ADP Employer Services in the New Orleans Metro and Southeast Louisiana market.¹⁰ While his regular income increased slightly from 2009 to 2010, the Claimant's commissioned income decreased in 2010.¹¹ Claimant presented W-2 forms showing wages of \$377,458.51 in 2009 and \$211,830.40 in 2010. Although this information indicates that the Claimant lost earnings in 2010, the Claimant does not present any documentation to show that this drop in income was a result of the oil spill. Claimant stated that his clients are primarily companies involved in industries affected by the oil spill, thus resulting in his loss of commissions.¹² However, the Claimant does not present any documentation to support this assertion.

Furthermore, the Claimant does not include any financial documentation to show that sales were lower in May – December 2010, compared to that same time period in previous years. The Claimant also failed to present documentation to show that sales only dropped in 2010 after the oil spill, having only presented evidence to show that his yearly sales commission was lower than his 2009 commission.

In order for the Claimant to more effectively pursue this claim on reconsideration, the Claimant would have to present documentation to evidence how his sales commissions were affected by the Deepwater Horizon oil spill, including documentation of losses of actual sales and information regarding specific clients allegedly affected by the oil spill.

⁷ Optional OSLTF Claim Form, 27 April 2011.

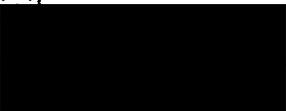
⁸ To date the NPFC has been unable to confirm the amount of the ICQ12011 claim to the GCCF.

⁹ Optional OSLTF Claim Form, 27 April 2011.

¹⁰ Letter from Claimant to NPFC, 27 April 2011.

¹¹ Letter from ADP, HR Processing to NPFC, 21 February 2011; Letter from Claimant to NPFC, 27 April 2011.

¹² Letter from Claimant to NPFC, 27 April 2011.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a financial loss in the amount of \$182,645.00, 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 a discharge of 

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *8/23/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments: