

CLAIM SUMMARY / DETERMINATION FORM

Date	: 4/06/2011
Claim Number	: A08003-0027
Claimant	: Mr. [REDACTED]
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Claim Manager	: [REDACTED]
Amount Requested	: \$64,616.75

FACTS

At approximately 1251 local time on Wednesday, November 7, 2007, the container ship COSCO BUSAN allided with the fender system of the Delta Tower of the San Francisco-Oakland Bay Bridge, causing a breach in the port side shell.¹ As a result of the breach, approximately 53,570 to 58,000 gallons of medium grade fuel oil (MFO) were discharged from fuel oil tank #4 into the San Francisco Bay, a navigable waterway of the United States.² The Coast Guard designated Regal Stone Limited (Regal) as the responsible party (RP) for the discharge. Regal accepted the designation and advertised its OPA claims process. Hudson Marine Management Services (HMMS) accepted and adjudicated claims on behalf of the RP, compensating claimants.³

CLAIM AND CLAIMANT

On 08 November, 2011, Ms. [REDACTED] submitted a loss of profits & earnings claim for her client, Mr. [REDACTED] (Claimant), a licensed fisherman in District 9 (northern California, including the Eureka, Trinidad and Crescent City areas) and District 10 (including the San Francisco Bay), in the amount of \$64,616.75 to the National Pollution Funds Center (NPFC) for reimbursement. On 30 March 2010, the claim was submitted to the RP but was denied by HMMS on or about 09 November 2010.⁴ Claimant asserts that he lost wages due to the oil spill, because he had planned on crabbing in the San Francisco Bay during the 2007 season. Claimant submitted documentation that showed that he had only previously fished and crabbed in (District 9 (Crescent City) and District 10 (Half Moon Bay) for the 2006 season.

In the claim submission, Ms. [REDACTED] stated that this claim was in mediation. While the claims manager requested a status update on 07 March 2011, regarding the mediation, she did not reply. As a courtesy, the claims manager contacted HMMS for the same information and was informed that the 09 November 2010 denial was the final denial, as HMMS did not receive required information from Claimant.⁵

¹ See USCG National Response Center Case # 853865 and USCG Sector San Francisco Case Report # 381733, both dated 11/07/2007.

² See USCG SITREPS/POLREPS 1 through 56 for Federal Project Number A08003.

³ See letter from [REDACTED] attorney representative for the RP, to Ms. [REDACTED] NPFC, dated and sent via email on 12/15/2010.

⁴ See cover letter for additional documentation, dated 01/17/2011, and submitted via email to the NPFC by HMMS for the RP on 1/17/2011.

⁵ See email from Mr. [REDACTED] HMMS, to Ms. [REDACTED] NPFC, and dated 3/10/2011.

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 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).

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.

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 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 support his claim, Claimant submitted:

1. Optional OSLTF Claim Form
2. A cover letter and explanation of his claim by his counsel, Ms. [REDACTED] dated 10/15/2010
3. Attorney Authorization for his claim, signed on 11/06/2010
4. A letter from LCZ Unloaders, stating that it loaded crab pots on the F/V Regina Marie on 11/01/2007
5. Copies of photographs of Mr. [REDACTED]'s crab pots and truck
6. Copies of correspondence with the RP's representative, HMMS, dated 3/30/2010, 5/26/2010, 11/01/2010
7. Copies of the [REDACTED]'s Verizon Wireless summary of usage from 10/22/2007 to 11/20/2007
8. A copy of the Declaration of [REDACTED] signed and dated 10/31/2010
9. A copy of the Zoon and Son Fishing, Inc. 2007 IRS 1098 Miscellaneous Income Form
10. Copies of checks paid to Mr. [REDACTED] dated 12/11/2007, 12/21/2007 and 12/24/2007
11. A copy of the Declaration of [REDACTED] signed and dated 10/31/2010
12. A copy of Mr. [REDACTED]'s State of California Driver License
13. A copy of the HMMS Claims Form Questionnaire, dated 3/29/2010
14. Copies of the CA DFG Landing Receipt Records for 12/20/2006 through 12/29/2009
15. A copy of Mr. [REDACTED]'s State of Oregon Commercial Driver License
16. A copy of Mr. [REDACTED]'s State of Oregon Driver License
17. A copy of the USCG Vessel Certification for the F/V Regina Marie
18. A copy of the CA DFG 2007-2008 Commercial Boat registration Application, signed 2/19/2007
19. A copy of the CA DFG Non-Resident Commercial Boat registration stamp form, dated 4/03/2007
20. A copy of the CA DFG 2007-2008 Fishing License Registration Application for Mr. [REDACTED] signed 2/20/2007, and approved 3/02/2007
21. A copy of the CA DFG 2007-2008 Fishing License Registration Application for Mr. [REDACTED] signed 2/21/2007, and approved 3/02/2007
22. Copy of receipt for undetermined marina in Newport, Oregon, dated 8/24/2007
23. Copies of the Eglund Marine Supply Co, Inc invoices, dated 10/22/2007 and 11/12/2007
24. Copies of the Chase Credit Card statement for Zoon and Son Fishing, Inc., for 10/20/2007 through 11/19/2007
25. A copy of the Costco American Express credit card for Mr. and Mrs. [REDACTED] for activity from 10/23/2007 through 11/11/2007
26. A copy of the Riverbend Marine Service Invoice for Mr. [REDACTED] dated 9/26/2007
27. Copies of the Crescent City Water/Sewer Department Invoices for Zoon and Son Fishing, Inc., dated 11/05/2007 and 12/05/2007
28. Copies of the Pacific Power invoices for Zoon and Son Fishing, Inc., dated 11/13/2007 and 12/14/2007
29. A copy of the letter from Mr. [REDACTED] to Audet and Partners, LLP re: Cosco Busan Oil Spill, signed and dated 5/28/2008
30. A copy of the HMMS denial for Claim # A052 (Harvey Zoon), dated 5/20/2010

NPFC Determination

Under 33 CFR 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 the documentation submitted by Claimant, as well as the documentation submitted by HMMS and reviewed publically available State of California statistics on the subject fishery

The claim is denied on two grounds. The Claimant has not established that his income was reduced as a consequence of injury to, destruction of or loss of property or natural resources, nor the amount of that reduction. 33 CFR 136.233(b). Moreover, the Claimant has not provided specific data to measure the alleged loss of profits and 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 from comparable periods. 33 C.F.R. § 136.233(c)

In this case, the Claimant has not established, through a preponderance of the evidence, that he incurred a loss or injury as a result of the Cosco Busan oil spill. The 2007 District 9 Commercial Dungeness crabbing season was originally scheduled to open on 01 December 2007. However, it actually opened early on 28 November 2007 at 0800, 64 hours in advance of the scheduled start.⁶ Meanwhile, the District 10 Commercial Dungeness crabbing season (San Francisco Bay area), which was scheduled to open between 15 November and 01 December 2007, was closed on 13 November 2007 by California Governor Arnold Schwarzenegger.⁷ However, on 29 November 2007, after assessment by the California Department of Fish and Game (CA DFG) in consultation with the California Office of Environmental Health Hazard Assessment, the District 10 Dungeness crabbing area re-opened until the end of the season on June 30, 2008, as it posed no significant health risk to human consumption.⁸ During this period, the documentation provided by the Claimant shows that on 1 December of 2007, he began crabbing in District 9 (Crescent City), north of the San Francisco Bay, a day after District 10 opened.

While the Claimant provided copies of the CA DFG Landing Receipt Records for 12/20/2006 through 12/29/2009, he failed to establish the amount of his specific profits and earnings in comparable periods compared with when the claimed alleged loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. According to the landing records he did not crab or fish in the San Francisco Bay area of District 10 during the 2006-2007 season or in any of the previous or subsequent reported seasons up to the present date.⁹ In December of 2007, the Claimant began crabbing in Crescent City, which is in District 9, north of the San Francisco Bay. These landing records show that the Claimant began crabbing in

⁶ See CA DFG Notice to All Interested and Affected Parties, signed by Mr. [REDACTED] CA DFG, on 11/26/2007.

⁷ See State of California Executive Order S-14-07, signed by Gov. [REDACTED] on 11/13/2007.

⁸ See CA DFG Memorandum Re: Fisheries Suspension Lift for the 2007-2008 Season, written by Mr. [REDACTED] Director, CA DFG, on 11/29/2007.

⁹ See CA DFG Landing Receipt Records for 12/20/2006 through 12/29/2009, submitted to the NPFC with the claim by Ms. [REDACTED] for the claimant on 10/15/2011.

Crescent City on December 1, 2007, a day after District 10 opened. Although it appears that he eventually moved into District 10 later that season, it was to crab in Bodega Bay and not to the San Francisco Bay. Had he intended to crab in District 10—more specifically, the San Francisco Bay area—as alleged, he had the opportunity to do so, from 30 November 2007 until the season ended on 30 June 2008. Additionally, the records provided by the Claimant show that for subsequent seasons, he has continued crabbing in Crescent City, but has not returned to District 10 to either fish or crab. These same landing records also show that, while the Claimant did not crab in the San Francisco Bay area of District 10 for the 2007-2008 season, it was his best season to date (based on the full-season records provided). For the 2006-2007 season, he landed 40,902 lbs of Dungeness crab and landed 43,031 lbs in the 2008-2009 season. During the affected 2007-2008 season, however, he landed 47,423 lbs of Dungeness crab.¹⁰

Although the intention to fish in the San Francisco Bay area is discussed in a 28 May 2008 letter to Audet and Partners, LLP (Audet), by Mr. [REDACTED] (Claimant's son and assistant) to sell Dungeness crab to Ken Sio's Inc., a wholesale company in the Oakland, CA area, this documentation is not contractual in nature. There is no indication that the Claimant actually entered into a contract with Mr. [REDACTED]. Moreover, if he did, there is nothing in the record to suggest that he could not have fulfilled his contract as he landed 47,423 lbs of dungeness crab during the 2007-2008 season.¹¹

Pictures provided to the NPFC show that the Claimant's truck was loaded in Crescent City with crab pots on 01 November 2007, well before the oil spill.¹² Also, phone records, receipts and invoices provided by the Claimant do not expressly show intent to crab in the San Francisco Bay of District 10 for the 2007-2008 season; rather, only the intent to crab in general. Claimant's cell phone logs show calls placed to Crescent City, CA, and invoices are for businesses in northern California and Oregon—costs that do not, in and of themselves, show an intention to crab in San Francisco Bay.¹³

This claim is denied as the Claimant has not established that his income was reduced as a consequence of injury to, destruction of or loss of property or natural resources, nor the amount of that reduction. 33 CFR 136.233(b). Were the Claimant to request reconsideration, not only would he need to provide documentation in accordance with the regulations to show that he lost profits-- as he did crab the 2007-2008 season-- but also the documentation to quantify the amount profits and earnings lost alleged at \$64,616.75 (i.e., W2s, copies of canceled checks, bank statements, etc.).

Determination amount: \$0.00

Amount denied: \$64,616.75

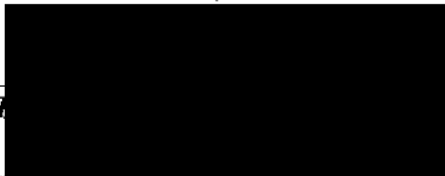
¹⁰ See CA DFG landing records for December 2006-December 2009, submitted to the NPFC with the claim by Ms. [REDACTED] for the claimant on 10/15/2011.

¹¹ See letter from Mr. [REDACTED] to Audet and Partners, LLP re: Cosco Busan Oil Spill, signed and dated 5/28/2008, and submitted to the NPFC with the claim by Ms. [REDACTED] for the claimant on 10/15/2011.

¹² See photographs of truck and crab pots, submitted to the NPFC with the claim by Ms. [REDACTED] for the claimant on 10/15/2011.

¹³ See Verizon Wireless summary of usage from 10/22/2007 to 11/20/2007, as well as various receipts and invoices as listed above in "Claimant Submissions," submitted to the NPFC with the claim by Ms. [REDACTED] for the claimant on 10/15/2011.

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Claim Supervisor: T

Date of Supervisor's review: 4/5/11

Supervisor Action: Denial allowed

Supervisor's Comments: