



APPEAL PANEL DECISION FORM

2014-814

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First	Middle
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Business Economic Loss		
Law Firm	[REDACTED]		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> BP's Final Proposal	Compensation Amount	\$21,675
	Risk Transfer Premium	2.00
	Prior Payment Offset	\$0
<input checked="" type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$38,466.02
	Risk Transfer Premium	2.00
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment (optional):

See reasons submitted to Appeals Coordinator.

Reasons for Decision

Appeal # [REDACTED]

November 24, 2014

“You say too-may-toe, I say too-mah-toe.”

This Appeal involves the ongoing debate between BP and Claimants over whether to classify an expense as “fixed” or “variable.” In particular, this Appeal focuses on whether an expense, which Exhibit 4D of the Settlement Agreement lists as fixed, should be really be classified as variable on the basis that the expense appears to fluctuate from month to month based on the level of the Claimant’s business.

A common example of this dilemma is medical supplies, and in particular latex gloves. The cost of this item will vary from month to month based on the number of patients. Yet in spite of this variance, “Supplies” is a fixed expense on Exhibit 4D. BP has argued that the cost of latex gloves is a variable expense. Appeal panelists have disagreed, consistently affirming the finding by the Settlement Program that supplies are fixed as defined by Exhibit 4D, even though they may vary from month to month.

Claimant in the instant matter provides helicopter services. Apparently the Claimant does not own all of its helicopters, but instead leases them from third parties. The amount that Claimant pays to lease the helicopters varies from month to month. [For purposes of this Appeal, the Panelist assumes that this variance is based on Claimant’s level of business.]

BP argues that because the expense varies from month to month, the lease payments should be categorized as “COGS – Variable.” Claimant argues that the expense should be classified as “Lease Expense,” which Exhibit 4D defines as a fixed expense.

In the absence of the Settlement Agreement, BP’s position would be more compelling. Case law cited by BP support the proposition that variable expenses are those that vary with the level of business while fixed expenses are those costs which continue even if the firm is temporarily shut down. However, the parties took it upon themselves to define variable versus fixed. They did so by creating a list of expenses on Exhibit 4D and categorizing them as fixed or variable. [It should be noted that a number of the expenses defined as fixed on Exhibit 4D are going to vary from month to month, and indeed would cease if a business temporarily shut down (e.g., “Postage”). Notwithstanding, the parties agreed to classify these expenses as fixed.]

In the instant matter, the payment made to secure the use of helicopters is clearly a lease expense. “Lease Expense” is defined by Exhibit 4D as a fixed cost.

Almost all appeal decisions have found that, in spite of a month to month variance, if an expense falls squarely into a listed expense on Exhibit 4D, then that exhibit’s categorizing of the expense will be honored.

BP cites a contrary decision by an esteemed Panelist that fellow Panelists have deemed the “Abe Lincoln and the five legged cow” appeal.” There, the issue involved an expense that did not fit squarely into one of the expenses listed on Exhibit 4D. Consequently, the Panelist was required to focus on the nature of the expense. In that Panelist’s opinion, notwithstanding the Claimant’s characterization of the expense (Abe Lincoln once said that calling a cow’s tail a leg doesn’t make the cow have five legs), the expense was more like a variable expense than a fixed one because the expense varied with the claimant’s level of business.

This Panelist does not find that decision to be inconsistent with the majority of other appeal decisions. Where the expense clearly falls into one of the listed expense items on Exhibit 4D, the Settlement Agreement’s definition of that expense should control. On the other hand, if the expense is not listed on Exhibit 4D and could fall into either category, then the Settlement Program must use its best judgment in categorizing the expense by focusing on the nature of the expense.

In the instant matter, the expense (lease payments) falls squarely into one of the expense items listed on Exhibit 4D (“Lease Expense”), and because that item is categorized as fixed, this Panelist affirms the Settlement Program’s characterization of the expense as fixed, and adopts Claimant’s Final Proposal.