

U.S. Department of
Homeland Security

United States
Coast Guard



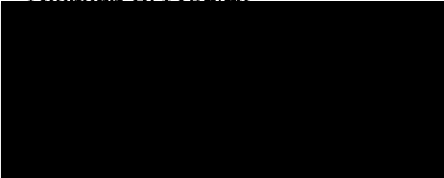
Director
United States Coast Guard
National Pollution Funds Center

NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd., Suite 1000
Arlington, VA 20598-7100
Staff Symbol: (CA)
Phone: 1-800-280-7118
E-mail: arl-pf-npfcclaimsinfo@uscg.mil
Fax: 202-493-6937

CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4636 1864

5890/DWHZ
Claim # N10036-1316
John E. Fountain
13 September 2011

Amanda G. Proujan



Re: Claim Number: N10036-1316

Dear Ms. Proujan:

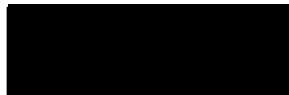
The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on your claim number N10036-1316 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination 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. If, however 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 N10036-1316.

Mail reconsideration requests to:

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



Claims Reproduction Division
National Pollution Funds Center
U.S. Coast Guard

Copy: John E. Fountain



USPS Certified Receipt: 7011 1150 0000 4636 1895

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1316
Claimant	John E. Fountain
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$28,000.00

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 certain individual and business claims on behalf of BP.

CLAIM AND CLAIMANT

On 17 August 2011, Amanda G. Proujan, on behalf of John E. Fountain, (collectively the Claimant), presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$28,000.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant sold fish and shrimp dinners using seafood he caught in the Gulf of Mexico in the Moss Point, Mississippi region.¹ The Claimant asserted that as a result of the Deepwater Horizon oil spill, the waters where he would catch his seafood were closed.² Additionally, the Claimant asserted that even after the waters were open for fishing, he could not catch nearly as much seafood as before the Deepwater Horizon oil spill.³ As a result, the Claimant was forced to purchase local seafood to sell as dinners.⁴ The Claimant stated that it was no longer feasible to sell seafood dinners because his customers were afraid to eat the locally caught seafood.⁵ Due to purchasing seafood and being unable to sell it, the Claimant asserted a loss of income.⁶

The Claimant did not provide an explanation for his calculation of his sum certain of \$28,000.00.

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

¹ Optional OSLTF Claim Form received 17 August 2011.

² Optional OSLTF Claim Form received 17 August 2011.

³ Optional OSLTF Claim Form received 17 August 2011.

⁴ Optional OSLTF Claim Form received 17 August 2011.

⁵ Optional OSLTF Claim Form received 17 August 2011.

⁶ Optional OSLTF Claim Form received 17 August 2011.

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).

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 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 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

In support of the claim, the Claimant presented the following documentation to the NPFC:

- Letter from Amanda G. Proujan to NPFC dated 10 August 2011;
- Optional OSLTF Claim Form received 17 August 2011;
- Letter from Douglas M. Schmidt to GCCF regarding association of Nexsen Pruet, LLC dated 11 March 2011;
- Douglas M. Schmidt Retainer Agreement Oil Spill/Discharge dated 09 September 2010;
- Wiring Instructions dated 10 August 2011;
- 2010 Form 1040 Federal Tax Return;
- 2010 W-2 Wage and Tax Statement, Individual Data Sheet Mississippi;
- 2009 Form 1040A Federal Tax Return;

- Internal Revenue Service Record of Account for tax period ending 31 December 2008;
- Flexicrew Staffing Certificate dated 12 May 2010;
- Pay stub from Flexicrew Staffing Inc. for dates: 25 June 2010-08 August 2010;
- Pay stub from McGrath Technical Staffing Inc. for dates: 20 August 2010, 17 September 2010;
- Photocopies of Walmart receipt dated 05 November 2010 and Coastal Family Health Center card dated 27 September 2010;
- Pay stubs from Masse Contracting, Inc.-Mississippi for dates: 22 October 2009 and 29 October 2009;
- Email from Amanda G. Proujan to the NPFC dated 23 August 2011;
- GCCF Denial Letter dated 14 December 2010;
- GCCF Deficiency Denial Letter dated 02 August 2011;
- GCCF Denial Letter dated 02 August 2011.

Prior to presenting this Claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAPa) Six Month Claim with the GCCF on 19 November 2010 in the amount of \$18,200.00 for loss of profits and impairment of earnings capacity.⁷ He was assigned Claimant ID # 3383341 and Claim ID # 499080. The EAPa Claim was denied on 14 December 2010.⁸ Additionally, the Claimant filed an Emergency Advance Payment (EAPb) Six Month Claim on 19 November 2010 in the amount of \$50,000.00 for injury damages.⁹ He was assigned Claim ID # 499127. The EAPb claim was denied.¹⁰ Additionally, the Claimant filed a Full Review Final (FRFa) Claim with the GCCF on 06 January 2011 in the amount of \$28,000.00 for loss of profits and impairment of earnings capacity.¹¹ The Claimant was assigned Claim ID # 9095467. The FRFa Claim was denied on 02 August 2011.¹² Additionally, the Claimant filed a Full Review Final (FRFb) Claim with the GCCF on 06 January 2011 in the amount of \$50,000.00 for injury damages.¹³ The Claimant was assigned Claim ID # 9095467. The FRFb Claim was denied on 02 August 2011.¹⁴

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claims involving loss of profits and impairment of earnings capacity is the same as the subject matter of his claim before the NPFC, i.e., that he could no longer sell seafood dinners to customers and as a result lost income due to the Deepwater Horizon oil spill. The NPFC deems that the Claimant's GCCF claims involving loss of profits and impairment of earnings capacity to be properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC claim N10036-1316 considers and addresses the earnings claimed in the claims presented to the responsible party up to \$28,000.00, specifically; GCCF Claim #'s 499080 (EAPa), 9095467 (FRFa). Regarding the Claimant's claims to the GCCF involving injury damages, those claims were not presented to the NPFC, specifically GCCF Claim #'s 499127 (EAPb) and 9095467 (FRFb). Accordingly, those claims will not be considered or addressed in the Claim Summary Determination for NPFC claim N10036-1316.

NPFC Determination

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. The NPFC considered all documentation presented by the Claimant.

⁷ Report from the GCCF dated 07 September 2011.

⁸ GCCF Denial Letter dated 14 December 2010.

⁹ Report from the GCCF dated 07 September 2011.

¹⁰ Report from the GCCF dated 07 September 2011.

¹¹ Report from the GCCF dated 07 September 2011.

¹² GCCF Denial Letter dated 02 August 2011.

¹³ Report from the GCCF dated 07 September 2011.

¹⁴ GCCF Deficiency Denial Letter dated 02 August 2011.

The claim is denied because the Claimant has not provided sufficient evidence to establish a financial loss due to the Deepwater Horizon oil spill. The Claimant's submission to the NPFC consisted of various paystubs and tax returns from 2008, 2009 and 2010. This documentation, however, fails to demonstrate an actual loss of earnings. On the contrary, the Claimant's submission shows that he earned more in 2010 (\$18,581.00)¹⁵ than in 2009 (\$5,787.00)¹⁶ or 2008 (\$4,419.00)¹⁷. Thus, the Claimant's documentation fails to support his assertion that he suffered a decrease in earnings due to the oil spill.

Moreover, Claimant fails to provide documentation to show that he caught and/or sold any fish at all. Claimant's submitted financial documentation lacks any reference to sales from seafood in 2008, 2009 and 2010. The lack of documentation, included among other things, a fishing license, trip tickets, and sales receipts of seafood. In an effort to verify the Claimant's assertions, the NPFC contacted the Claimant's legal representative to obtain additional information on the Claimant's business selling cooked seafood.¹⁸ In a subsequent phone conversation with the Claimant's legal representative, the NPFC was informed that the Claimant did not provide any receipts or any documentation to his legal representative regarding his business selling cooked seafood.¹⁹ Furthermore, the Claimant's legal representative stated that the Claimant did not have the ability to provide any documentation not already submitted to the NPFC.²⁰ Accordingly, the Claimant failed to support his assertion that he suffered reduced earnings from the inability to sell cooked seafood meals due to the Deepwater Horizon oil spill.

This claim is denied because the Claimant failed to meet his burden to demonstrate (1) that there was an alleged loss in the amount claimed, 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.


Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *9/13/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments:

¹⁵ 2010 Form 1040 Federal Tax Return.

¹⁶ 2009 Form 1040A Federal Tax Return.

¹⁷ Internal Revenue Service Record of Account for tax period ending 31 December 2008.

¹⁸ PHONECON between the NPFC and the Claimant's legal representative.

¹⁹ PHONECON between the NPFC and the Claimant's legal representative.

²⁰ PHONECON between the NPFC and the Claimant's legal representative.