

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
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5890/DWHZ
Claim # N10036-1393
22 September 2011

Kelly's Barber College


Dear Mr. Kelly:

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 N10036-1393 involving Deepwater Horizon. 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 N10036-1393.

Mail reconsideration requests to:

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


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

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1393
Claimant	Kelly's Barber College Calvin Kelly, owner
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$120,488.00

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 12 September 2011, Kelly's Barber College, owned by Calvin Kelly (collectively the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$124,488.00 for loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.

The Claimant owns and operates a barber school in Gretna, Louisiana.¹ The school, which has one instructor and about 25 students per session,² has been in business since June 2009.³ Most of the students work in the retail, seafood, and hospitality industries.⁴ The students receive no federal financial aid for tuition payments.⁵ The Claimant states that "barber services and student enrollment has [sic] decrease [sic] significantly since the Gulf Coast oil spill."⁶ The Claimant alleged that he decreased tuition costs and offered discounts on barber services in an effort to mitigate his losses.⁷

¹ OSLTF Claim Form signed by Claimant 09 September 2011

² Information from Claimant in response to NPFC request for additional information dated 13 September 2011

³ PHONECON between the Claimant and NPFC Staff 19 September 2011

⁴ OSLTF Claim Form signed by Claimant 09 September 2011

⁵ Information from Claimant in response to NPFC request for additional information dated 13 September 2011

⁶ OSLTF Claim Form signed by Claimant 09 September 2011

⁷ Information from Claimant in response to NPFC request for additional information dated 13 September 2011

From June 2009 to December 2009, the Claimant's school was named the "New Blade Barber College", and was owned by the Claimant and a business partner. After December of 2009, the partnership was dissolved, at which time the Claimant operated the school as a sole owner and the name of the school was changed to "Kelly's Barber College". The school remained in the existing location.⁸

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.

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;

⁸ Information from Claimant in response to NPFC request for additional information dated 13 September 2011

- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertake, 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:

- OSLTF Claim Form signed by Claimant 09 September 2011
- State of Louisiana Articles of Organization for Kelly's Enterprise dated 17 January 2006
- State of Louisiana Certificate of Registration to operate a Barber College for 2010
- Web site for Kelly's Barber College
- Worksheets for 2009, 2010 and 2011 for monthly revenue and expenses for Kelly's Barber Shop.
- Listing of student names and telephone numbers
- IRS Tax Return Transcripts for 2008 and 2009 tax returns
- Information from Claimant in response to NPFC request for additional information dated 13 September 2011

On 13 September 2011 NPFC sent the Claimant a letter requesting additional information in order to further evaluate the claim. On 18 September 2011, the Claimant responded to the request.

Claimant seeks lost profits and earnings in the amount of \$120,488.00.

Before presenting the claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) with the GCCF. The claim was assigned Claimant ID #3199235 and claim #275547. The EAP claim was denied on 12 November 2010.⁹ Additionally, Claimant filed a Full Review Final (FRF) claim with the GCCF in November 2010.¹⁰ The FRF claim was assigned claim #9043070. The GCCF issued Deficiency Letters on 20 March and 15 July 2011.¹¹ To date, the GCCF has made not made a final determination as to the FRF claim.¹²

Based upon the evidence provided by the Claimant, it appears that the subject matter of the GCCF claims is the same as the subject matter of the claim before the NPFC, i.e., Claimant lost earnings as a result of the Deepwater Horizon oil spill. The NPFC deems

⁹ GCCF Denial Letter dated 12 November 2010

¹⁰ PHONECON between the Claimant and NPFC Staff 19 September 2011

¹¹ GCCF Deficiency Letters dated 20 March and 15 July 2011

¹² GCCF On-Line Claim Status site

the GCCF claims to be properly presented to the Responsible Party and Party and, to the extent the amount of the claims presented to the RP are equal to or greater than the amount currently presented to the NPFC, the subject claim is properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1393 considers and addresses the loss of earnings up to the amount of \$120,488.00 in all claims presented to the Responsible Party, specifically: GCCF Claim #275547 EAP and #9043070 FRF.

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 or destruction or loss of real or personal property or 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.

This NPFC determination shall address this claim to the extent that it has been presented to and denied by the RP/GCCF. Any amount of damages now presented to the NPFC, which were not first presented to the RP/GCCF are denied.

Because the barber college opened in June 2009, the Claimant does not have a financial history prior to the oil spill to conclusively establish that the Claimant suffered a loss of earnings. The loss asserted by the Claimant is for a period of sixteen months but is based upon an average of only three months: January, February and March 2010. The loss of earnings presented by the Claimant appears to represent gross revenues. However, any loss claimed under OPA must clearly reflect adjustments for any saved overhead or normal expenses not incurred as a result of the incident.¹³ Accordingly, the Claimant has not established his sum certain presented to the NPFC by a preponderance of the evidence.

The Claimant stated that his students work in the retail, seafood, and hospitality industries. The Claimant further stated that employment in these industries was significantly affected by the oil spill and that the students could not afford to pay tuition. However, the Claimant has provided no documentation to support this assertion. As such, the Claimant has not established by a preponderance of the evidence that his alleged loss of earnings was due to the oil spill.

¹³ See Code of Federal Regulations (CFR) 33 Part 136.235(d) Compensation Allowable

This claim is denied because the Claimant failed to meet the 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:  *Claims Adjudication Division*

Date of Supervisor's Review: *22 September 2011*

Supervisor's Action: *Denial approved*

Supervisor's Comments: