

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
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Arlington, VA 20598-7100
Staff Symbol: (CA)
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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1150 0000 4636 2915

5890/DWHZ
13 October 2011

Mrs. Kimberly Leet Razor


Re: Claim Number: N10036-1272

Dear Mrs. Razor:

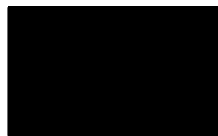
The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on your claim number N10036-1272 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination 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 N10036-1272.

Mail reconsideration requests to:

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



ion Division
National Pollution Funds Center
U.S. Coast Guard

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1272
Claimant	Kimberly Razor
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$3,634.00

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 05 August 2011, Kimberly Razor, (the Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$3,634.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant owns a vacation rental condominium in Bradenton Beach, Florida.¹ The Claimant asserted that she experienced a loss in rental income due to the Deepwater Horizon oil spill.² The Claimant indicated that she received very few bookings for the condominium after the oil spill.³ The Claimant also asserted that the GCCF incorrectly calculated her damages when assessing her loss.⁴ She further indicated that the GCCF included \$3,600.00 into her rental earnings from 2010, when in fact those earnings were deposits for a rental that occurred in 2011, which, according to the Claimant, reduced the amount she should have received from the GCCF by \$3,600.00.⁵

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).

¹ Optional OSLTF Claim Form.

² Optional OSLTF Claim Form.

³ Optional OSLTF Claim Form.

⁴ Letter from Claimant dated 20 July 2011.

⁵ Letter from Claimant dated 20 July 2011.

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

The Claimant's Submission to the OSLTF

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

- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form;
- Letter from the Claimant dated 20 July 2011;
- Affidavit of Richard Kieda dated 16 July 2011;
- Letter from the Claimant to GCCF dated 19 May 2011;
- Hand-written spreadsheet for monthly rents received from January 2008-December 2011;
- Letter from the Claimant to GCCF dated 17 May 2011;
- 2008 1009-MISC Federal tax form from Island Vacation Properties;
- Emails from Island Vacation Properties to the Claimant regarding expense statements for dates: January 2008-December 2008;
- Document titled Register Report for period January 2008-May 2010, December 2010-May 2011;
- Document titled 'Owner Services-Mike Norman Real Estate' Unit Reservations for the period 19 January 2009-10 December 2010;

- Document titled 'Owner Services-Mike Norman Real Estate' Unit Reservations for the period 01 January 2011-15 April 2012;
- GCCF Determination Letter on Final Payment Claim dated 01 June 2011;
- Letter from the Claimant to the NPFC dated 22 August 2011;
- Island Vacation Properties Reservation Confirmation dated 02 September 2008;
- Email from Razor Paving to mwrlaw@windstream.net dated 08 October 2009;
- Island Vacation Properties Notice of Rental Reservation dated 14 October 2008;
- Island Vacation Properties Reservation Confirmation dated 08 December 2008;
- Emails from Razor Paving to mwrlaw@windstream.net dated 08 October 2009, 09 October 2009;
- Email from Citizens Property Insurance Corporation to Razor Paving dated 16 April 2010;
- Citizens Property Insurance Corporation settlement letter dated 16 April 2010;
- Letter from the Claimant to Citizens Property Insurance Corporation dated 18 March 2010;
- Letter from the Claimant to Citizens Property Insurance Corporation dated 05 March 2009;
- State of Florida Mediation Programs information packet;
- The Claimant's day planner for dates 01 January 2008-31 December 2008;
- 2008 Federal Income Tax Return;
- 2009 Federal Income Tax Return; and
- 2010 Federal Income Tax Return.

Prior to presenting its claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) Claim with the GCCF on 12 September 2010 in the amount of \$4,500.00.⁶ The Claimant was assigned Claimant ID # 3012497 and Claim ID # 62670. The EAP Claim was denied on 07 December 2010.⁷ Additionally, the Claimant filed a Full Review Final (FRF) Claim with the GCCF on 30 March 2011 in the amount of \$4,500.00.⁸ The Claimant was assigned Claim ID # 9338273. The GCCF presented a final offer to the Claimant on 01 June 2011 in the amount of \$25,000.00.⁹ To date, the Claimant has not accepted the final offer.¹⁰

Based upon the evidence provided by the Claimant, it appears that the subject matter for the GCCF claims is the same as the subject matter of her claim before the NPFC, i.e., that Claimant lost rental income due to the Deepwater Horizon oil spill. The NPFC deems the Claimant's GCCF claims to be properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1272 considers and addresses the earnings claimed in the Claimant's claims presented to the responsible party up to \$3,634.00, specifically; GCCF Claim #'s 62670 (EAP) and 9338273 (FRF).

NPFC Determination

The claim is denied. 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.

This claim is denied because the Claimant failed to prove she suffered a financial loss due to the Deepwater Horizon oil spill. The Claimant asserted that she lost rental earnings due to the effects of the Deepwater Horizon oil spill. The Claimant asserted that the GCCF erroneously attributed a \$3,600.00 deposit made in 2010 for a 2011 booking towards her 2010 rental earnings. The Claimant provided a signed affidavit and contact information from the renter which supports her contention that the deposit

⁶ Report from the GCCF dated 21 September 2011.

⁷ GCCF Denial Letter dated 07 December 2010.

⁸ Report from the GCCF dated 21 September 2011.

⁹ GCCF Determination Letter on Final Claim dated 01 June 2011.

¹⁰ GCCF Claimant Status Page.

made was for a 2011 booking.¹¹ However, the calculation of the Claimant's damages by the GCCF is not dispositive here.

Under OPA, the claims processes of the GCCF and the NPFC are completely independent of one another. In June of 2010, BP agreed to contribute \$20 billion dollars over a four year period to a fund to be administered by the GCCF.¹² The GCCF, with Kenneth Feinberg as its independent Claims Administrator, is an entirely independent third party and is not controlled by either BP or the Government.¹³ The funds available for the payment of claims by the GCCF and the NPFC are completely separate and distinct. The NPFC oversees the OSLTF, which is a public fund and is funded by taxes on the petroleum industry.¹⁴

The OSLTF, 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).

While OPA requires that claimants first present their claims to the RP before pursuing a claim against the OSLTF, the OSLTF claims process *is not an appeal* of claims determinations by the RP/GCCF. The NPFC is charged with determining whether the Claimant has provided sufficient evidence of a loss under OPA.

In order to prove a claim for loss of profits and impairment of earnings capacity, a Claimant must demonstrate (1) that she sustained a loss or reduction in profits or earnings capacity, and (2) that loss or reduction was due to the discharge or substantial threat of discharge of oil caused by the Deepwater Horizon oil spill. In this instance, the Claimant was unable to provide documentation of a single cancelled rental contract due to the Deepwater Horizon oil spill. In fact, the only evidence provided by the Claimant is a deposit which she received for a 2011 booking. Money paid by a renter for the use of the subject property is not a loss under OPA. Whether the booking at issue was properly included in the calculations of the GCCF is immaterial to the claim before the NPFC.

In a response to additional information from the NPFC, the Claimant stated, "I am not aware of any cancellations [for the rental property in 2010]."¹⁵ Thus, the Claimant has failed to show that any particular loss of rental earnings was a result of the Deepwater Horizon oil spill. She has likewise failed to provide evidence of a loss in the amount of \$3,634.00.

¹¹ Affidavit of Richard Kieda dated 16 July 2011.

¹² The White House, Office of the Press Secretary. Statement by the President After Meeting with BP Executives [Press Release]. Retrieved from <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-withbp-executives>

¹³ The White House, Office of the Press Secretary. Statement by the President After Meeting with BP Executives [Press Release]. Retrieved from <http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-withbp-executives>

¹⁴ http://www.uscg.mil/npfc/About_NPFC/osltf.asp

¹⁵ Letter from the Claimant to the NPFC dated 22 August 2011.

Accordingly, this claim is denied because the Claimant failed to meet her burden to demonstrate 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: *10/13/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments: