

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 4476

5890/DWHZ
3 October 2011

Barry Sze


Re: Claim Number: N10036-1285

Dear Mr. Sze:

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 N10036-1285 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 N10036-1285.

Mail reconsideration requests to:

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

Sincerely,


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

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1285
Claimant	Barry Sze
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$19,000.00

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 08 August 2011, Barry Sze (the Claimant), presented a claim to the National Pollution Funds Center (NPFC) seeking \$19,000.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant is a server at Trulucks's Seafood and Crab Restaurant in Naples, Florida.¹ The Claimant asserted that the restaurant was affected by the Deepwater Horizon oil spill, which resulted in a loss of wages for the Claimant.²

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).

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.

¹GCCF Full Review Final Payment Claim Form, received on 28 January 2011.

² Optional OSLTF Claim Form, dated 4 August 2011.

- (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 the claim, the Claimant presented the following documentation to the NPFC:

- Optional OSLTF Claim Form, dated 4 August 2011
- 2010 Form W-2 Wage and Tax Statement from Truluck Seafood LLC;
- Compensation Report for the Claimant from Truluck Seafood for the period 24 June 2010 through 13 October 2010;
- Compensation Detail for the Claimant from Truluck Seafood for earnings checks dated 13 January 2010 through 14 July 2010;
- Paystubs and direct deposit slips from Truluck Seafood in 2011;
- Letter from the GCCF, dated 4 February 2011;
- Copies of Florida Driver's License and Social Security Card;
- 2009 Form W-2 Wage and Tax Statement from Truluck Seafood LLC;
- 2009 Form W-2 Wage and Tax Statement from West End Restaurants;
- 2009 Form W-2 Wage and Tax Statement from RCSH Operations LLC;
- 2009 U.S. Individual Income Tax Return Form 1040;
- Paystubs from West End Restaurants in 2010;
- GCCF Emergency Advance Payment Supplemental Request Form, dated 1 December 2010;
- Letter from Claimant to "whom it may concern," undated;
- GCCF Full Review Final Payment Claim Form, received on 28 January 2011;
- GCCF Release and Covenant Not To Sue, signed by the Claimant on 19 March 2011;

- GCCF Claim Form Generated Online;
- Letter from the GCCF, dated 20 October 2010;
- Determination Letter on Final Payment, dated 9 March 2011; and
- Unsigned GCCF Release and Covenant Not To Sue, dated 17 March 2011.

Prior to presenting this Claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) one month claim with the GCCF for \$4,600.00.³ The Claimant was assigned Claimant ID # 3150909 and Claim ID # 205583. The Claimant received payment of \$4,600.00 for this claim.⁴ The Claimant also filed twenty Supplemental claims worth a total of \$90,400.00 to the GCCF on 15 December 2010.⁵ The GCCF denied all the supplemental claims.⁶ Lastly, Claimant filed a Full Review final claim with the GCCF on 29 January 2011 in the amount of \$5,000.⁷ The GCCF sent the Claimant a Final Payment Offer in the amount of \$5,000.00 on 9 March 2011.⁸ Additionally, the GCCF sent the Claimant a Release and Covenant Not to Sue Letter, which the Claimant signed on 19 March 2011.⁹

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.

Based on the information provided to the NPFC, the Claimant has accepted a Final Payment from the RP/GCCF in the amount of \$5,000.00 and executed a Release and Covenant Not to Sue in return for this Final Payment.¹⁰ By signing this document, the Claimant has released to the RP/GCCF, any rights to additional recovery regarding this injury. The Release executed by the Claimant specifically states:

[i]n consideration of payment in the amount of \$12,827.34, Claimant hereby releases and forever discharges, and covenants not to sue BP Exploration & Production Inc. ("BP") and the other Released Parties, [. . .] for any losses, damages, costs, expenses, injuries, claims, causes of actions, liabilities, or other relief that Claimant has or may have [. . .] arising from or relating in any way to the [Deepwater Horizon oil spill].¹¹

Furthermore, language in the document states that:

Released Parties means anyone who is or could be responsible or liable in any way for the [Deepwater Horizon oil spill] or any damages related thereto, whether a person, company or governmental entity, including (but not limited to) BP, other potentially responsible or liable parties, including but not limited to the parties listed in Attachment A to this Release, the federal Oil Spill Liability Trust Fund and any state or local fund, and each of their respective Affiliates as defined above.¹²

³ Report from the GCCF, dated 21 September 2011.

⁴ Determination Letter on Final Payment, dated 9 March 2011

⁵ Report from the GCCF, dated 21 September 2011.

⁶ Report from the GCCF, dated 21 September 2011.

⁷ Report from the GCCF, dated 21 September 2011.

⁸ GCCF Final Payment Letter dated 9 March 2011.

⁹ GCCF Release and Covenant Not to Sue Letter, signed by the Claimant on 19 March 2011.


¹⁰ GCCF Release and Covenant Not to Sue Letter, signed by the Claimant on 19 March 2011.

¹¹ GCCF Release and Covenant Not to Sue Letter, signed by the Claimant on 19 March 2011.

¹² GCCF Release and Covenant Not to Sue Letter, signed by the Claimant on 19 March 2011.

Therefore, the Claimant has waived rights to further recovery regarding the losses presented to the NPFC. Any payment from the OSLTF requires the acquisition of rights from the RP. Because these rights have been released by the Claimant to the RP/GCCF, the Claimant cannot also recover from the OSLTF.

If the Claimant believes that payments received from the RP/GCCF are for damages other than those that are the subject of this claim, the Claimant must explain this in his request for reconsideration.

This claim is denied because the Claimant has accepted Final Payment from the RP/GCCF, waiving any rights to further recovery  stemming from the Deepwater Horizon oil spill.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *10/2/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments: