

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
Number: 7011 1570 0001 4802 7019

5890/DWHZ
03 November 2011

Two Dagos In Heat, LLC


Re: Claim Number: N10036-1371

Dear Mr. Tulli:


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 N10036-1371 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 N10036-1371.

Mail reconsideration requests to:

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


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

Enclosures: (1) Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1371
Claimant	Two Dagos In Heat LLC
Type of Claimant	Business
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$35,040.00

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 07 September 2011, Anthony Tulli, on behalf of Two Dagos In Heat, LLC (collectively, the Claimant), presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$35,040.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant operates a construction inspection business in the Mandeville, Louisiana region.¹ Specifically, the Claimant's business would provide certification services for ongoing construction projects.² The Claimant asserted that due to the Deepwater Horizon oil spill, his sole remaining client, Robin & Son Construction, suffered reduced income and by extension was not able to hire the Claimant to provide inspection services.³ As a result of losing his remaining client, the Claimant stated that his company lost income and subsequently went out of business.⁴

The Claimant provided the following explanation for the calculation of his sum certain of \$35,040.00: the Claimant took his actual revenue from January 2010-April 2010 of \$4,380.00 and multiplied it by eight, representing the months of May 2010-December 2010 for a total sum of \$35,040.00.⁵ The Claimant then adopted this amount as his sum certain.⁶

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).

¹ PHONECON between the NPFC and the Claimant dated 16 September 2011.

² PHONECON between the NPFC and the Claimant dated 16 September 2011.

³ PHONECON between the NPFC and the Claimant dated 16 September 2011.

⁴ PHONECON between the NPFC and the Claimant dated 16 September 2011.

⁵ Document labeled 'TDIH, LLC BP Trend Analysis'.

⁶ Optional OSLTF Claim Form received 07 September 2011.

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

- Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form received 07 September 2011;
- Document labeled 'TDIH, LLC BP Trend Analysis';
- GCCF Denial Letter dated 12 August 2011;
- Letter from the Claimant to the GCCF dated 11 May 2011;
- The Claimant's Comparative Income Statements for period: January 2008-December 2010;

- 2008 Form 1120S Federal Tax Return;
- 2009 Form 1120S Federal Tax Return;
- 2010 Form 1120S Federal Tax Return;
- 2010 Form 7004 Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns.

Prior to presenting this Claim to the NPFC, the Claimant filed an Emergency Advance Payment (EAP) Six Month Claim with the GCCF for loss of profits and impairment of earnings capacity on 19 November 2010 in the amount of \$20,000.00.⁷ The Claimant was assigned Claimant ID # 3418796 and Claim ID # 496428. The EAP Claim was denied on 04 December 2010.⁸ Additionally, the Claimant filed an Interim Payment Claim Quarter I 2011 (ICQ12011) with the GCCF for loss of profits and impairment of earnings capacity on 01 February 2011 in the amount of \$39,000.00.⁹ The Claimant was assigned Claim ID # 9268045. The ICQ12011 was denied on 12 August 2011.¹⁰

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claims is the same as the subject matter of Claimant's claim before the NPFC, i.e., that due to the Deepwater Horizon oil spill, the Claimant lost his sole remaining client and by extension suffered reduced income before going out of business. The NPFC deems the Claimant's GCCF claim to be properly presented to the RP and properly presented to the NPFC. Accordingly, this Claim Summary Determination for NPFC Claim N10036-1371 considers and addresses the earnings claimed in the claim presented to the responsible party up to \$35,040.00 specifically; GCCF Claim #'s 496428 (EAP) and 9268045 (ICQ12011).

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.

The Claimant included in his submission to the NPFC a description of his business and the effect of the Deepwater Horizon oil spill on it.¹¹ The Claimant stated that due to the oil spill, the Claimant's sole remaining client¹² in 2010, Robin & Sons Construction (Robin Construction), was unable to hire the Claimant to perform construction inspections due to a lack of available construction projects.¹³ Despite the Claimant's assertion that his business consisted of construction inspection services, the Claimant's 2008, 2009 and 2010 tax returns all listed 'Accounting Services' as the nature of the Claimant's business.¹⁴

In order to determine the nature of the Claimant's business, as well as the effect of the Deepwater Horizon oil spill on it, on 19 September 2011 the NPFC requested additional information from the

⁷ Report from the GCCF dated 06 October 2011.

⁸ GCCF Denial Letter dated 04 December 2011.

⁹ Report from the GCCF dated 06 October 2011.

¹⁰ GCCF Denial Letter dated 12 August 2011.

¹¹ Letter from the Claimant dated 27 September 2010.

¹² In a phone conversation between the NPFC and the Claimant dated 16 September 2011, the Claimant informed the NPFC that beginning in 2008 his business was losing both clients and income and that by 2010, the Claimant maintained only one client, Robin & Sons Construction.

¹³ PHONECON between the NPFC and the Claimant dated 16 September 2011.

¹⁴ 2008 Form 1120S Federal Tax Return, 2009 Form 1120S Federal Tax Return and 2010 Form 1120S Federal Tax Return.

Claimant.¹⁵ The NPFC requested that the Claimant provide bank statements for his business from 2008-2010, a sales ledger for construction inspection projects from 2008-2010, customer cancellations for inspection projects in 2010 including contracts, contact information for customers that cancelled inspection projects in 2010, a list of all employees who worked for the Claimant, contracts for work between the Claimant and any general contractor involving a cancelled contract due to the Deepwater Horizon oil spill, and complete profit and loss statements for 2008-2010.¹⁶ To date, the NPFC has not received any response from the Claimant regarding the above requests.

Nevertheless, the NPFC contacted Robin Construction for verification of both the Claimant's business relationship with Robin Construction as well as the effect of the oil spill on it. In a subsequent phone conversation, the NPFC was informed that the Claimant is hired by Robin Construction to complete Robin Construction's taxes, payroll data and provide inspection certification for the company's billable hours.¹⁷ Specifically, the certification aspect of the Claimant's business with Robin Construction is the 'inspection' services the Claimant used to describe his business.¹⁸ Robin Construction explained to the NPFC that the Claimant will certify for billing purposes, what percentage of a project Robin Construction has completed and translate that number into an invoice for the pending project.¹⁹ Furthermore, the NPFC was informed that rather than losing Robin Construction as a client, the Claimant is still hired to complete taxes, payroll and inspection certification for billable hours.²⁰

Under 33 C.F.R. 136.9, persons submitting false claims or making false statements in connection with claims under this part may be subject to prosecution under Federal law, including but not limited to 18 U.S.C. 287 and 1001. In addition, persons submitting written documentation in support of claims under this part which they know, or should know, is false or omits a material fact may be subject to a civil penalty for each claim.

The Claimant's request for \$35,040.00 is hereby denied because the evidence presented by the Claimant regarding the nature of his business as well as the business relationship with Robin Construction as outlined above clearly demonstrates evidence of a material misrepresentation of fact and as such, this claim is denied.

Claim Supervisor: **NPFC**

Date of Review: **11/3/11**

Supervisor's Actions: ***Denial approved***

Supervisor's Comments:

¹⁵ Letter from the NPFC to the Claimant Requesting Additional Information dated 19 September 2011.

¹⁶ Letter from the NPFC to the Claimant Requesting Additional Information dated 19 September 2011.

¹⁷ PHONECON between the NPFC and Robin & Son Construction dated 26 October 2011.

¹⁸ PHONECON between the NPFC and Robin & Son Construction dated 26 October 2011.

¹⁹ PHONECON between the NPFC and Robin & Son Construction dated 26 October 2011.

²⁰ PHONECON between the NPFC and Robin & Son Construction dated 26 October 2011.