

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
28 October 2011

Dan Kelly Trim & Woodworking, Inc.
Attn: Dan Kelly
965 Marge Lane
Molino, Florida 32577

Re: Claim Number: N10036-1402

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 your claim number N10036-1402 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 N10036-1402.

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 N10036-1402
Claimant Dan Kelly Trim & Woodworking, Inc.
Type of Claimant Business
Type of Claim Loss of Profits and Impairment of Earnings Capacity
Amount Requested \$10,358.00

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 13 September 2011, Dan Kelly, on behalf of Dan Kelly Trim & Woodworking, Inc. (collectively, the Claimant) presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$10,358.00 in loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant operates a carpentry business and works as a subcontractor in the Gulf Shores, Alabama region.¹ The Claimant asserted that due to the Deepwater Horizon oil spill, the general contractor that the Claimant obtains his primary construction projects from, Larry Newell General Contracting suffered a reduction in demand for housing and other construction.² By extension, the Claimant asserted that the reduction in construction projects reduced the demand for his carpentry services, which eventually resulted in a loss of income for the Claimant.³

The Claimant provided the following explanation for the calculation of his sum certain of \$10,358.00: the Claimant stated that he took his gross income⁴ in 2009 (\$26,276.00) and subtracted it from his gross income in 2010 (\$15,918.00).⁵ The difference, \$10,358.00 became the Claimant's 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

¹ PHONECON between the NPFC and the Claimant dated 15 September 2011.

² PHONECON between the NPFC and the Claimant dated 15 September 2011.

³ PHONECON between the NPFC and the Claimant dated 15 September 2011.

⁴ The NPFC notes that the Claimant utilizes the gross income listed on the Claimant's 2009 and 2010 Form 1120S Federal Tax Returns, respectively. However, the Claimant's own profit and loss spreadsheet included in the submission to the NPFC shows total gross revenue in 2010 as \$15,944.78 rather than the \$15,918.00 listed on the Claimant's 2010 Form 1120S Federal Tax Return. Nevertheless, because the Claimant utilizes the gross revenue as reported in his tax return in the calculation of his sum certain, the NPFC will address the Claimant's losses using the submitted sum certain of \$10,358.00.

⁵ Letter from the Claimant to the NPFC dated 04 October 2011.

⁶ Letter from the Claimant to the NPFC dated 04 October 2011.

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.
- (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 OSLTF Claim Form, dated 2 September 2011;
- GCCF Full Review Final Payment Claim Form;
- Report from Oxford Economics titled 'Potential Impact of the Gulf Oil Spill on Tourism';
- Page 1 of 2008 Form 1120S Federal Tax Return;
- Page 1 of 2009 Form 1120S Federal Tax Return;

- Page 1 of 2010 Form 1120S Federal Tax Return;
- Hand-written monthly profit statements for the period January 2008-May 2011;
- GCCF Denial Letter dated 19 July 2011;
- GCCF Appeal Form;
- GCCF Denial Letter dated 13 August 2011;
- GCCF Ineligible Appeal Letter dated 18 August 2011;
- Letter from the Claimant dated 04 October 2011;
- Bank statements from Regions Bank for period: 01 January 2008-31 December 2008; 01 January 2009 -31 December 2009, 01 January 2010-31 December 2010;
- 2008 Form 1120S Federal Tax Return;
- 2009 Form 1120S Federal Tax Return;
- 2010 Form 1120S Federal Tax Return.

Prior to presenting this Claim to the NPFC, the Claimant filed a Full Review Final (FRF) Claim with the GCCF for loss of profits and impairment of earnings capacity on 13 July 2011 in the amount of \$18,122.55.⁷ The Claimant was assigned Claimant ID # 1628188 and Claim ID # 9416283. The FRF Claim was denied on 13 August 2011.⁸

Based upon the evidence provided by the Claimant, it appears that the subject matter for the Claimant's GCCF claim 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 demand for the Claimant's carpentry business plummeted, and as a result the Claimant suffered reduced income. 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 N10036-1402 considers and addresses the earnings claimed in the claim presented to the responsible party up to \$10,358.00 specifically; GCCF Claim # 9416283 (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.

The claim is denied because the Claimant has not proven his alleged loss in the amount of \$10,358.00 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. The Claimant failed to prove a connection between the Deepwater Horizon oil spill and any alleged loss to his carpentry business.

The Claimant asserted that the Deepwater Horizon oil spill resulted in a reduction in demand for housing and other construction in the Gulf Shores, Alabama region.⁹ Specifically, the Claimant asserted that the reduction in demand for housing construction caused the general contractor that the Claimant obtained work from, Larry Newell General Contracting, to lose existing construction contracts.¹⁰ The Claimant, however, failed to provide evidence to support his assertion. The Claimant failed to provide documentary evidence that any customer cancelled, rescinded or abandoned any existing contract with his carpentry business.

Nevertheless, the NPFC attempted to verify the assertions submitted by the Claimant in his original submission to the NPFC. The NPFC contacted Larry Newell General Contracting (Newell Contracting) regarding the cancelled contracts that the Claimant asserted he suffered as a result of the oil spill. In a

⁷ Report from the GCCF dated 06 October 2011.

⁸ GCCF Denial Letter dated 13 August 2011.

⁹ PHONECON between the NPFC and the Claimant dated 15 September 2011.

¹⁰ PHONECON between the NPFC and the Claimant dated 15 September 2011.

subsequent conversation with Newell Contracting, the NPFC was informed that there was only one potential construction project that was affected by the Deepwater Horizon oil spill.¹¹ Newell Contracting stated that this was a reconstruction project for Cotton's Restaurant in Orange Beach, Alabama.¹² The NPFC was informed that this contract, however, did not contain the Claimant as a party to the agreement. Rather, the contract was only between Newell Contracting and Cotton's Restaurant.¹³ Furthermore, Newell Contracting stated that there was never a contract between the Claimant and Newell Contracting regarding the Claimant's subcontracting work on the project.¹⁴ Regarding other potential construction projects, Newell Contracting stated that no other projects had gone past the permitting stage, making it impossible to determine what the Claimant's responsibilities regarding those projects would have been.¹⁵

Additionally, on 19 September 2011, the NPFC requested additional information from the Claimant to fully evaluate the claim and specifically to determine the effect of the Deepwater Horizon oil spill on the Claimant's carpentry business.¹⁶ The NPFC requested that the Claimant provide all customer cancellations for 2010 due to the Deepwater Horizon oil spill, contact information for customers that cancelled orders in 2010 including names, addresses and telephone numbers and contracts for work between the Claimant's business and any general contractor involving a cancelled contract due to the Deepwater Horizon oil spill.¹⁷

To date, the NPFC has not received any of the above listed documentation, including evidence of a contract between the Claimant and Newell Contracting or between Cotton's Restaurant and Newell Contracting. Further, in a letter to the NPFC, the Claimant stated that, "I cannot give an estimate or an exact number of cancellations because my work is not scheduled as such; when the contractor calls I show up.¹⁸ I won't know how many people decided to hold off having work done or how many people decided not to come here at all because of the oil spill."¹⁹

Furthermore, the Claimant fails to provide evidence that he suffered a financial loss due to the Deepwater Horizon oil spill at all. Despite the purported loss of the construction project with Cotton's Restaurant, the Claimant failed to articulate exactly how he suffered a loss regarding it. In addition to the lack of an existing contract between the Claimant and Newell Contracting, the Claimant failed to provide specific financial information regarding his agreed-upon price for completing the project, the costs involved in the project, and the projected net income that the Claimant was to generate from the project. Accordingly, the Claimant failed to prove a specific financial loss as a result of the purported loss of the construction project involving Cotton's Restaurant.

Moreover, although the Claimant asserted that his business suffered reduced income due to the Deepwater Horizon oil spill, an analysis of the Claimant's financial data shows that the period January 2009-April 2009; the Claimant had a gross income of \$9,151.60.²⁰ During the equivalent period in 2010, the Claimant's business had a gross income of \$3,825.00.²¹ Thus, from equivalent periods not affected by the oil spill, the Claimant's business showed a negative growth trend of 12.54%. Accordingly, the Claimant failed to prove a reduction in business income isolated to the Deepwater Horizon oil spill.

¹¹ PHONECON between the NPFC and Larry Newell General Contracting dated 17 October 2011.

¹² PHONECON between the NPFC and Larry Newell General Contracting dated 17 October 2011.

¹³ PHONECON between the NPFC and Larry Newell General Contracting dated 17 October 2011.

¹⁴ PHONECON between the NPFC and Larry Newell General Contracting dated 17 October 2011.

¹⁵ PHONECON between the NPFC and Larry Newell General Contracting dated 17 October 2011.

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

¹⁷ Letter from the NPFC to the Claimant Requesting Additional Information dated 19 September 2011.

¹⁸ Letter from the Claimant to the NPFC dated 04 October 2011.

¹⁹ Letter from the Claimant to the NPFC dated 04 October 2011.

²⁰ Hand-written monthly profit statements for the period January 2008-May 2011.

²¹ Hand-written monthly profit statements for the period January 2008-May 2011.

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 Review: *10/28/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments: