

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 7217

5890/DWHZ
08 November 2011

Jan Kinkella
[REDACTED]

RE: Claim Number: N10036-1463

Dear Ms. Kinkella:

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 claim number N10036-1463 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. 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 N10036-1463.

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

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	N10036-1463
Claimant	Jan Kinkella
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$10,000.00

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 28 September 2011, Jan Kinkella (Claimant) presented an optional Oil Spill Liability Trust Fund (OSLTF) claim form seeking \$10,000.00 for loss of profits and impairment of earnings capacity to the National Pollution Funds Center (NPFC) alleging damages resulting from the Deepwater Horizon oil spill.

The Claimant worked as a cook for AJ's Seafood from February 2010 through 20 August 2010.¹ The Claimant asserted that the restaurant could not get seafood and nobody wanted to eat seafood as a result of the Deepwater Horizon oil spill.² Thus her company terminated her employment.³

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.

¹ Writing on paystubs from AJ's Seafood Restaurant, INC.

² Optional OSLTF claim form undated.

³ Optional OSLTF claim form undated.

- (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;
- (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

Claimant's Submission to the OSLTF

To support her claim, the Claimant submitted:

- 1) Optional OSLTF claim form undated;
- 2) Paystubs from AJ's Seafood Restaurant, INC. dated 05 February 2010, 12 February 2010, and 20 August 2010.

Claimant seeks lost profits and impairment of earnings capacity in the amount of \$10,000.00.

On 04 October 2011, the NPFC sent a letter to Claimant requesting additional information in order to further evaluate the claim. The Claimant did not respond to the request. The letter was sent Certified Mail Return Receipt Requested. The USPS Tracking site showed the letter was delivered 17 October 2011.⁴

⁴ USPS #7011 1150 0000 4636 3004.

Prior to presenting her claim to the NPFC, Claimant filed an Emergency Advance Payment (EAP) with the GCCF on 04 November 2010 in the amount of \$12,000.00.⁵ She was assigned Claimant ID #3353968 and claim #415056. This claim was denied on 15 December 2010.⁶ Additionally, the Claimant filed an Interim claim (ICQ12011) with the GCCF on 04 January 2011 in the amount of \$12,000.00.⁷ The claim was assigned GCCF #9144954.⁸ As of the date of this determination claim ICQ12011 is currently under review by the GCCF.⁹

Based upon the evidence provided by the Claimant, it appears that the subject matter for each of the GCCF claims is the same as the subject matter of her claim before the NPFC, i.e., that she lost her job and earnings as a result of the Deepwater Horizon oil spill. The NPFC deems each of Claimant's two submitted GCCF claims to be properly presented to the responsible party and properly presented to the NPFC. Accordingly, this Claim Summary determination for NPFC Claim N10036-1463 considers and addresses the earnings claimed in both of the claims presented to the responsible party, specifically; GCCF Claim #'s 415056 (EAP) and 9144954 (ICQ12011).

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. The NPFC considered all the documentation submitted by the Claimant.

In connection with a review of this claim, the NPFC sent the Claimant a letter requesting additional information in order to further evaluate her claim.¹⁰ The letter requested, among other things, financial documentation for an accurate accounting of the Claimant's losses, questions regarding causation of the alleged loss, and contact information for her employer.¹¹ The letter was sent on 04 October 2011.¹² On 17 October 2011, the Claimant acknowledged receipt of the letter.¹³ However, to date no response has been received by the NPFC.

As such, the Claimant has provided no documentation besides her assertion that she was terminated¹⁴ and three paystubs¹⁵ to substantiate her alleged loss of profits and impairment of earnings capacity or to show that her alleged loss of earnings was due to the Deepwater Horizon oil spill. Accordingly the Claimant has not established her sum certain as presented to the NPFC or that the alleged loss of earnings was due to the Deepwater Horizon oil spill by a preponderance of the evidence.

⁵ Report from the GCCF dated 02 November 2011.

⁶ GCCF Denial Letter dated 15 December 2010.

⁷ Report from the GCCF dated 02 November 2011 and GCCF online status report.

⁸ Report from the GCCF dated 02 November 2011 and GCCF online status report.

⁹ Report from the GCCF dated 02 November 2011.

¹⁰ NPFC request for additional information dated 04 October 2011.

¹¹ NPFC request for additional information, USPS 7011 1150 0000 4636 3004.

¹² USPS 7011 1150 0000 4636 3004.

¹³ USPS 7011 1150 0000 4636 3004.

¹⁴ Optional OSLTF claim form.

¹⁵ Paystubs from AJ's Seafood Restaurant Inc. dated 05 February 2010, 12 February 2010, and 20 August 2010.

This claim is denied because the Claimant failed to meet her burden to demonstrate (1) that she has an alleged loss in the amount claimed, and (2) that her 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: *11/8/11*

Supervisor's Actions: *Denial approved*

Supervisor's Comments: