

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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CERTIFIED MAIL-RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4802 8313

5890/DWHZ
27 December 2011

Mario Raul Espineira
[REDACTED]

Re: Claim Number: N10036-1605

Dear Mr. Espineira:

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 N10036-1605 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 N10036-1605.

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	N10036-1605
Claimant	Mario Raul Espineira
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earnings Capacity
Amount Requested	\$120,000.00

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 12 December 2011, Mario Raul Espineira (the Claimant), presented an Optional Oil Spill Liability Trust Fund (OSLTF) Claim Form to the National Pollution Funds Center (NPFC) seeking \$120,000.00 for loss of profits and impairment of earnings capacity that allegedly resulted from the Deepwater Horizon oil spill.

The Claimant is a co-owner of Deco Truss Company, Inc. (Deco), a roof truss and building material supplier in south Florida, operating in Miami and the Florida Keys.¹ The Claimant alleged that the Deepwater Horizon oil spill “caused [the] Florida Keys Construction Market to Stop.”² The Claimant alleged that due to the loss of business, the Claimant “did not take pay nor rental income to help keep employees, employed.”³

The Claimant stated that although Deco has been compensated by the GCCF for its corporate losses, the Claimant has not been compensated for \$64,800.00 in salary and \$55,000.00 in rental income allegedly lost due to effects of the Deepwater Horizon oil spill, which he now seeks from the NPFC.⁴

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).

¹ Letter from the Claimant to the GCCF, dated 22 November 2011, indicating that the Claimant owns 50% of Deco Truss Company, Inc.

² Optional OSLTF Claim Form, dated 8 December 2011.

³ Optional OSLTF Claim Form, dated 8 December 2011.

⁴ Letter from the Claimant to the GCCF dated 22 November 2011, including spreadsheets titled ‘Salary’ and ‘Rental Income.’

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.
- (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 08 December 2011.
- Email from the Claimant to the NPFC, dated 08 December 2011;
- 2008 Form W-2 Wage and Tax Statement from Deco Truss Company, Inc.;
- 2009 Form W-2 Wage and Tax Statement from Deco Truss Company, Inc.;
- 2010 Form W-2 Wage and Tax Statement from Deco Truss Company, Inc.;
- Document titled 'Deco Truss Company, Inc; Summary Report' for the Claimant for the period January 2008-September 2011;
- Letter from the Claimant to the GCCF, dated 02 May 2011;
- GCCF Determination Letter, dated 13 October 2011;
- GCCF Full Review Final Payment Claim Form;
- GCCF Denial Letter, dated 30 June 2011;
- Email from the GCCF to the Claimant, dated 29 November 2011;
- Letter from the Claimant to the GCCF, dated 22 November 2011, including spreadsheets titled 'Salary' and 'Rental Income';
- Letter from the Claimant to the GCC, dated 30 July 2011.

Presentment of Business Claim to the GCCF

Prior to presentment of this Claim to the NPFC, the Claimant presented a Full Review Final (FRF) Claim to the GCCF for losses sustained by Deco. Deco, as a corporate claimant, was assigned Claimant ID # 3488160 and the FRF claim was assigned Claim # 9222565. The GCCF issued payment on this claim on 13 October 2011 in the amount of \$98,132.42.⁵ The Claimant, acting in his capacity as co-owner of the business, executed a Release and Covenant Not to Sue in return for Final Payment on 19 October 2011.⁶

Presentment of Individual Claim to the GCCF and NPFC

Prior to presenting this Claim to the NPFC, the Claimant filed a Full Review Final (FRF) Claim with the GCCF as an individual for loss of profits and impairment of earnings capacity in the amount of \$150,000.00.⁷ The Claimant was assigned Claimant ID # 3517643 and Claim ID # 9373812. The FRF Claim was denied on 30 June 2011.⁸

On 12 December 2011, the Claimant presented this claim to the NPFC, seeking loss of profits damages in the amount of \$120,000.00.⁹ Specifically, the Claimant seeks to recover his lost salary and rental income, which he alleges is separate and distinct from lost corporate income.¹⁰

Because this claim addresses the same losses as previously presented to the RP/GCCF, and because the claimed damage amount does not exceed the amount previously presented to the

⁵ GCCF Determination Letter dated 13 October 2011.

⁶ GCCF Release and Covenant Not to Sue Letter signed on 19 October 2011.

⁷ GCCF Claimant Status page.

⁸ GCCF Denial Letter dated 30 June 2011.

⁹ Optional OSLTF Claim Form, dated 8 December 2011.

¹⁰ Email from the Claimant to the NPFC, dated 8 December 2011.

RP/GCCF, the NPFC may fully adjudicate this claim in the amount of \$120,000.00 as currently before the NPFC.¹¹

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, 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 this claim.

This claim is denied because the Claimant (1) has executed a Release and Covenant Not to Sue, barring any further recovery for injuries allegedly resulting from effects of the Deepwater Horizon oil spill, and (2) has failed to demonstrate that any losses the Claimant sustained were caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

1. Release of rights to the RP/GCCF

The Claimant first submitted a claim to the RP/GCCF to recover losses allegedly sustained by Deco Truss Company, Inc. (Deco).¹² The Claimant, acting in his capacity as a co-owner of the business, executed a Release and Covenant Not to Sue in return for final payment in the amount of \$98,132.42.¹³

By signing this document, the Claimant released to the RP/GCCF, any rights to additional recovery regarding damages allegedly resulting from effects of the Deepwater Horizon oil spill.¹⁴ The Release, signed by the Claimant on 19 October 2011, explicitly applies to “heirs, beneficiaries, agents, estates, executors, administrators, personal representatives, subsidiaries, parents, affiliates, partners, limited partners, members, joint ventures, *shareholders*, predecessors, successors, assigns, insurers, and attorneys” (emphasis added).¹⁵

As a co-owner and officer of Deco, the Claimant is a shareholder, and has therefore released all rights regarding damages allegedly resulting from the Deepwater Horizon oil spill, to the RP/GCCF.

Any payment from the Oil Spill Liability Trust Fund (the Fund) 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 Fund.

2. Failure to prove loss of profits due to the Deepwater Horizon oil spill

In order to prove this claim for loss of profits damages under OPA, the Claimant would be required to furnish evidence sufficient to establish that (1) Deco sustained a certain amount of

¹¹ 33 C.F.R. § 136.103(a).

¹² Deco Truss Company, Inc., GCCF Claimant ID 3488162.

¹³ GCCF Release and Covenant Not to Sue, signed on 19 October 2011.

¹⁴ GCCF Release and Covenant Not to Sue, signed on 19 October 2011.

¹⁵ GCCF Release and Covenant Not to Sue, signed on 19 October 2011.

financial loss, (2) the loss resulted in the corporation being unable to continue to pay the Claimant's salary and rental income, and (3) the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

The Claimant stated that the "oil spill caused [the] Florida Keys construction market to stop."¹⁶ However, the Claimant has failed to provide any documentation to support this assertion or to indicate the extent of the financial loss allegedly sustained by Deco as a result of the oil spill.

Rather, as proof that the Deepwater Horizon oil spill caused Deco to sustain a financial loss, the Claimant provided evidence of payments made to Deco by the GCCF. The Claimant stated that a GCCF payment offer letter "proves Deco Truss Company Inc. was [a]ffected, because again, Deco Truss Company, Inc. did receive payment."¹⁷ However, proof of payment by the RP/GCCF does not prove that the Claimant's business sustained a loss of profits that would be compensable under the Oil Pollution Act of 1990 (OPA).

Furthermore, because the Claimant has not provided evidence regarding losses allegedly sustained by Deco, the NPFC is unable to calculate the extent to which the Claimant's losses as an officer of the corporation may have been compensated by payments made by the RP/GCCF.

Based on the foregoing, this claim is denied because (1) the Claimant has signed a Release and Covenant not to Sue, releasing all rights regarding these alleged injuries to the RP/GCCF, and (2) the Claimant has failed to prove that any losses he may have sustained were caused by the discharge or substantial threat of discharge of oil resulting from the Deepwater Horizon oil spill.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *12/27/11*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁶ Optional OSLTF Claim Form, signed on 9 December 2011.

¹⁷ Email from the Claimant to the NPFC, 8 December 2011.