

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Pollution Funds Center
United States Coast Guard

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US COAST GUARD
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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 7049

5890/DWHZ
23 April 2012

Mr. Todd A. King


Re: Claim Number: N10036-1767

Dear Mr. King:

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 the claim number N10036-1767 involving the Deepwater Horizon oil spill. Please see the attached 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 N10036-1767.

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

CC: Mr. Todd A. King
177 Fairmont Dr.
Spring Hill, FL, 34609

CERTIFIED MAIL-RETURN RECEIPT REQUESTED: 7011 1570 0001 4803 7049

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1767
Claimant	Todd A. King
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$38,497.99

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 17 April 2012, Mr. Robert A. Reynolds, Esq., on behalf of Mr. Todd A. King, (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$38,497.99 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

At the time of the oil spill, the Claimant was working as a manager of a fast food restaurant in Brooksville, Florida.² The Claimant alleged that the restaurant was forced to close as a result of a lack of business caused by the Deepwater Horizon oil spill.

According to the Claimant, the location of the restaurant was such that it relied on tourist traffic to generate sales. The Claimant stated that,

[the restaurant's] location is at crossroad of State Hwy. 41 and State Hwy 50. State Hwy 41 being a direct route to Tampa, St. Petersburg, Fl and State Hwy 50 being a direct route to the outer most west coast of Florida from the Central Florida region, also directly inland from US Hwy 19 at Spring Hill, Fl.³

Following the oil spill, the Claimant stated that a reduction in tourist traffic caused the restaurant to sustain a substantial loss in sales. Specifically, the Claimant stated,

[t]hroughout the year of 2010 after the Oil Spill, the traffic flow on these three main routes became almost non-existent and sales continued to decrease to a point that eventually the company was forced to close this location.⁴

The Claimant alleged to have lost \$2,130.35 in income in 2010 and \$7,128.66 in 2011 for an actual loss of \$9,259.01. Based on these figures, the Claimant calculated to have lost \$487.32 per month. The Claimant then multiplies his monthly loss by an industry effect multiplier of 60

¹ Claim Cover Letter, 14 March 2012.

² GCCF Full Review Final Payment claim form, at page 7.

³ Hardship Letter, 24 August 2011.

⁴ Hardship Letter, 24 August 2011.

to calculate an additional loss of \$29,238.98, which the Claimant adds to his actual loss to reach a total claimed damage amount of \$38,497.99.⁵

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.
- (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 undertake, 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 this claim, the Claimant submitted the following documentation:

⁵ Lost Earnings/Income Worksheet.

- Claim Cover Letter, 9 April 2012;
- NPFC Authorization Agreement, 5 April 2012;
- GCCF Denial Letter on Interim Payment/Final Payment Claim, 22 March 2012;
- Deepwater Horizon Lost Earnings/Income Worksheet;
- Copy of the Claimant's Florida Driver's License;
- Hardship Letter, 24 August 2011;
- Letter from Human Resources Director, regarding the loss of the Claimant's employment 16 August 2011;
- 2008 Form W-2 Wage and Tax Statement;
- 2009 Form 1040;
- 2010 Form W-2 Wage and tax Statement;
- 2009 Form 1099-G, Unemployment Compensation;
- 2011 Pay Stubs;
- GCCF Client Authorization Form signed on 7 November 2011.

On 10 August 2011, the Claimant submitted a Third Quarter Interim Payment Claim (ICQ32011) to the RP/GCCF, seeking loss of profits and wages damages in the amount of \$115,000.00.⁶ The Claimant was assigned Claimant ID 3536884 and the ICQ32011 was assigned claim # 9434478.⁷ The RP/GCCF denied payment on this claim.⁸

On 13 December 2011, the Claimant submitted a Full Review Final (FRF) payment claim, seeking loss of profits and wages damages in the amount of \$38,497.99.⁹ The FRF claim was assigned claim # 9548215. The RP/GCCF also denied payment on this claim.

On 17 April 2012, the Claimant submitted this claim to the NPFC, asserting the same damages as presented in the Claimant's FRF claim to the GCCF.¹⁰ Because this claim has been presented to and denied by the GCCF prior to its presentment to the NPFC, the NPFC may fully adjudicate this claim for \$38,497.99, stemming from the Claimant's loss of employment, allegedly due to the effects of the Deepwater Horizon oil spill.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.

In order to prove a claim for loss of profits and impairment of earning capacity damages, a claimant must provide documentation sufficiently proving (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

⁶ Transition Program, United States Coast Guard Report, 1 May 2012.

⁷ Transition Program, United States Coast Guard Report, 1 May 2012.

⁸ Transition Program, United States Coast Guard Report, 1 May 2012.

⁹ Transition Program, United States Coast Guard Report, 1 May 2012.

¹⁰ GCCF Full Review Final Claim Form.

¹¹ 33 C.F.R. § 136.103(a).

Furthermore, prospective future damages are not compensable under OPA's loss of profits damage category, which limits potentially available compensation to "the actual net reduction or loss of earnings or profits *suffered*" [emphasis added].¹² Therefore, payment is denied on \$29,238.98 of this claim, which constitutes losses not incurred by the Claimant.¹³

The remaining \$9,259.01 is also denied, as the Claimant has failed to provide evidence to prove that the restaurant was actually forced to shut down as a result of the Deepwater Horizon oil spill.

The Claimant alleged that the restaurant closed when tourist traffic in the area substantially decreased as a result of the oil spill. However, the Claimant failed to provide any evidence that might indicate that the restaurant indeed relied on tourist traffic as opposed to local traffic, or to show that patronage and sales actually began to decrease in the period following, and as a result of, the oil spill.

The fast food restaurant managed by the Claimant at the time of the Spill was located in Brooksville, Florida, within Hernando County. However, the Claimant has not provided evidence to show that Hernando County was affected by decreases in tourism following the Deepwater Horizon oil spill. Rather, research conducted by the NPFC indicates that the County was struggling to generate tourism prior to the oil spill.

An article in the Tampa Bay Times on 13 March 2010, states that "there's no denying that the sluggish economy continues to plague efforts to lure visitors to the area."¹⁴ Economic issues are also cited in a letter from the Claimant's employer regarding the reasons behind termination of the Claimant's employment. Specifically, the letter stated that the company "closed the Brooksville, Florida location due to economic reasons."¹⁵ Upon contacting the regional management representative who provided the letter, the NPFC was informed that sales at the restaurant had been low prior to the oil spill, and that the oil spill did likely not lead to the closure of the restaurant.¹⁶

This claim is therefore denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$38,497.99, 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 Supervisor's Review: **5/23/12**

Supervisor's Action: ***Denial approved***

Supervisor's Comments:

¹² 33 C.F.R. § 136.235.

¹³ Lost Earning/Income Worksheet, showing sum certain of \$160,371.76

¹⁴ Neill, Logan, *Tourism remains sluggish in Hernando County*, Tampa Bay Times, 13 March 2010.

¹⁵ Letter from Sonic Human Resources Director regarding the Claimant's employment, 16 August 2011.

¹⁶ PHONECON: NPFC Staff and Regional Management, McClain Group, 18 May 2012.