

U.S. Department of
Homeland Security

**United States
Coast Guard**



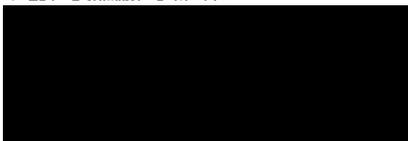
Director
National Pollution Funds Center
United States Coast Guard

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED
Number: 7011 1570 0001 4803 7087

5890/DWHZ
23 May 2012

Ms. Galina Gunter



Re: Claim Number: N10036-1762

Dear Ms. Gunter:

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 N10036-1762 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 N10036-1762.

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

Enclosure: Claim Summary/Determination Form

CC: Galina Gunter



CERTIFIED MAIL-RETURN RECEIPT REQUESTED: 7011 1570 0001 4803 7070

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1762
Claimant	Galina Gunter
Type of Claimant	Private (US)
Type of Claim	Loss of Profits and Impairment of Earning Capacity
Amount Requested	\$29,774.00

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 April 2012, Mr. Robert A. Reynolds, Esq., on behalf of Ms. Galina Gunter, (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$29,774.00 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant alleged to have lost a seasonal employment opportunity in Destin, Florida as a result of the oil spill.² During spring and summer months from 2006 until 2010, the Claimant worked as a house-keeping supervisor for Blue Sky Resort Services in Destin, Florida.³ In a letter describing her losses, the Claimant stated,

[d]ue to the BP Oil Spill in April 2010, there was a great decrease in the amount of tourists that came to Destin for vacation. Because of that tragic decrease, Blue Sky Resort Services was not needed for their cleaning services and they did not have any work for me any longer.⁴

In computing her losses, the Claimant subtracted her 2010 and 2011 income from her 2008 income, to come to a total loss of \$7,161.00 for the two years, or an average monthly loss of \$376.89.⁵ The Claimant then multiplied her monthly loss by an "industry effect multiplier" of 60, to reach a total future loss of \$22,613.68. The Claimant added her alleged actual losses, to her future losses, to reach her sum certain of \$29,774.68.

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.

¹ Claim Cover Letter, 4 April 2012.

² Letter from the Claimant to the GCCF, 13 December 2011.

³ Letter from the Claimant to the GCCF, 13 December 2011.

⁴ Letter from the Claimant to the GCCF, 13 December 2011.

⁵ Deep Water Horizon Oil Spill Lost Earnings/Income Worksheet.

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 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 this claim, the Claimant submitted the following documentation:

- Claim cover letter, 4 April 2012;
- NPFC Authorization Agreement, 27 March 2012;
- GCCF Full Review Final Payment Claim Form;
- Lost Earning/Income Worksheet;
- Copy of the Claimant's driver's license;
- Letter from the Claimant to the GCCF, 13 December 2011;
- Letter from Thomas Rakocy, regarding employment with the Claimant;
- 2008 Schedule C (Form 1040);
- 2008 Schedule SE (Form 1040);

- 2008 Form 1040;
- Supporting Schedule;
- 2009 Form 1040;
- 2009 Schedule C-EZ (Form 1040);
- 2010 Form 1040A;
- Earning Statement, Krispy Kreme, showing yearly earnings of \$24,655.00;
- GCCF Client Authorization Form, 28 November 2011;
- GCCF Deficiency Letter on Interim Payment/Final payment Claim, 28 February 2012;
- Letter from the Claimant's legal representative regarding provision of the Claimant's tax documentation, 16 March 2012;
- Response to NPFC Request for additional information, received on 18 May 2012, containing the following:
 - Cover Letter, 16 May 2012;
 - Response to NPFC questions, 10 May 2012;
 - Letter from Krispy Kreme managers regarding the Claimant's employment, 10 May 2012;
 - 2008, 2009 Form 1099-MISC, showing payments from Blue Sky Resort Services to the Claimant;
 - Pay Stubs, 4/10/2008 through 12/6/2008;
 - Pay Stubs, 4/1/2009 through 8/29/2009.

On 27 January 2012, the Claimant presented a Full Review Final (FRF) claim to the RP/GCCF, seeking loss of earnings and wages damages in the amount of \$29,774.00.⁶ The Claimant was assigned Claimant ID 1639661 and the FRF claim was assigned claim # 9561085.⁷ The RP/GCCF denied payment on this claim.

On 12 March 2012, the Claimant presented this claim to the NPFC, again seeking \$29,774.00 in loss of profits and impairment of earning capacity damages.⁸ The NPFC may adjudicate this claim to the extent that the RP has denied payment on this claim, or has failed to render a determination on the claim following 90 days of presentment by the Claimant.⁹ Because these damages have first been presented to and were denied by the RP/GCCF, the NPFC may fully adjudicate this claim for lost profits damages totaling \$29,774.00.

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 sufficient to prove (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 Claim Cover Letter, 14 March 2012.

⁹ 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].¹⁰ Therefore, payment is denied on \$22,613.68 of this claim, which constitutes losses not incurred by the Claimant but rather future alleged losses.¹¹

Regarding the remaining \$7,161.00 in alleged income lost as a result of the oil spill, the Claimant has failed to prove either that she sustained a financial loss, or that any alleged loss was caused by the Deepwater Horizon oil spill.

1. Failure to prove an actual financial loss.

Although the Claimant alleged to have lost seasonal employment with Blue Sky Resort Services in 2010, the Claimant's 2010 earnings exceeded the Claimant's 2009 earnings.¹² Likewise, in 2011, the Claimant's yearly earnings increased over 2010.

In determining whether or not a claimant has sustained an actual loss within the meaning of OPA, the NPFC must consider, "[t]he amount of the claimant's earnings in comparable periods and during the period when the claimed loss or impairment was suffered."¹³ Furthermore, the amount of compensation available to a claimant must clearly reflect adjustments for all income earned as a result of other employment in which the claimant was engaged during the claimed loss period.¹⁴ Because the Claimant's earnings in the claimed loss period actually increased as compared to the Claimant's earnings prior to the oil spill, the Claimant has not proven that she has experienced a financial loss within the meaning of OPA.

2. Failure to prove a loss caused by the oil spill.

Secondly, the Claimant has failed to provide evidence sufficient to prove that any loss she may have sustained was caused by the Deepwater Horizon oil spill. In response to an NPFC request for additional information, the Claimant provided pay stubs documenting her earnings with Blue Sky Resort Services for 2008 and 2009. The Claimant stated that she did not have pay stubs for 2010 because the business closed in that year.¹⁵ However, in 2008 and 2009, the Claimant was able to provide pay stubs dating back to early April of each year. Because the oil spill did not begin until late April of 2010, the Claimant should be able to provide pay stubs as proof that the Claimant was indeed employed and working regular hours for Blue Sky Resort Services in April and at least through early May of 2010, prior to effects of the Deepwater Horizon oil spill.

The NPFC also requested that the Claimant provide financial documentation demonstrating the extent of the losses incurred by Blue Sky Resort Services.¹⁶ The Claimant failed to respond to this request and has failed to prove that Blue Sky Resort services indeed lost income from certain customers as a result of the Deepwater Horizon oil spill.

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 \$29,774.00, and (2) that the alleged loss is due to the

¹⁰ 33 C.F.R. § 136.235.

¹¹ Lost Earning/Income Worksheet.

¹² Lost Earning/Income Worksheet.

¹³ 33 C.F.R. § 136.233(c).

¹⁴ 33 C.F.R. § 136.235(b).

¹⁵ Response to NPFC request for additional information 10 May 2012.

¹⁶ NPFC Request for additional information, 3 May 2012.

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: