

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
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5890/DWHZ
15 June 2012

Grim's Sports Key West



Re: Claim Number: N10036-1834

Dear Mr. Grimesey:

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 N10036-1834 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

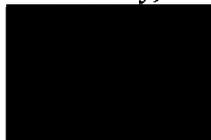
You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you 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 N10036-1834.

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	N10036-1834
Claimant	John H. Grimesey/Grim's Sports Key West
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$303,192.00

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 30 May 2012, Mr. John Grimesey, on behalf of Grim's Grill (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$303,192.00 in loss of profits damages resulting from the Deepwater Horizon oil spill.¹

The Claimant opened Grim's Grill, a sports bar in Key West, in June of 2009.² In July of 2010, the Claimant closed the business, and has alleged that although the restaurant was struggling financially prior to the oil spill, it was the effects of the spill that finally caused it to close. In a letter describing his losses, the Claimant stated that due to concerns regarding the potential effects of the oil spill on Key West, "tourists cancelled trips and locals stayed home to hang on to their money"³ thus causing a "sales freefall in April, May and June" of 2010.⁴

The Claimant alleged that because the oil spill caused him to actually lose his business, he should be compensated for the entire value of the business as well as for profits lost during the period in which the restaurant was operational following the oil spill. Specifically, the Claimant seeks "first year lost profits" totaling \$99,528.00, as well as \$203,664.00, as the estimated value business.⁵

In sum, the Claimant seeks \$303,192.00 in loss of profits damages allegedly resulting from effects of the Deepwater Horizon oil spill.⁶

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 § 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

¹ Optional OSLTF Claim Form, received on 30 May 2012.

² Earliest profit and loss statement included in this claim package is for the month of June 2009.

³ Letter from the Claimant to the GCCF, 25 October 2010.

⁴ Letter from the Claimant to the GCCF, 25 October 2010.

⁵ Loss calculation sheet.

⁶ Optional OSLTF Claim Form, received on 30 May 2012.

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:

- Letter from the Claimant describing losses, received on 30 May 2012;
- Optional OSLTF Claim Form, received on 30 May 2012;
- Cover Letter, "correspondence with RP";
- Letter describing PROPOSED SETTLEMENT OF BP DEEPWATER HORIZON LITIGATION, 15 March 2012;
- Letter from the GCCF re: Important Deadline to Elect Quick Payment Option: May 7, 2010, dated March 12, 2010;
- GCCF Re-Review Determination Letter, 14 February 2012;
- Letter from the Claimant to the GCCF, 25 October 2010;
- GCCF Determination Letter on Interim Payment, Final Payment Claim, 3 November 2011;
- Letter from the Claimant to the GCCF, 13 June 2011;
- Letter from the Claimant to the GCCF, undated, regarding issues with GCCF calculations;
- Cover Sheet, Documentation of Business Losses Due to Spill;
- Loss Calculations, including First Year Lost Profits and Value of Business;
- Spreadsheet showing projected sales;
- Spreadsheet, "Projected Profit & Loss Assuming No Oil Spill";
- Calculation showing estimated value of business;

- Cover sheet, map of Area Showing Business Location and Spill Impact Area;
- Map showing effects of economic loss;
- Cover Sheet, Grim's Grill;
- Confidentiality Agreement regarding Business Plan;
- Business plan table of contents;
- Business Plan, including appendices;
- Cover sheet, financial statements;
- Monthly Profit & Loss Statements, January – October 2010;
- Monthly Profit & Loss Statements, June – December 2009;
- Cover sheet, Income Tax Returns;
- 2009 Form 1040;
- 2009 Form 3800;
- 2009 Form 8846;
- 2009 Schedule M, (Form 1040A or 1040);
- 2009 Federal Statements;
- 2008 Form 1040A;
- Cover Sheet, Efforts to Mitigate Losses;
- Document listing efforts to mitigate losses/restaurant promotions, with accompanying details on various promotions;
- Keysnews.com, *Grim's Grill's last gasp wins a championship*, 5 November 2010;
- Keysnews.com, *Grim's Hosting Co-Ed hoops tourney*, 16 April 2010;
- Keysnews.com, *KW football team hosting car wash*, 1 May 2010;
- Happy hour specials, articles regarding various promotions/sporting events;
- Cover Sheet, Statements from Witnesses;
- Statement from John Mott;
- Statement from Stan Griffith;
- Statement from W. Sam Holland, Jr., 1 June 2011;

On 25 October 2010, the Claimant presented an Emergency Advance Payment (EAP) claim to the RP/GCCF, seeking loss of profits damages in the amount of \$117,000.00.⁷ The GCCF assigned the Claimant ID 3289469, and issued full payment on this claim.⁸

The Claimant then submitted a Final Payment claim to the GCCF, this time seeking \$186,192.00 in loss of profits damages.⁹ The Claimant identified this claimed damage amount as the value of the business at the time of its closure.¹⁰ The GCCF issued a re-review determination on this claim, finding that the Claimant had been fully compensated for his alleged losses, and offering the Claimant \$25,000.00 as full and final settlement.¹¹ The Claimant has not executed a Release and Covenant not to Sue in order to receive full and final payment. However, the Claimant has received 60% of the final payment offer, meaning that a total of \$132,000.00 has been paid to the Claimant by the GCCF for claims arising from the Deepwater Horizon oil spill.

On 30 May 2012, the Claimant submitted this claim to the NPFC, seeking \$303,192.00 in loss of profits or impairment of earning capacity damages.¹² OPA requires that prior to presentation to the NPFC, all claims be first presented to the RP, and either denied, or left unsettled following 90 days of presentment.¹³ The Claimant has complied with this requirement and the claims previously presented by the Claimant to the GCCF total the same amount of damages as now presented to the NPFC. However, as noted above, the GCCF has compensated \$132,000.00 of these damages and has denied payment on \$171,192.00.

⁷Letter from the Claimant to the GCCF, 25 October 2010.

⁸ GCCF Determination Letter on Interim Payment/Final Payment Claim, 3 November 2011, at pg. 4.

⁹ Letter from the Claimant to the GCCF, 13 June 2011.

¹⁰ Letter from the Claimant to the GCCF, 13 June 2011.

¹¹ GCCF Re-Review Determination Letter on Final Payment Claim, 14 February 2012.

¹² Optional OSLTF Claim Form, received on 30 May 2012.

¹³ 33 C.F.R. § 136.103(c)(2).

As an initial matter, pursuant to 33 C.F.R. § 136.235, the amount of compensation allowable 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 all income resulting from the incident* [emphasis added].

Accordingly, this claim is denied in the amount of \$132,000.00 because the Claimant's sum certain did not reflect an adjustment for the compensation that he has already received. The remainder of this determination, therefore, addresses this claim for loss of profits and impairment of earning capacity damages in the amount of \$171,192.00, which is the amount previously presented to and denied by the GCCF.

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.

Here, in order to prove a claim for loss of profits or 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.

This claim is denied because the Claimant has failed to prove that his business failed as result of the Deepwater Horizon oil spill. Documentation provided by the Claimant indicates that the Claimant's restaurant had been struggling financially prior to the Deepwater Horizon oil spill. The Claimant has not presented evidence sufficient to prove that the Deepwater Horizon oil spill, and not other factors affecting the Claimant's business prior to the spill, resulted in the closure of the Claimant's business on 11 July 2010.¹⁴

In his claim submission, the Claimant provides evidence of promotions staged by the restaurant "in an attempt to boost lagging sales in the spring of 2010."¹⁵ The promotions were scheduled to begin at least as early as 24 April 2010, indicating that sales were lagging when the oil spill began.¹⁶

Furthermore, since the opening of the Claimant's business, it had failed to meet sales projections. In a business plan included in the Claimant's supporting documentation, the Claimant estimated that gross sales for the first year of business would fall between \$52,000.00 and \$68,000.00 per month, with sales highest during the fall and winter months.¹⁷ Furthermore, the Claimant stated that the restaurant "needs to service at least 100 customers per day" averaging approximately \$20.00 in sales per customer.¹⁸ In other words, the Claimant estimated that the restaurant needed to conduct an average of approximately \$60,000.00 in sales per month in order to be profitable.

Actual profit and loss statements indicate that sales never reached anticipated levels and generally remained between \$40,000.00 and \$50,000.00 per month.¹⁹ Furthermore, during the period in which the restaurant was open, the Claimant reported a profit only in February of 2010.²⁰ In every other month, the restaurant operated at a loss. It is unclear then, that the oil spill and not low sales experienced by the restaurant prior to the oil spill, actually caused the restaurant to close.

¹⁴ Letter from the Claimant to the GCCF, requesting Emergency Advance Payment, 25 October 2010.

¹⁵ Attachment to Letter from the Claimant to the GCCF, 25 October 2010.

¹⁶ See, e.g. *BP Oil Spill Timeline*, www.guardian.co.uk, 22 July 2010, accessed on 12 June 2012.

¹⁷ Grims Grill business plan, Appendix.

¹⁸ Grim's Grill business plan, at 1.1. Objectives.

¹⁹ Monthly profit and Loss Statements provided by the Claimant.

²⁰ February 2010 Profit and Loss Statement.

Additionally, regarding the Claimant's statement that "tourists cancelled trips"²¹ to Key West, thereby contributing to the Claimant's loss of sales, the NPFC notes that Key West tourism does not appear to have decreased following the Deepwater Horizon oil spill. Tourism & Recreation taxable sales for Key West actually show a year over year increase from 2009 to 2010.²² In fact, tourism and recreation taxable sales increased for every month in 2010 after the Deepwater Horizon oil spill, with the exception of September, which showed just a slight decrease. These numbers are further bolstered by Key West Bed Tax collections, which also showed an increase for every month after the oil spill in 2010 compared to 2009, other than a slight decrease in September. Although there appears to be a significant decrease in the number of passengers arriving in Key West from cruise ships after the Deepwater Horizon oil spill, there is an equally significant increase in the number of passengers arriving to Key West by plane. For passengers arriving by ferry, there was a marginal decrease in 2010 from 2009; however a similar percentage decrease had occurred during the months of 2010 prior to the Deepwater Horizon oil spill. Accordingly, the Claimant's theory relating to decreased tourism due to the Deepwater Horizon oil spill and the effects of that decrease on his business is not supported by available tourism statistics.

Based on the foregoing, this claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$303,192.00, 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: *6/15/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

²¹ Letter from the Claimant to the GCCF, 25 October 2010.

²² Statistics available at, www.keywestchamber.org/PDF/trends.PDF, accessed on, 12 June 2012.