

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 2970 0004 1302 0113

5890/DWHZ

25 February 2013

Breaking Dr. Inc.



Re: Claim Number: N10036-1892

Dear Ms. Petelle,

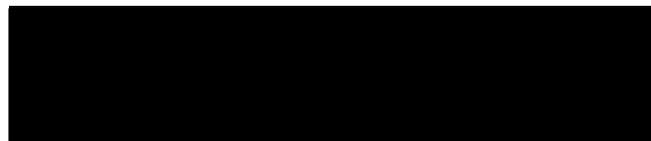
The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1892 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination 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 N10036-1892.

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

CLAIM SUMMARY/DETERMINATION FORM

Claim Number	N10036-1892
Claimant	Brushing By, Inc.
Type of Claimant	Private (US)
Type of Claim	Loss of Profits or Impairment of Earning Capacity
Amount Requested	\$9,570.00

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 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.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 02 May 2012, and the CSSP began processing claims on 04 June 2012.

CLAIM AND CLAIMANT

On 14 February 2013, Ms. Kara Lee Petelle on behalf of Brushing By, Inc., (collectively "the Claimant") submitted a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$9,570.00 in loss of profits or impairment of earning capacity damages allegedly resulting from the Deepwater Horizon oil spill.¹

The Claimant is the owner and operator of a business involved in "painting and cleanup of seasonal rental units" in Clearwater Beach, Florida.² The Claimant alleged that after the oil spill, "no rental reservations [were] coming in" which caused the Claimant to lose approximately nine jobs between May and September of 2010, which forced her to close the business.³ The Claimant does not indicate precisely when the business closed.

The Claimant alleged to have lost nine jobs, worth \$550.00 each, between 1 May 2010 and 30 September 2010, as well as "five months of advertising" costs, at \$40.00 per month for a total loss of \$4758.00 for that period. The Claimant estimated a loss of \$4,785 in 2010 and \$4,785.00 through 2011 and 2012 to calculate a total loss of \$9,570.00.

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

¹ Claim Cover Letter, 23 January 2013.

² Claim Cover Letter, 23 January 2013.

³ Claim Cover Letter, 23 January 2013.

water, adjoining shorelines, or the exclusive economic zone of the United States, as described in § 2702(b) of OPA.

The OSLTF 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. 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; and
- (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.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring, by subrogation, all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the NPFC

The Claimant submitted the following documentation in support of this claim:

- Claim cover letter, dated 23 January 2013;
- Article, *Profits show BP growing stronger*, New York Times, undated;

- Letter from the GCCF to the Claimant noting inclusion of claim submission documents, 5 January 2012; Claimant ID 3521268;
- Letter from the GCCF to the Claimant, "Follow-Up to Previous Denial Letter, 12 October 2011;
- Claimant Profile, undated;
- Loss calculation sheet;
- Business flyer;
- Copy of the Claimant's driver's license and social security card;
- State of Florida, document confirming business incorporation as of 1 June 2004;
- 2010 Form 1099-MISC, showing payment to the Kara Lee Petelle of \$1,372.00;
- Google Maps printout, Stuart Tumer General Contracting, Inc.;
- 2010 Form 1040, showing business income of \$15,271.00;
- 2010 Schedule C Form 1040, showing gross sales of 21,388.00;
- 2009 Form 1040, showing business income of \$16,842.00;
- 2009 Schedule C Form 1040, showing gross sales of \$23,519.00;
- Claimant Hardship Letter(2), undated;
- Chart showing monthly gross income, January 2008 – March 2011;
- 2010 Profit and Loss Statement;
- 2008 Profit and Loss Statement;
- 2008 Form 1120S, showing gross sales of \$24,225.00;
- Letter from J.R. Whiting, Rodco Group, LLC, on behalf of the Claimant, 11 August 2011;
- Letter from Laverne Phillips on behalf of the Claimant, 10 August 2011;
- Article, Tampa Tribune, 11 June 2010;
- Copies of statements of concern regarding oil spill impacts in Clearwater Beach, yahooanswers.com;
- Document labeled, "Cover Page For News Articles";
- Article, *Clearwater Talks Oil Spill Issues*, 26 May 2010;
- Article, *BP Oil Spill: One year Later*, wtsp.com, 20 April 2011;
- 2008 Form 1040, showing business income of \$15,800.00;
- 2008 Schedule SE (Form 1040);

On 23 January 2013, the Claimant submitted this claim to the NPFC seeking \$9,570.00 in loss of profits or impairment of earning capacity damages.⁴ This claim submission includes evidence indicating that the Claimant previously attempted to recover these losses from the Responsible Party through the GCCF, which denied payment on these claims.⁵ As such, this claim satisfies presentment requirements under OPA.⁶

However, evidence in this claim submission indicates that the Claimant is a member of the Deepwater Horizon oil spill economic and property damages class action settlement (the E&PD Settlement).⁷ The Claimant has not provided evidence that might show that her business is either excluded from the Settlement class or that she has opted out of the Settlement class.

NPFC Determination

⁴ Claim Cover letter, 23 January 2013.

⁵ See, e.g., Letter from the GCCF to the Claimant noting inclusion of claim submission documents, 5 January 2012; Claimant ID 3521268.

⁶ 33 C.F.R. § 136.10.

⁷ Letter to the Claimant from the Plaintiff Steering Committee, 13 December 2012.

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 all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

As an initial matter, it appears that the Claimant is a member of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the claimant no longer has rights to the claim and therefore cannot subrogate the NPFC to those rights.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that she is a member of the economic damages class of the E&PD Settlement, she should submit evidence to indicate that she has either opted out or is excluded from the E&PD Settlement in her request for reconsideration of this claim.

Furthermore, this claim would also be denied on its merits. In order to prove a claim for loss of profits damages, a Claimant must provide evidence sufficient to prove (1) that the Claimant sustained a loss or reduction in income, and (2) that the financial loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

Financial documents provided in support of this claim fail to prove that the Claimant sustained a loss in any amount in the period following the spill. Rather, the Claimant's profit and loss statements indicate that for the period from May through December for 2008, 2009 and 2010, the Claimant reported revenue of \$16,298.00, \$15,823.00 and \$15,137.00 for a decrease of 2.9% from 2008 to 2009 and a decrease of 4.4% from 2009 to 2010.⁸ The Claimant's income in 2010 does not appear to be outside of the normal range of the Claimant's earnings and does not support the Claimant's assertion that she lost approximately \$4,758.00 in that year.

Furthermore, according to the Claimant's profit and loss statements, the entirety of the reduction in the Claimant's earnings from 2009 to 2010 can be attributed to the month of May, when the Claimant reported revenue of only \$159.00 in 2010, as compared to \$1,718.00 and \$1,668.00 in 2008 and 2009. It is unclear how the Claimant's business might have been affected by the oil spill in May of 2010, but not in June or July of that year, particularly considering the Claimant's assertion that business began to decrease approximately two months after the oil spill began.⁹ Furthermore, in the months of July and August of 2010, when the Claimant alleged to have been most affected by the oil spill, the Claimant reported higher revenue than in those months of either 2008 or 2009.

Additionally, the Claimant has failed to provide any evidence to identify particular customers who cancelled or did not schedule expected work with the Claimant as a result of the oil spill. The Claimant references certain rental properties in and around Clearwater, Florida which failed to use her services in 2010 due to a decrease in tourism resulting from the oil spill. However, she fails to identify any particular jobs which were indeed lost or cancelled from May through December of 2010.

⁸ Chart of Gross Income, 2008 – March 2011.

⁹ Hardship Letter, undated.

Lastly, the Claimant has failed to provide evidence sufficient to prove that tourism in and around Clearwater Beach actually decreased in either 2010 or 2011, nor has she proven that any alleged decrease in tourism was caused by the Deepwater Horizon oil spill. Rather, 2010 Pinellas County tourism statistics indicate that tourism in the summer and fall of 2010 did not decrease as compared to the previous year. The 2010 Annual Visitors Profile for Pinellas County indicates that the number of visitors to the county in May, June, July and August 2010, actually increased as compared to those months of 2009.¹⁰ Likewise, the Visitors Profile indicates that expenditures in the spring and summer months of 2010, did not drop, but remained at 2009 levels.¹¹ These statistics are further supported by Pinellas County Bed Tax collections, which indicate year over year increases starting in July of 2010 and continuing through 2011.¹²

Based on the foregoing, this claim is denied because the Claimant has failed to provide evidence sufficient to prove (1) that she sustained a financial loss in the amount \$9,570.00, or (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 discharge of oil. Additionally, this claim is considered to have been settled by virtue of the Claimant belonging to the E&PD Settlement, and is therefore not eligible for OSLTF compensation.

Claim Supervisor: *NP*

Date of Supervisor's Review: *2/25/13*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹⁰ St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, <http://www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf>, at 6. Accessed on 3 January 2012.

¹¹ St. Petersburg/Clearwater Area Convention and Visitors Bureau Annual 2010 Visitor Profile, Available at, www.pinellascvb.com/statistics/Pinellas2010AnnualReport.pdf, at 7. Accessed on 3 January 2012.

¹² Pinellas County, CVB statistics, Bed Tax Information. Available at, www.pinellascvb.com/cms/index.php?id=6. Accessed on 3 January 2012.