

U.S. Department of  
Homeland Security

United States  
Coast Guard



Director  
United States Coast Guard  
National Pollution Funds Center

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US COAST GUARD  
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5890  
9/22/2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED  
Number: 7011 1150 0000 4666 8680

Mark Ippolito  
c/o Boggs, Loehn & Rodrigue  
ATTN: Mr. Thomas Loehn  
3616 South I-10 Service Road West  
Metairie, LA 70001

RE: Claim Number: N10036-1284

Dear Mr. Loehn:

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 claim number N10036-1284 involving the Deepwater Horizon oil spill. Please see the enclosed Claim Summary/Determination Form for further explanation.

Disposition of this reconsideration constitutes final agency action.

If you have any questions or would like to discuss the matter, you may contact me at the above address and phone number.

Sincerely,



Thomas S. Morrison  
Chief, Claims Adjudication Division  
U.S. Coast Guard

ENCL: Claim Summary / Determination Form

Copy to: Mark Ippolito  
4421 Lake Trail Drive  
Kenner, LA 70065  
Via certified mail # 7011 1150 000 4666 8697

## CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: N10036-1284
Claimant	: Mark Ippolito
Type of Claimant	: Private (US)
Type of Claim	: Loss of Profits and Earning Capacity
Amount Requested	: \$61,523.00

### **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 claims for certain individual and business claims on behalf of BP.

### **CLAIM AND CLAIMANT:**

On 10 August 2011, Mark A. Ippolito (Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) for \$61,523.00 in loss of profits and impairment of earnings capacity resulting from the Deepwater Horizon oil spill.

The Claimant was an outside salesperson for Dreyfus-Courtney and Lowery Brothers Rigging Center (DCL) in New Orleans at the time of the oil spill. DCL terminated the Claimant on 10 August 2010. DCL stated: "Company is reducing the number of employees and reorganizing certain departments in response to the overall weak economic conditions and the reduction in business resulting from the drilling moratorium. Claimant's position is eliminated."<sup>1</sup> Claimant began a new position at Atomic Marine & Safety Supply on September 1, 2010. Claimant's sum certain represents his alleged loss of profits from August 2010, when he was terminated from DCL, to August 2011.

The claim was denied on August 18, 2011 on the grounds that Claimant failed to establish that he suffered an alleged loss in the amount claimed and that the alleged loss was due to the injury, destruction or loss of property or natural resources resulting from a discharge or substantial threat of discharge of oil.

The Claimant retained Silva Gurtner & Abney CPAs in New Orleans to calculate his lost earnings and benefits. In a letter dated September 17, 2010, explains that the alleged \$61,523 loss of profits was based on a projection forward of his DCL pay and benefits from January 31, 2011 (six months from his dismissal) reduced by his projected earnings through January 31, 2011 from his new employer (hired September 1, 2011). Thus, the claim amount represents the difference between what the Claimant projected he would have earned if employed by DCL and what he earned at Atomic Marine.<sup>2</sup>

<sup>1</sup> Employment Status Report for Mark Ippolito from Dreyfus-Cortney-Lowery Mooring and Rigging (DCL) 10 August 2010

<sup>2</sup> Letter from Silva Gurtner & Abney CPAs to Thomas E. Loehn with Boggs, Loehn & Rodrigue concerning computation of loss of earnings claimed

The Claimant also retained Boggs, Loehn & Rodrigue, attorneys at law, in Metairie, Louisiana. NPFC cannot access the Claimant's GCCF On-Line Claim Status to confirm his submission to GCCF. The On-Line Claim Status is unavailable because an attorney represents the Claimant.

Before presenting the claim to the NPFC, the Claimant stated he filed an Emergency Advance Payment (EAP) with the GCCF. The claim was assigned Claimant ID #01018538. This claim was denied on 12 November 2010.<sup>3</sup> Additionally, Claimant filed an Interim Claim. This claim was denied.<sup>4</sup> GCCF denied the Emergency Advance Payment Claim because the Claimant did not submit proof of damage for his Property Damage.<sup>5</sup> The Claimant's attorney stated to the GCCF that his claim was not for Property Damage. The attorney stated, "We have provided clear and concrete documentation that the Claimant was fired from his job because of the moratorium."<sup>6</sup>

The Claimant stated that the GCCF considered him as an oil rig worker and referred him to the Gulf Coast Restoration and Protection Foundation.<sup>7</sup> The Claimant informed GCCF he is not an oil rig worker. He sells equipment and supplies used on off-shore oil rigs.<sup>8</sup>

### **REQUEST FOR RECONSIDERATION:**

On September 9, 2011, the Claimant sent a request for reconsideration to the NPFC via a legal representative, Mr. Loehn of Boggs, Loehn & Rodrigue stating he would like the NPFC to reconsider his claim.

As noted above the NPFC denied the claim originally on August 18, 2011 on the grounds that Claimant had not established his loss of profits and that the loss was due to the injury or destruction or loss of real or personal property pursuant to 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136. Further, 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.

The Claimant's employer, Dreyfus-Courtney and Lowery (DCL), stated that it terminated the Claimant's employment due to downsizing and reorganizing of the company as a result of the weak economic conditions and the oil drilling moratorium and that the Claimant's position was being eliminated.<sup>9</sup>

### **RECONSIDERATION CLAIM ANALYSIS:**

The claimant requested reconsideration which was received by the NPFC on September 19, 2011. The Claimant's legal representative provided a two-page letter that requested the claim be reconsidered. The legal representative provided no new information other than an argument in support of why the claim should be reconsidered.

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<sup>3</sup> GCCF Denial Letter for Emergency Advance Payment 12 November 2010

<sup>4</sup> Based on a discussion between Claimant and NPFC Claims Adjuster 11 August 2011

<sup>5</sup> GCCF Denial Letter for Emergency Advance Payment 12 November 2010

<sup>6</sup> Letter from Boggs, Loehn & Rodrigue to GCCF 09 November 2010

<sup>7</sup> GCCF Letter referring Claimant to Gulf Coast Restoration and Protection Foundation 20 December 2010

<sup>8</sup> Fax Transmittal Form in response to NPFC's request for additional information 12 August 2011 and discussion between the Claimant and NPFC Claims Adjuster 11 August 2011

<sup>9</sup> Employment Status Report for Mark Ippolito from Dreyfus-Cortney-Lowery Mooring and Rigging (DCL) 10 August 2010

The two-page letter provided by the Claimant's legal representative stated that (1) the Claimant disagrees that he failed to meet the burden to demonstrate that there was an alleged loss in the amount claimed and (2) the Claimant disagrees that he failed to demonstrate that the alleged loss was due to "injuring, destruction or loss of property and natural resources as a result of a discharge or substantial threat of a discharge of oil." The reconsideration further argues that the NPFC acknowledged the Deepwater Horizon oil spill incident and as such, the NPFC should take notice of the fact that, as a result of the of the Deepwater Horizon incident, all production was shut down in the Gulf of Mexico and, that as a result, that caused a decline in business for the Claimant's employer. The argument states that furthermore, and with all due respect, the NPFC can take notice that, as a direct result of the explosion upon the Deepwater Horizon and the significant impact upon the Gulf of Mexico, as a result of the oil spill, a moratorium was imposed to prevent any further drilling operations.

In closing the letter states that the NPFC's denial is without basis, given the facts and circumstances that have occurred. It goes on to say, that the denial is without basis in fact, logic or law and that ... "but for the Deepwater Horizon Explosion and Oil Discharge which has been admitted by the NPFC in the factual section, Mr. Ippolito would not have lost his job."

### **NPFC Determination on Reconsideration**

The NPFC considered all the documentation submitted by the Claimant. The request for reconsideration must be in writing and include the factual or legal grounds for the relief requested, providing any additional support for the claim. 33 CFR 136.115(d).

The NPFC performed a *de novo* review of the entire claim submission upon reconsideration. Upon receipt of the request for reconsideration, the NPFC notified the Claimant via email that pursuant to 33 CFR 136.105(d)(3), the Claimant must provide authorization for the legal representative to act on his behalf with respect the reconsideration request. The Claimant responded to the NPFC via email authorizing Mr. Thomas Loehn of Boggs, Loehn & Rodrigue to act as his legal representative for his official request for reconsideration.

As noted above Claimant's sum certain is \$61,523.00. The NPFC confirmed with the RP/GCCF that the Claimant did file an Emergency Advance Payment (EAP) claim as originally stated; however, the EAP claim for lost profits was only presented for the total amount of \$38,056.00. Since OPA provides that a claimant must present its claim to the responsible party, i.e., GCCF in this case, prior to presenting a claim to the Fund, all amounts in excess of \$38,056.00 is denied because it has not been properly presented to the RP/GCCF before being presented to the Fund. See 33 U.S.C. § 2713(a) and 33 CFR 136.103(a). Thus, the NPFC did not consider the \$23,467 that was not properly presented to the RP/GCCF in this reconsideration. Further, it is unknown which portion of the \$61,523.00 of the claim to the NPFC was properly presented (\$38,056) to the RP/GCCF.

While the Claimant retained Silva Gurtner & Abney CPAs in New Orleans to calculate his lost earnings and benefits, they generated a letter dated September 17, 2010, that explains the alleged \$61,523 loss of profits which was based on a projection forward of his DCL pay and benefits from January 31, 2011 (six months from his dismissal). It is important to note that since the Claimant was employed in sales with DCL, a portion of his income was derived from commissions. When the CPA calculated his projection forward, he based his numbers on some of the previous commissions earned which becomes problematic because because commission is not guaranteed pay therefore you cannot use something not earned in a future projection since

there is no way to know positively that the Claimant would have made a set amount of sales to earn a set amount of commission. Additionally, the projections made based on commissions are prospective and therefore cannot be used. Furthermore, the Claimant did secure new employment therefore it is not reasonable to calculate prospective earnings for a position lost while employed elsewhere during the same period in question therefore the NPFC has determined that the CPA calculation of projected losses is not an appropriate measure to be used.

Claimant's attorney argues that the moratorium was put in place due to the Deepwater Horizon incident; therefore, Claimant's loss is a result of the Deepwater Horizon incident. The NPFC disagrees. The DCL letter states that the Claimant's position was eliminated because the company was reducing its employees and reorganizing certain departments in response to overall weak economic conditions and reduced business resulting from the moratorium. Thus, his termination was due in part to the economic conditions and in part to the moratorium.

The evidence presented and validated by the employer demonstrates that the Claimant's alleged loss is a direct result of intervening causes such as permitting delays that resulted following the imposed drilling moratorium and weak economic conditions.

Based on the foregoing, the NPFC has determined on reconsideration that the Claimant has failed to demonstrate (1) that he has suffered a loss in the amount claimed, (2) that any loss that may have occurred was 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, and (3) that proper presentment of \$23,467.00 of the Claimant's alleged losses were properly presented to the RP/GCCF pursuant to 33 CFR 136.103(a).

This claim is denied upon reconsideration.

Claim Supervisor

Date of Supervisor's review: *9/22/11*

Supervisor Action: *Denial on reconsideration approved*

Supervisor's Comments: