

DEC 14 2011

Mr. Thomas Stone
Vice President, Chief Operations and Maintenance Officer
Florida Gas Transmission Company, LLC
5051 Westheimer Road
Houston, TX 77056

Re: CPF No. 2-2010-1004

Dear Mr. Stone:

Enclosed please find the Decision on Reconsideration issued in the above-referenced case. It denies your Petition for Reconsideration. Service of the Decision by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Wayne Lemoi, Director, Southern Region, PHMSA
Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, Pipeline Safety, PHMSA
Mr. Louis Soldano, Vice President and General Counsel, Florida Gas Transmission Company, LLC

CERTIFIED MAIL – RETURN RECEIPT REQUESTED [71791000164202950824]

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

_____)	
In the Matter of)	
)	
Florida Gas Transmission)	CPF No. 2-2010-1004
Company, LLC,)	
)	
Petitioner.)	
_____)	

DECISION ON RECONSIDERATION

In a June 29, 2011 Final Order, I found that Florida Gas Transmission Company, LLC (FGTC) had violated the drug and alcohol testing requirements in 49 C.F.R. §§ 199.105(b) and 199.225(a)(1) and the gas transmission line recordkeeping requirements in 49 C.F.R. § 192.709(a), based on the results of the Office of Pipeline Safety's (OPS) investigation of a May 2009 pipeline accident in Southeast Florida. I assessed FGTC a civil penalty of \$95,000 for those violations and issued the company a warning item for several other probable violations.

On July 15, 2011, FGTC submitted a Petition for Reconsideration (Petition) of the Final Order. The Petition stated that the findings of violation related to the drug and alcohol testing requirements were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The Petition requested that those portions of the Final Order be withdrawn.

Because the evidence of record supports the findings in question, I am denying this Petition and affirming the Final Order without modification.

Background

On May 4, 2009, FGTC's 18-inch natural gas pipeline ruptured at Milepost (MP) 810.3 in Martin County, Florida.¹ The rupture caused the ejection of a 113-foot section of the pipeline, the hospitalization of three individuals, and the closure of the Florida Turnpike.

¹ See *In the Matter of Florida Gas Transmission Company, LLC*, CPF No. 2-2009-1002H (May 7, 2009) (available at www.phmsa.dot.gov). FGTC is the operator of a 5,000-mile natural gas pipeline system that runs from Texas to South Florida. http://www.panhandleenergy.com/comp_fld.asp.

The Director, Southern Region, OPS (Director), initiated an investigation of the accident and subsequently issued Petitioner a Notice of Probable Violation and Proposed Civil Penalty (Notice). The Notice, dated February 23, 2010, proposed finding that FGTC had violated 49 C.F.R. §§ 192.709(a), 199.105(b), and 199.225(a)(1) and assessing a civil penalty of \$95,000 for the alleged violations. The Notice also included several warning items pursuant to 49 C.F.R. § 190.205.

FGTC responded to the Notice, by letter dated March 26, 2010, and requested a hearing. That hearing was held on July 15, 2010, in Atlanta, Georgia. By letter dated August 30, 2010, Petitioner provided a post-hearing statement for the record.

On June 29, 2011, I issued a Final Order that sustained all of the findings of violation proposed in the Notice. Specifically, I found that FGTC had an obligation to administer drug and alcohol tests to the three day-shift pipeline control room employees who reported for duty on May 4, 2009, because the company did not have sufficient information available immediately after the accident to conclude that the conduct of those employees could be completely discounted as a contributing factor. I further found that FGTC had failed to retain a record of the date, location, and description of certain repairs made to the ruptured section of the pipeline. Accordingly, I concluded that Petitioner had violated §§ 199.105(b), 199.225(a)(1), and 192.709(a) as alleged in the Notice and assessed the proposed civil penalty amount of \$95,000 for those violations.

On July 15, 2011, FGTC submitted this Petition requesting reconsideration of those portions of the Final Order that concerned the drug and alcohol testing requirements of 49 C.F.R. Part 199. Petitioner argued that the best information available at the time of the accident did not show that the conduct of the three day-shift pipeline controllers caused or contributed to the May 4, 2009 accident; therefore, FGTC had no obligation to test those employees for the presence of drugs or alcohol. Petitioner further argued that the Final Order relied on inadequate evidence and an erroneous interpretation of §§ 199.105(b) and 199.225(a)(1) to sustain the violations alleged in the Notice.

Standard of Review

A respondent is afforded the right to petition the Associate Administrator for reconsideration of a final order. However, that right is not an appeal or an opportunity to seek a de novo review of the record.² It is a venue for presenting the Associate Administrator with information that was not previously available or requesting that any errors in the final order be corrected. Requests for consideration of additional facts or arguments must be supported by a statement of reasons as to why those facts or arguments were not presented prior to the issuance of the final order. Repetitious information or arguments will not be considered.

Analysis

Sections 199.105(b) and 199.255(a)(1) require an operator to administer a drug and alcohol test for each employee whose performance either contributed to an accident or cannot be completely

² 49 C.F.R. § 190.215(a)-(e).

discounted as a contributing factor to an accident. Those regulations further state that an operator's decision not to administer a drug or alcohol test must be based on the best available information at the time.

In its Petition, FGTC argues that the best information available at the time showed that the conduct of the three day-shift pipeline controllers did not cause or contribute to the May 4, 2009 rupture. Petitioner further argues that the Final Order relied on inadequate evidence (i.e., the fact that FGTC listed the cause of the rupture as unknown in several reports submitted after the accident, and that the company failed to maintain any documentation of its decision not to subject the day-shift controllers to drug or alcohol testing) and an erroneous interpretation of §§ 199.105(b) and 199.225(a)(1) to sustain the allegations of violation.

As I explained in the Final Order, the pipeline in question ruptured at approximately 5:09 a.m. Eastern Daylight Savings Time (EDT) on May 4, 2009. At that time, FGTC had two night-shift pipeline controllers on duty. However, the company's three day-shift pipeline controllers all reported for duty within the next 30 minutes (i.e., at 5:10 a.m., 5:34 a.m., and 5:35 a.m., respectively). At 5:49 a.m., Petitioner first learned of the rupture at MP 810.3, when the company received a telephone call from the Martin County Fire and Rescue Squad. The three day-shift controllers spent the next several hours assisting Petitioner's accident response efforts. At 8:05 a.m., FGTC informed the National Response Center (NRC) that the cause of the failure was unknown, a position the company continued to maintain in an incident report filed with PHMSA on June 8, 2009.

Citing these facts, I reached the following conclusions in the Final Order as to whether FGTC had an obligation to administer a drug test to the three day-shift controllers:

Respondent did not have sufficient information available immediately after the accident to conclude that the performance of the day-shift controllers could "be completely discounted as a contributing factor to the accident." Accident scenarios play out over a period of time and the actions of employees who came on the scene in the minutes following the initiating event can impact the severity of . . . releases and the effectiveness of response actions. All three of these employees were on duty when FGTC first learned of the failure, and each had an active role in its response to the accident.

Moreover, Respondent had not identified the cause of the failure in the NRC report filed on the morning of the accident, or in the incident report filed with PHMSA some 34 days later. That undermines FGTC's assertion that it had a legitimate basis for concluding that the performance of the day-shift controllers could be completely discounted as a contributing factor, particularly in the immediate aftermath of the failure.

In summary, the day-shift controllers were on duty when events critical to the accident occurred, including the initial reporting and response to the failure, and Respondent lacked a sufficient, contemporaneous basis for concluding that those employees should not be drug tested.

In a subsequent portion of the Final Order, I noted that the same reasoning applied in determining whether FGTC had an obligation to test the three day-shift controllers for the presence of alcohol.

Petitioner has not presented any persuasive basis for reconsidering these findings. The evidence in the record does not show that FGTC had sufficient information available immediately after the accident to conclude that the performance of the day-shift controllers could “be completely discounted as a contributing factor to the accident.” Those employees were on duty during critical phases of the accident, and the record does not show that Petitioner had enough information about the cause of the failure to determine that they should not be subject to a drug or alcohol test. That conclusion is supported by a reasonable construction of the text, structure, and purpose of the applicable regulations, which create a strong presumption in favor of post-accident drug and alcohol testing.

For these reasons, I am rejecting Petitioner’s request for reconsideration of the findings that FGTC violated 49 C.F.R. §§ 199.105(a) and 199.225(a)(1) by failing to perform a drug and alcohol test of each employee whose performance either contributed to the May 4, 2009 accident or could not be completely discounted as a contributing factor to that accident.

RELIEF DENIED

Based on the information provided in the Petition, a review of the relevant portions of the record, and for the reasons stated above, I am affirming the Final Order without modification.

This Decision is the final administrative action in this proceeding.

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued