FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

JUN 07 2016

OAK GROVE RESOURCES, LLC :

Docket Nos. SE 2009-261-R

v. :

SE 2009-487

SECRETARY OF LABOR,

MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION APPROVING SETTLEMENT

BY THE COMMISSION:

These proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involve a citation issued by the Department of Labor's Mine Safety and Health Administration to Oak Grove Resources, LLC following a fatal accident at its mine. The Secretary of Labor issued the citation for a violation of a notice of safeguard which had been previously issued to the mine pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b).

Oak Grove contested the citation and the associated civil penalty before a Commission Administrative Law Judge. The Judge vacated the citation; he concluded that the underlying safeguard had not been validly issued. 33 FMSHRC 846, 852-54 (Mar. 2011) (ALJ).

The Secretary filed a petition for discretionary review, which we granted. The Commission reversed the Judge, concluded that the safeguard notice was valid, and remanded the cases to the Judge for further proceedings. 35 FMSHRC 2009, 2015 (July 2013).

On remand, the Judge concluded that Oak Grove violated the safeguard, the violation was significant and substantial ("S&S"), and the violation was the result of a moderate degree of negligence on the part of Oak Grove. 35 FMSHRC 3422, 3431 (Nov. 2013) (ALJ).

Oak Grove then filed a petition for discretionary review, which we granted. On review, the Commission affirmed the Judge's decision that Oak Grove violated the safeguard, but concluded that the Judge's determination that the violation was S&S was not supported by substantial evidence in the record. 37 FMSHRC 2687, 2695 (Dec. 2015). The Commission remanded the proceedings to the Judge for an assessment of an appropriate penalty.

On remand, the Judge applied the statutory penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and assessed a \$50,000 penalty. In determining "whether the operator was negligent," as required by the penalty criteria, the Judge revised his finding that Oak Grove was moderately negligent, and determined that the violation was the result of Oak Grove's high negligence. 38 FMSHRC ___, slip op. at 17-19 (April 6, 2016).

The parties subsequently filed a joint petition for discretionary review. Included in the joint petition for discretionary review is a motion requesting that the Commission approve a settlement agreement between the parties. The Commission has granted the petition for discretionary review in a separate order, and now disposes of these cases.

The parties' joint request for approval of settlement was filed in accordance with section 110(k) of the Mine Act, 30 U.S.C. § 820(k), which provides, in relevant part, that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." Commission Procedural Rule 31 provides that a "proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion." 29 C.F.R. § 2700.31(a). The movant is required to provide "facts in support of the penalty agreed to by the parties." 29 C.F.R. §§ 2700.31(b)(1), (c)(1).

In their joint filing, the parties contend that the Judge exceeded his authority when he revised his negligence finding from moderate negligence to high negligence, given that the original determination of moderate negligence had not been appealed, and had become law of the case. PDR at 3 (citing *Manalapan Mining Co.*, 36 FMSHRC 849, 852-54 (Apr. 2014)). The parties represent that a total penalty of \$35,000, rather than the \$50,000 ordered by the Judge, is appropriate based upon the Judge's original conclusion that Oak Grove was moderately negligent.

The parties' joint request for approval of settlement is granted. We determine that the parties have justified that a reduction of the penalty is appropriate considering the Judge's original finding that Oak Grove was moderately negligent. *See* 30 U.S.C. § 820(i) ("In assessing civil monetary penalties, the Commission shall consider . . . whether the operator was negligent . . ."). Oak Grove is ordered to pay the civil penalty of \$35,000 within 30 days of the issuance of this order.

Mary Lu Joggan, Chairman

Michael G. Young, Commissioner

Robert F. Chunh

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner