

BRB No. 98-0566 BLA

JOHN LATSHAW)	
)	
Claimant)	
)	
v.)	
)	
G.B. MINING COMPANY)	DATE ISSUED:
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Anthony J. Urban, Pottsville, Pennsylvania, for employer.

J. Matthew McCracken (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

G.B. Mining Company (G.B. Mining) appeals the Decision and Order on Remand (91-BLA-0198) of Administrative Law Judge Ainsworth H. Brown designating G.B. Mining as the responsible operator on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the third time. In the original Decision and Order, the administrative law judge credited

claimant with more than twenty years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits, which he ordered to commence as of March 1, 1989. The administrative law judge also found that G.B. Mining was the responsible operator, and that North Mountain Coal, Incorporated (North Mountain) was the successor operator to G.B. Mining.

In response to G.B. Mining's appeal, the Board noted that the administrative law judge's finding of entitlement on the claim was not contested. Further, the Board affirmed the administrative law judge's finding that the sale of G.B. Mining's assets to Glen Burn Mining was ineffectual because the deal was never finalized due to non-payment, and rejected G.B. Mining's contention that claimant did not work for it for at least one year. However, the Board vacated the administrative law judge's finding that G.B. Mining was the responsible operator, and remanded the case for the administrative law judge to determine whether claimant was a traditional employee of G.B. Mining, whether claimant was a self-employed operator under the control, supervision, or financial responsibility of G.B. Mining pursuant to 20 C.F.R. §725.491(c)(2)(ii), or whether claimant was an independent contractor. The Board instructed the administrative law judge that if he determined that claimant was an independent contractor, he must dismiss G.B. Mining as the responsible operator and direct North Mountain to begin payments of benefits. *Latshaw v. G.B. Mining Co.*, BRB No. 92-0806 BLA (Dec. 22, 1994)(unpub.). On remand, the administrative law judge dismissed North Mountain as a party to this matter and found that liability for the payment of benefits will be with either G.B. Mining or the Black Lung Disability Trust Fund (Trust Fund). The administrative law judge also found that G.B. Mining was the responsible operator.

In disposing of G.B. Mining's second appeal, the Board affirmed the administrative law judge's dismissal of North Mountain and his finding that if G.B. Mining is not determined to be the responsible operator, liability for benefits reverts to the Trust Fund. The Board declined to revisit G.B. Mining's contention that claimant worked less than one year with G.B. Mining since the Board had previously addressed and rejected this contention, and since G.B. Mining did not raise any new credible arguments concerning this issue. Further, the Board vacated the administrative law judge's finding that G.B. Mining is the responsible operator, and remanded the case to the administrative law judge to provide a detailed analysis of his findings on the issue of G.B. Mining's control of the details of claimant's work. The Board specifically instructed the administrative law judge to determine whether the evidence was sufficient to establish that claimant was an employee, a self-

employed operator but still under the control of G.B. Mining pursuant to 20 C.F.R. §725.491(c)(2)(ii), or an independent contractor. *Latshaw v. G.B. Mining Co.*, BRB No. 96-1426 BLA (Aug. 6, 1997)(unpub.). On the most recent remand, the administrative law judge found that G.B. Mining was the responsible operator, and denied G.B. Mining's request for another hearing to submit additional company checks and present further testimony.

On appeal, G.B. Mining contends that the administrative law judge erred in finding that G.B. Mining is the responsible operator because claimant was not its employee but was an independent contractor. G.B. Mining also contends that the administrative law judge erred by refusing its request for another hearing on remand to submit additional company checks and present further testimony. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's Decision and Order on Remand. Claimant has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

G.B. Mining contends that the administrative law judge erred in finding that G.B. Mining is the responsible operator because claimant was not its employee but was an independent contractor. We disagree. The administrative law judge stated that "[t]he evidence of record establishes that G.B. Mining was Claimant's employer, and is therefore the responsible operator, liable for payment of Claimant's black lung benefits." Decision and Order on Remand at 4. G.B. Mining initially asserts that it is not the responsible operator because claimant was employed by it for less than one year. The Board has previously rejected G.B. Mining's assertion that claimant worked for it for less than one year. *Latshaw v. G.B. Mining Co.*, BRB No. 92-0806 BLA (Dec. 22, 1994)(unpub.). We hold that the Board's prior disposition of this issue constitutes the law of the case, as G.B. Mining has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue. See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Next, G.B. Mining asserts that North Mountain is the responsible operator because it was claimant's last coal mine employer. The Board has previously affirmed the administrative law judge's dismissal of North Mountain as a potentially responsible operator. *Latshaw v. G.B. Mining Co.*, BRB No. 96-1426 BLA, slip op. at 2-3 n.1 (Aug. 6, 1997)(unpub.). Since the administrative law judge's

dismissal of North Mountain, which the Board has affirmed, constitutes the law of the case on this issue, and since there is no persuasive evidence that the law of the case doctrine should not be applied, or that an exception has been shown, we decline to revisit this issue. *See Coleman, supra*.

Additionally, G.B. Mining asserts that the administrative law judge erred by refusing its request for another hearing on remand to submit additional company checks and present further testimony. The administrative law judge denied G.B. Mining's request for another hearing on remand "[s]ince ample opportunity to [present] testimony and evidence has been afforded the parties, and no extraordinary circumstances have been shown, and indeed, no argument presented as to why the request should be granted."¹ Decision and Order on Remand at 2. Therefore, we reject G.B. Mining's assertion that the administrative law judge erred by denying G.B. Mining's request for a hearing on remand and hold that the administrative law judge acted within the broad discretion granted to him in resolving procedural issues. *See Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

¹The administrative law judge correctly stated that "[t]estimony was presented twice for this case, on June 25, 1991 and April 24, 1996." Decision and Order on Remand at 2.

Further, G.B. Mining asserts that it is not the responsible operator because the factors demonstrating the right to control underlying an employer-employee relationship were not established. Although no single factor is dispositive, the primary factor to be considered in determining whether claimant was an employee or an independent contractor is the employer's right to control the details of work.² See *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). An employer must exercise greater control over an employee "than that required for assignment of work to an independent contractor." *Folmar v. River Hill Coal Co.*, 8 BLR 1-385 (1986); *Crews v. Leckie Smokeless Coal Co.*, 7 BLR 1-220 (1984). The principal factors demonstrating right to control include direct evidence of right or exercise of control, the method of payment, the furnishing of equipment, and the right of termination. See *Crabtree, supra*; 1 B Larson's Workmen's Compensation Law §44.00 *et seq.* (1996).

In the instant case, the administrative law judge concluded that "since the furnishment and control of equipment has been adequately shown on these proofs, and because the right of control reserved by G.B. Mining has been shown, I find that G.B. Mining was Claimant's employer for purposes of compensation payment liability under the Act." Decision and Order on Remand at 8. While the administrative law judge did not find that all of the factors considered in the determination of whether claimant was an employee or an independent contractor

²In *Elliot Coal Mining Co. Inc. v. Director, OWCP*[Kovalchick], 17 F.3d 616, 18 BLR 2-125 (3d Cir. 1994), the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, reviewed the administrative law judge's dismissal of Elliot Coal Mining Company (Elliot) as the operator responsible for the payment of benefits. The court stated that the key issue concerned whether Elliot, as a sublessor of several mining sites, retained the effective power to control the mining operations of its sublessees. The court further indicated that this was a question of fact to be resolved by the administrative law judge. The court held that the administrative law judge's finding that Elliot did not possess a sufficient right to control the actions of its sublessees was supported by substantial evidence, inasmuch as Elliot lacked effective power to supervise mining operations, gained little economic benefit from the extraction of coal, and informed its sublessees that the terms of the primary lease between Elliot and its lessors were controlling. The court also indicated that, contrary to the Board's holding, retention of the right of inspection, the right of ejection and confession of judgment, and the right to direct the manner of coal extraction did not demonstrate, as a matter of law, that Elliot continued to operate coal mining facilities under the terms of 20 C.F.R. §725.493(a)(2).

were established, he nonetheless found that “the evidence on balance...reflects that Claimant was G.B. Mining’s employee.” *Id.* at 7. The administrative law judge relied on G.B. Mining’s presence at the mining site and its furnishing uniforms and heavy equipment. The administrative law judge stated that “G.B. Mining maintained a permanent office on the property.” *Id.* The administrative law judge also stated that “[t]he evidence reflects that the owner of G.B. Mining, Vincent Guarna, Jr., was present at the mining site approximately once per week, while his partner was present weekly or bi-weekly.” *Id.* Further, the administrative law judge stated that “Richard Kleman worked for Mr. Guarna at the site daily, and received employment applications from prospective miners.” *Id.* The administrative law judge observed that “Mr. Kleman regarded himself as the foreman of the miners on the site.” *Id.* Moreover, the administrative law judge stated that “[a]t least initially, G.B. Mining instructed the miners as to where to work.” *Id.*

Additionally, the administrative law judge stated that “G.B. Mining initially furnished Claimant with uniforms (albeit at Claimant’s expense), which it cleaned, and Claimant was responsible for the cost only if he damaged it.” *Id.* at 5. The administrative law judge observed that “[t]he uniform had the name ‘G.B.’ upon it.” *Id.* The administrative law judge stated that “G.B. Mining provided timber to the miners for use in the mining process.” *Id.* The administrative law judge also stated that “G.B. Mining provided Claimant with mine cars, equipped with a motor and an air compressor.” *Id.* The administrative law judge observed that “G.B. Mining was responsible for maintenance of the equipment, as discerned from Claimant’s uncontradicted testimony on this point.” *Id.* Further, the administrative law judge observed that “there is indication that the equipment for which Mr. Kleman was charged to maintain was not limited to the coal car, motor and compressor, as demonstrated by Claimant’s unchallenged statement that if ‘it was broke like a drill, we’d bring it out and he’d fix it.’” *Id.* In addition, the administrative law judge stated that “G.B. Mining maintained the right to allocate the equipment elsewhere if it was so needed,” and that “[t]he company stored the equipment as well.” *Id.* The administrative law judge also relied on G.B. Mining’s perception of claimant as an employee. The administrative law judge stated that “Claimant was told by G.B. Mining that it would furnish insurance for the miner, which would be on the order of an employee benefit.” *Id.* at 6. The administrative law judge also stated that “Claimant completed a job application (nomenclature which Employer did not contest) for the miner position, rather than an agreement as an independent contractor.” *Id.*

G.B. Mining asserts that the evidence is insufficient to establish the factors necessary to demonstrate the right to control. Specifically, G.B. Mining argues that the equipment used by claimant was leased to Glen Burn Mining. We reject G.B.

Mining's argument. The administrative law judge acted within his discretion in discrediting the testimony of Mr. Guarna, a principal owner of G.B. Mining, that G.B. Mining rented the equipment to claimant and his fellow miners on the ground that "[s]everal inconsistencies mar [Mr. Guarna's] testimony." *Id.* at 4; see *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). The administrative law judge rationally determined, therefore, that G.B. Mining exhibited an indicia of control by providing heavy equipment necessary for the mining process to claimant and other miners. Decision and Order on Remand at 5.

G.B. Mining also argues that it lacked control over claimant as an employee because it paid claimant according to the quantity of coal mined rather than on an hourly basis. The administrative law judge, within a proper exercise of his discretion as trier of fact, found that the method by which compensation to claimant was calculated does not settle the issue of whether claimant was an employee or independent contractor, inasmuch as no single factor is dispositive of the right to control. See *Crabtree, supra*; Decision and Order on Remand at 7. Thus, we reject G.B. Mining's argument that claimant was an independent contractor because he was paid on a per ton basis.³ Since the record indicates that G.B. Mining maintained a presence at the mine site, and furnished uniforms and heavy equipment, we affirm the administrative law judge's finding that G.B. Mining is the responsible operator because it exercised greater control over claimant than that required for the assignment of work to an independent contractor. See *Folmer, supra*; *Crabtree, supra*; *Crew, supra*; see also *Elliot Coal Mining Co. Inc. v. Director, OWCP* [Kovalchick], 17 F.3d 616, 18 BLR 2-125 (3d Cir. 1994).

Accordingly, the administrative law judge's Decision and Order on Remand designating G.B. Mining as the responsible operator is affirmed.

SO ORDERED.

³Further, the administrative law judge, within a proper exercise of his discretion as trier of fact, found that the fact that "Claimant received a 1099 form for tax purposes similarly does not further G.B. Mining's position, premised as it is upon this form of payment." Decision and Order on Remand at 7.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge