OPINION NO. 76-077

Syllabus:

There are no constitutional limitations on R.C. 4123.01 (A)(3) and a partner or sole proprietor, who has otherwise qualified, may be included as an "employee" under the provisions of the Workmen's Compensation Act.

To: Robert C. Daugherty, Administrator, Bureau of Workmen's Compensation, Columbus, Ohio
By: William J. Brown, Attorney General, November 18, 1976

I have before me your request for my opinion in which you present the following question:

> "What are the constitutional limitations on Revised Code Section 4123.01(A)(3) in light of Ohio Attorney General Opinion 1967-022 and the case of Goldberg v. Industrial Commission, 131 Ohio St. 399 (1936) together with other relevant law?"

Your request raises the basic question of whether a member of a partnership or the owner of a sole proprietorship may be included as an "employee" under the provisions of the Workmen's Compensation Act.

Prior to 1925 the Workmen's Compensation Act did not make specific provision for the inclusion of partners or sole proprietors as "employees". However, in 1925, the General Assembly amended G.C. 1465-68 to provide in part:

> "Any member of a partnership, firm or association composed of two or more individuals, who is paid a fixed compensation for services rendered to such partnership, firm, or association, and the dependents

> of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, shall be paid such compensation and benefits as are provided in case of other injured, diseased or killed employees by this act, provided such partnership, firm or association includes in the pay roll furnished by it to the industrial commission the compensation of such member and pays the premiums based thereon."

Thus, with the enactment of G.C. 1465-68 a member of a partnership composed of two or more individuals could be covered by the benefits of the Workmen's Compensation Act.

In 1936, however, the Supreme Court of Ohio in the case of Goldberg v. Industrial Commission, 131 Ohio St. 399 (1936), held the above quoted language to be unconstitutional and void. In so doing the Court held that a partner-employee is not embraced within the terms "workmen" and "employee" as used in Section 35 of Article II of the Constitution of Ohio. The Court was of the opinion that to allow such a relationship to exist in light of the provisions of Section 35 requiring an additional award for injuries resulting from violations of specific safety requirements would tempt a partner-employee to violate the law in one capacity in order to obtain additional compensation in another capacity under the same law. Although the statute involved in Goldberg, supra, did not include sole proprietors, I believe it is safe to assume that the Goldberg court would have applied the same rationale to sole proprietors.

To date, the Goldberg, supra, decision has not been specifically overruled. In the case of Kuehnl v. Industrial Commission, 136 Ohio St. 313 (1940), however, the Supreme Court held as follows:

> "1. An officer, director or shareholder of a corporation, injured while engaged in performing manual labor for the corporation as its employee, will not be denied compensation for such injury under the Workmen's Compensation Act solely because he is such officer, director or shareholder.
>
> "2. A claimant under the Workmen's Compensation Act, although president, general manager and owner of half the capital stock of a corporation, injured while regularly engaged in performing manual labor as an employee of such corporation which had included his wages in its payroll report to the Industrial Commission and had paid its premium into the State Insurance Fund accordingly, is entitled to participate in such State Insurance Fund."

In Kuehnl, supra, the Industrial Commission argued that the Goldberg, supra, decision should be controlling since the claimant's relationship to his corporation was akin to the relationship of a partner to his partnership; that, as in a partnership, he stood in the position of both employer and employee. The Court rejected this contention and held that the doctrine announced in Goldberg, supra, did not extend to the case of a shareholder of a corporation.

In arriving at its decision the Court in Kuehnl, supra, stated the following at page 317:

> "The Workmen's Compensation Act does not discriminate against small corporations and their employees, the latter being entitled to full protection under this law. The law was enacted, pursuant to the Constitution as stated in Section 35, Article II, 'For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment . . . .' In fact the spirit of the Workmen's Compensation Act is to give encouragement to the employment of the corporate fiction as a nominal employer, so that all bona fide employees of such an entity, when they exceed two in number, are granted coverage. The social implications of the law are that the economic loss of the injured employee, or of his dependents in case of his death, must be borne by industry, and that this policy should not be thwarted by the device of making a bona fide employee an executive officer of a corporation, or by making such an employee a member of a partnership in order to reduce the number of persons employed and thus escape the application of the law."
> (Emphasis added.)

While Goldberg, supra, was not overruled by Kuehnl, supra, a reading of the latter case causes one to speculate that the Kuehnl Court did not necessarily agree with the earlier decision and may well have found the statute to be constitutional had it been given the opportunity to pass upon the issues presented in Goldberg, supra.

Following the Kuehnl decision the General Assembly amended G.C. 1465-68 in 1941 by deleting the last paragraph which Goldberg, supra, had held to be unconstitutional (119 Ohio Laws 565). In 1967, the then Attorney General further distinguished Goldberg, supra, in Ohio Att'y Gen. Op. No. 1967-022. My predecessor opined that the partners of a limited partnership association could be considered "employees" under the Workmen's Compensation Act, even though the partners of a general partnership could not. The syllabus of that opinion reads as follows:

> "1. A member of a limited partnership association who does in fact perform services under a contract of hire and, therefore, would qualify as an employee were he not a member of the association, is an employee for the purpose of the Ohio Workmen's Compensation Insurance Act.
>
> "2. An official of a limited partnership association is not entitled to a limitation of reporting remuneration for premium purposes by the terms of the Industrial Commission's General Rating, Rule VII.

"3. An official of a limited partnership association may be covered by the Ohio Workmen's Compensation Act, depending upon the factual context in which the injury is sustained."

Thus, the decision rendered in Goldberg, supra, has twice been distinguished and narrowed by subsequent interpretation.

Most recently the Legislature amended R.C. 4123.01 to provide that partners and sole proprietors may be included as "employees" under the Workmen's Compensation Act. R.C. 4123.01 (A)(3) as amended effective January 1, 1974, provides:

"As used in Chapter 4123. of the Revised Code:

"(A) 'Employee,' 'workmen,' or 'operative' means:

". . .

"(3) If an employer is a partnership, or sole proprietorship, such employer may elect to include as an 'employee' within this Chapter, any member of such partnership, or the owner of the sole proprietorship. In the event of such election, the employer shall serve upon the commission written notice naming the persons to be covered, include such employee's remuneration for premium purposes in all future payroll reports, and no such proprietor, or partner shall be deemed an employee within this division until such notice has been served."

By enacting the above language it appears that the General Assembly intended to deliver the final blow to Goldberg, supra, through legislation. The language of the statute is clear and unambiguous. With respect to such language, the Supreme Court held in the fifth syllabus of Sears v. Weimer, 143 Ohio St. 313 (1944):

"5. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted."

Nevertheless, because the language of R.C. 4123.01(A)(3) is so similar to the language held to be unconstitutional by Goldberg, supra, one can not avoid questioning, as you have, its constitutionality. However, until such time as a court of this state specifically rules R.C. 4123.01(A)(3) to be unconstitutional, it must be presumed to be constitutional and in full force and effect. The Attorney General has traditionally declined to decide the constitutionality of statutes, as such a determination is the perogative of the courts. 1973 Op. Att'y Gen. No. 73-105; 1973 Op. Att'y Gen. No. 73-088; 1954 Op. Att'y Gen. No. 3644. R.C. 1.47 specifically provides:

"In enacting a statute, it is presumed that:

"(A) Compliance with the constitutions of the state and of the United States is intended;

"(B) The entire statute is intended to be effective;

"(C) A just and reasonable result is intended;

"(D) A result feasible of execution is intended."

Therefore in specific answer to your request, it is my opinion and you are so advised that there are no constitutional limitations on R.C. 4123.01(A)(3) and a partner or sole proprietor, who has otherwise qualified, may be included as an "employee" under the provisions of the Workmen's Compensation Act.