

## OPINION NO. 76-067

## Syllabus:

1. The term "on duty" as used in Section 4155.04, Ohio Revised Code, is not defined by statute nor is it a state of the art word and therefore should be interpreted in keeping with its common usage and in light of the legislative intent to provide safe working practices and conditions in the mines. To be on duty the mine foreman must at all times be performing his duties or at least physically present and capable of performing these duties when the occasion arises.

2. The provisions of Section 4155.04, Ohio Revised Code, establish a minimum requirement that one mine foreman must be on duty at all times while a mine is in operation and such requirement cannot be increased or decreased by promulgation of a rule by the Ohio Division of Mines. However, Section 4155.04, Ohio Revised Code, does not establish the mine operators' sole obligation to provide certified foremen and the Division of Mines may establish by guideline rules as to when additional mine foremen are necessary for safe operation of a mine.

3. Only persons filling the position of mine foreman fireboss, and mine electrician need be certified in accordance with Sections 4151.17 through 4151.21, Ohio Revised Code.

4. Pursuant to its authority under Section 4151.03, Ohio Revised Code, the Ohio Division of Mines may establish experience requirements, by rule, for temporary mine foremen if such a rule is deemed to be necessary and not inconsistent with the mining laws of this state.

5. A mine foreman may delegate his supervisory duties to non-certified men pursuant to Section 4155.02, Ohio Revised Code but must determine that the individual is capable of performing the duties. The foreman remains responsible for the supervisory responsibilities.

6. In keeping with the legislative intent of the mining laws to provide safe working practices and conditions in mines, the supervision of inexperienced miners required by Section 4155.03, Ohio Revised Code, although undefined, must be a type which will assure the safety of an inexperienced miner in performing his specific duties. Whether or not such supervision is required to be constant supervisions will largely depend on the nature of the work to be performed by the inexperienced miner.

7. The phrases "working with an experienced miner" and "working alone" as used in Sections 4155.03 and 4155.04, Ohio Revised Code, are neither specifically defined nor state of the art words and, therefore, should be interpreted in light of the specific job to be performed, the type of supervision necessary to provide safety, and in keeping with their common usage.

8. There are no standards set out in Section 4155.03, nor any other provision of the Revised Code, to determine when a miner is competent to work alone as that term is used in Section 4155.03, Ohio Revised Code. Again looking to the legislative intent of the mining laws, a miner would be "competent to work alone" when he is capable of safely performing his work alone.

9. There are no provisions other than the requirement of Section 4155.04, Ohio Revised Code, requiring a certified foreman to supervise a miner once he is determined to be competent to work alone.

10. The provisions of Section 4155.24, Ohio Revised Code, which prohibit an inexperienced miner from working "by himself" when read in pari materia with other provisions of the mining laws indicates that such language was intended to mean that an inexperienced miner must work with an experienced miner until qualified to work alone.

11. The term "miner" as used in Chapter 4151., 4153., and 4155. of the Ohio Revised Code is more inclusive in meaning than "those workers at the face of the mine." A miner, for purposes of the mining laws of Ohio, is any person working in a "mine" as that term is defined in Section 4151.01(A) of the Revised Code.

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To: Helen W. Evans, Director, Dept. of Industrial Relations, Columbus, Ohio  
By: William J. Brown, Attorney General, September 22, 1976

Your request for my opinion reads as follows:

1. Section 4155.04 of the Ohio Revised Code states in part, "All such mines shall have at least one certified foreman on duty at all times when men are employed in the mining of coal." What is meant by "on duty" under this section?

2. Does the above quoted portion of Section 4155.04 of the Ohio Revised Code establish the mine operator's sole obligation to provide certified foremen or does it merely establish a minimum requirement which the Division of Mines may increase by rule?

3. Do all persons in a mine who occupy supervisory positions have to be certified in accordance with Sections 4151.17 through 4151.21 of the Ohio Revised Code, when Section 4155.06 of the Ohio Revised Code does not apply?

4. Section 4155.06 of the Ohio Revised Code provides that miners without certificates may be appointed as temporary foremen. Although no experience requirements are specified in the statute for these temporary appointees, can the Division of Mines establish such requirements by rule?



5. Under Section 4155.02 of the Ohio Revised Code, the mine foreman may delegate his duties to men who "in his judgment are competent to perform them." Does this language enable the mine foreman to assign supervisory duties to non-certified men?

6. Section 4155.03 of the Ohio Revised Code requires that the mine foremen have the work of an inexperienced person supervised until that person is deemed competent. Does this section require the constant supervision of the inexperienced miner throughout his work day or is some other standard intended?

7. What kind of proximity is intended by the language "working with an experienced miner" as used in Section 4155.03 of the Ohio Revised Code? Conversely what is meant by "working alone" as used in this same section?

8. What criteria must be met in order to be "competent to work alone" as that phrase is used by Section 4155.03 of the Ohio Revised Code?

9. Once a man is competent, is there any requirement, other than that of Section 4155.04 of the Ohio Revised Code, that he be supervised by a certified foreman?

10. When Section 4155.24 of the Ohio Revised Code prohibits an inexperienced miner from working "by himself" should that language be construed to mean that he must work with an experienced miner or is a more literal interpretation appropriate?

11. Does "miner" as used in Chapters 4151., 4153., and 4155. of the Ohio Revised Code mean those workers at the face of the mine, or is it more inclusive?

In response to your first question the words "on duty" as used in Section 4155.04, Ohio Revised Code, are not specifically defined in the mining laws nor are they "state of the art" terms. A search of other state jurisdictions and federal laws has not produced a legal or judicial definition of these words with respect to mining operations. However, a somewhat analogous situation was presented in the case of U.S. v. Denver & R.G.R. Co., 197 F. 629 (U.S.D.C., 1912). This case arising in New Mexico raised the question of when trainmen were, within the statutory term, "on duty." The Court at page 631 stated as follows:

"It is doubtful if any definition of the words 'on duty' can be clearer than the words themselves. Manifestly, however, they mean to be either actually engaged in work or to be charged with present responsibility for such should occasion for it arise."

The Court, in other words, looked to the normal meaning of the words and then went on to apply that definition within the context of the legislation in which the words were used. The same must be done by the Division of Mines with respect to the mining laws. The intent of the legislature in enacting the mining laws was to provide safe working practices and conditions in the mines. Obviously, the legislature felt that a safe practice is to keep a mine foreman "on duty" at all times. A mine foreman has many sta-

tutorily defined duties as well as many other duties. It therefore seems clear that the mine foreman to be "on duty," must at all times be performing his duties or at least physically present and capable of performing them when the occasion arises.

In response to your second question Section 4155.04, Ohio Revised Code states as follows:

"The owner, lessee, or agent of each mine who is an employer as defined in section 4123.01 of the Revised Code, or any mine working three or more men, shall employ a certified mine foreman. In gaseous mines, only a holder of a first class mine foreman's certificate shall be employed as mine foreman. In other mines, the foreman and assistant foreman must hold a second class mine foreman's certificate. All such mines shall have at least one mine foreman on duty at all times which men are employed in the loading or mining of coal.

"No owner, lessee, agent, or operator of mine shall willfully refuse or neglect to comply with this section." (Emphasis added.)

The clear import of R.C. 4155.04 is that a mine shall not operate without at least one mine foreman on duty. This section should not be viewed as the exclusive, or controlling statute with regard to a mine operator's responsibility to provide foremen. There are, in fact, other provisions of the mining laws which have a direct effect on the number of mine foremen which need to be on duty at specific times in a mine. The thrust of this statute is to insure that a mine is never in operation without at least one mine foreman on duty. For example, all the mine's foremen cannot leave the premises to go to lunch at the same time. One must remain on duty while the mine is in operation, even if he has no specific duties to be performed at that time.

This statute is clear, specific, and establishes a minimum standard for safe operation of a mine. R.C. 4151.03 which is the grant of rule-making authority to the Division of Mines requires that rules promulgated shall not be inconsistent with the mining laws of this state. Therefore, the Division of Mines cannot make a specific rule which requires any less than one mine foreman to be on duty at all times, as such a rule would conflict with R.C. 4155.04. Neither do I believe it would be consistent with Chapter 4155. to adopt a rule establishing an absolute and higher minimum than set out in R.C. 4155.04. However, inasmuch as the legislature has set the minimum at "at least" one mine foreman, there is an apparent legislature expectation that additional foremen shall be on duty if required in any given operation. Since it is the duty of the Division of Mines to, generally, ensure the health and safety of mining operations by rule, it would be consistent with R.C. 4155.04 for the Division to establish guideline rules as to where additional foremen are necessary for safe operation.

In response to your third question, it is clear from a reading of the certification provisions set out in R.C. Chapter 4155.



that the only positions which must be filled by certificate holders are mine foremen, fire bosses and mine electricians.

Section 4151.17 states in part as follows:

"The mine examining board shall conduct examinations for offices and positions in the division of mines, and for mine foremen, mine electricians, and fire bosses, as follows:

- (A) Division of mines;
- (1) Deputy mine inspectors;
- (2) Electrical inspectors;
- (3) Superintendent of rescue stations;
- (4) Assistant superintendents of rescue stations;
- (5) Mine chemists at division of mines laboratory;
- (6) Gas storage well inspector.
- (B) Mine foremen:
  - (1) Foreman of gaseous mines;
  - (2) Foreman of nongaseous mines.
- (C) Fire bosses.
- (D) Mine electricians."

Section 4151.23 states in part as follows:

"The mine examining board shall issue the following certificate to those applicants who pass their examination:

- (A) First class certificates for foremen of gaseous mines;
- (B) Second class certificates for foremen of nongaseous mines;
- (C) Certificates for fire bosses;
- (D) Certificates for mine electricians."

Therefore, in answer to your question, all persons in a mine who occupy supervisory positions do not have to be certified in accordance with R.C. 4151.17 through 4151.21 when R.C. 4155.06 does not apply. Only the above enumerated individuals are required by statute to be certified.

In response to your fourth question, the Division of Mines has rule-making authority pursuant to R.C. 4151.03 which states as follows:

"The division of mines shall enforce and supervise the execution of all laws enacted for the health and safety of persons and the protection and conservation of property within, about, or in connection with mines, mining, and quarries, and for such purpose shall make, publish and enforce necessary rules and regulations not inconsistent with the mining laws of this state."

As is apparent such rule-making authority is limited to rules or regulations which are "necessary" and "not inconsistent with the mining laws." Experience requirements for temporary foremen

appointed pursuant to R.C. 4155.06 may be established by the Division of Mines, by rule, if such requirements are deemed by the Division to be "necessary." Since the legislature adopted the mining laws to provide for safe working practices and conditions in mines, the Division of Mines must determine whether or not experience requirements are needed to provide and promote the policy of the legislature. It would certainly not be inconsistent with the mining laws to adopt such experience requirements. The position filled by a foreman calls for a man of more experience than the average miner and, when an emergency requires appointment of a temporary foreman, the conditions which demand the position be filled by a man with reasonable experience in order to provide safe working conditions still exist. Therefore, the Division of Mines in the sound exercise of its discretion may adopt rules requiring a temporary foreman to have certain experience qualifications.

In response to your fifth question R.C. 4155.02 states as follows:

"Under the direction of the superintendent in charge of a mine, the mine foreman shall carry out Chapters 4151., 4154., 4155., 4157., and sections 1509.18 and 1509.19 of the Revised Code, see that the regulations prescribed for each class of workmen under his charge are carried out, and see that any deviations from any of them are promptly adjusted. This section does not prohibit the mine foreman from delegating any of his duties, except those which are subject to the limitations of such chapters, to men who in his judgment are competent to perform them, but such delegation shall not relieve the mine foreman from the responsibility of having these duties properly performed.

"No person shall willfully refuse or neglect to comply with this section."

This section permits a mine foreman to delegate any of his duties unless specifically prohibited from so doing to whomever "in his judgment are competent to perform them." There is no limitation in this section or any other which would permit such delegation only to certificate holders. Therefore, it is permissible for a foreman to delegate duties which may include those which are supervisory in nature to non-certified employees. It should be further noted that R.C. 4155.03 specifically permits delegation of supervisory duties in the following language:

"Unless the miner or loader has the required qualifications, the mine foreman, or the person whom he delegates as overseer, shall supervise the work of such miner or loader as to the manner in which he performs his duties, and shall instruct him concerning all things relating to his safety, and shall further instruct such miner or loader not to handle or use any explosives, except in the mine foreman's or overseer's presence, until such time as he is competent to handle and



use the same with safety. The mine foreman shall have the work of such inexperienced person supervised so long as such person is not working with an experienced miner or loader, until such person is competent to work alone."

The mine foreman, however, bears a heavy responsibility in delegating his duties to other employees. He must determine that the individual he is appointing to act for him to be competent to perform the task. In view of the fact that the very lives of miners may be a stake in the performance of a mine foreman's responsibilities the mine foreman must very carefully match the abilities of the appointee to the requirements and dangers of the task at hand. It may very well be that for the mine foreman to properly delegate his duties, the employee to which such duty is delegated will need to have the same level of skill, experience and competence as the foreman himself.

In response to your sixth question, as I indicated in answer to your first question, interpretations of the mining laws must be carried out in light of the objectives of the legislature in providing safe working practices and conditions in mines. R.C. 4155.03 does not set out specific standards for supervision. Therefore, where R.C. 4155.03 requires supervision of inexperienced miners, that supervision must be of a type which will assure the safety of an inexperienced miner in performing his specific duties. Whether or not such supervision is required to be constant supervision will largely depend on the nature of the work to be performed by the inexperienced miner.

In response to your seventh question, again the words "working with an experienced miner" and "working alone" as used in R.C. 4155.03 are undefined by statute. Nor are there any interpretations from any other state or federal jurisdictions which would be of help here. The statute itself does not suggest a "proximity," which you question. However, again I point out that the overall intent of the legislature in enacting the mining laws was to provide safe working practices and conditions. The interpretation of the terms you question must be made with the safety of miners in mind. The words, and the degree of safety provided through the Division of Mines interpretation of them, will depend largely on the needs of the specific job to be performed and the type of supervision necessary to provide safe working conditions.

In response to your eighth question, there are no standards set out in R.C. 4155.03 or any other provision of the Revised Code to determine when a miner is "competent to work alone" as the phrase is used in R.C. 4155.03. Again such language must be interpreted in light of the intent of the legislature to provide safe working practices and conditions. Consequently, a miner would be "competent to work alone" when he is capable of safely performing his work alone.

In response to your ninth question, there are no provisions other than the requirement of R.C. 4155.04 requiring a certified foreman to supervise a miner once he is determined to be competent to work alone.

In response to your tenth question, the requirement in R.C. 4155.24 that prohibits an inexperienced miner from working "by

himself" must be read in pari materia with the second paragraph of the same section as well as with R.C. 4155.03.

Section 4155.24 states as follows:

"No person shall work by himself as a miner in a coal mine without having produced satisfactory evidence to the mine boss of such mine that he has worked at least one year with, or as a practical coal miner. This section applies only to mines generating firedamp, gas, or combustible matter.

"No mine boss of a coal mine shall permit anyone to mine coal in such mine until such person is qualified, unless he is accompanied by a competent coal miner." (Emphasis added.)

Further, the provisions of R.C. 4155.03 require that an inexperienced miner have his work supervised by the mine foreman or overseer unless working with an experienced miner.

Thus when these sections are read in pari materia it becomes evident that an inexperienced miner must work with an experienced miner, or under the supervision of a miner foreman or overseer, until he is competent to work alone. A literal interpretation would not be appropriate in that a literal interpretation of "by himself" would seemingly permit two inexperienced miners to work together. Such an interpretation is not consistent with the obvious intent of the legislature when the mining laws are viewed in their entirety.

Finally, in answer to your eleventh question, the term "miner" is more inclusive in meaning than "those workers at the face of the mine." Miner is not specifically defined in Chapters 4151., 4153., or 4155., of the Revised Code. However, the term "miner" in common usage means those people working in a mine. The term "mine" is defined in Section 4151.01(A) as follows:

"(A) 'mine' means an underground or surface excavation or development with or without shafts, slopes, drifts, or tunnels for the extraction of coal, gypsum, asphalt, rock, or other materials containing the same, excluding natural gas and petroleum, with hoisting or haulage equipment and appliances for the extraction of such materials; and embraces the land or property of the mining plant, the surface, and underground, that is used for or contributes to the mining properties, or concentration or handling of coal, gypsum, asphalt, rock, or other materials containing the same."

It, therefore, follows that, when considering the intent of the legislature to provide safe working conditions and practices in mines for purposes of the mining laws of Ohio, a miner is any person working in a "mine" as that term is defined in R.C. 4151.01(A).

In specific answer to your questions it is my opinion, and you are so advised, that:



1. The term "on duty" as used in Section 4155.04, Ohio Revised Code, is not defined by statute nor is it a state of the art word and therefore should be interpreted in keeping with its common usage and in light of the legislative intent to provide safe working practices and conditions in the mines. To be on duty the mine foreman must at all times be performing his duties or at least physically present and capable of performing these duties when the occasion arises.

2. The provisions of Section 4155.04, Ohio Revised Code, establish a minimum requirement that one mine foreman must be on duty at all times while a mine is in operation and such requirement cannot be increased or decreased by promulgation of a rule by the Ohio Division of Mines. However, Section 4155.04, Ohio Revised Code, does not establish the mine operators' sole obligation to provide certified foremen and the Division of Mines may establish by guideline rules as to when additional mine foremen are necessary for safe operation of a mine.

3. Only persons filling the positions of mine foreman, fireboss, and mine electrician need be certified in accordance with Sections 4151.17 through 4151.21, Ohio Revised Code.

4. Pursuant to its authority under Section 4151.03, Ohio Revised Code, the Ohio Division of Mines may establish experience requirements, by rule, for temporary mine foremen if such a rule is deemed to be necessary and not inconsistent with the mining laws of this state.

5. A mine foreman may delegate his supervisory duties to non-certified men pursuant to Section 4155.02, Ohio Revised Code but must determine that the individual is capable of performing the duties. The foreman remains responsible for the supervisory responsibilities.

6. In keeping with the legislative intent of the mining laws to provide safe working practices and conditions in mines, the supervision of inexperienced miners required by Section 4155.03, Ohio Revised Code, although undefined, must be a type which will assure the safety of an inexperienced miner in performing his specific duties. Whether or not such supervision is required to be constant supervisions will largely depend on the nature of the work to be performed by the inexperienced miner.

7. The phrases "working with an experienced miner" and "working alone" as used in Sections 4155.03 and 4155.04, Ohio Revised Code, are neither specifically defined nor state of the art words and, therefore, should be interpreted in light of the specific job to be performed, the type of supervision necessary to provide safety, and in keeping with their common usage.

8. There are no standards set out in Section 4155.03, nor any other provision of the Revised Code, to determine when a miner is competent to work alone as that term is used in Section 4155.03, Ohio Revised Code. Again looking to the legislative intent of the mining laws, a miner would be "competent to work alone" when he is capable of safely performing his work alone.

9. There are no provisions other than the requirement of Section 4155.04, Ohio Revised Code, requiring a certified foreman

to supervise a miner once he is determined to be competent to work alone.

10. The provisions of Section 4155.24, Ohio Revised Code, which prohibits an inexperienced miner from working "by himself" when read in pari materia with other provisions of the mining laws indicates that such language was intended to mean that an inexperienced miner must work with an experienced miner until qualified to work alone.

11. The term "miner" as used in Chapters 4151., 4153., and 4155. of the Ohio Revised Code is more inclusive in meaning than "those workers at the face of the mine." A miner, for purposes of the mining laws of Ohio, is any person working in a "mine" as that term is defined in Section 4151.01(A) of the Revised Code.