

Opinion No. 58-204

October 8, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Mr. Matias L. Chacon, State Representative, Rio Arriba County, Espanola, New Mexico

QUESTION

QUESTIONS

1. Is it possible under New Mexico law to employ children under 18 years of age to separate mica, if blasting of said mica is done during periods when there is nobody working, and the mica is subsequently removed from the blasting area to another location nearby for the operation in question?
2. If said children under 18 and all other persons employed to separate said mica, are paid so much per 100 or 200 pounds, would they come under the provisions of the New Mexico Wage and Hour Act?

CONCLUSIONS

1. Yes, provided no children under the age of 14 may be employed.
2. No.

OPINION

ANALYSIS

Section 59-6-6, N.M.S.A., 1953 Compilation, prohibits the employment of children under the age of 18 at or about any place where explosives are used and provides as follows:

"No child under the age of eighteen (18) years shall be employed or permitted to labor in any mine or quarry underground or at or about any place where explosives are used."

If the mica is subsequently removed from the place of blasting to a location where the workers would be in no danger from the blasting operations, the statute, in our opinion, would not be violated. However, the operation in question utilizing children under the age of 14 would be in violation of Article XVII, Section 2 of the New Mexico Constitution which provides that "no child under the age of 14 shall be employed in mines". Section 63-3-1, N.M.S.A., 1953 Compilation, defines a "mine" as follows:

"For the purpose of this act the term 'mine' except where qualified in various sections of this act shall include surface and underground operations to win coal, metals, and other mineral substances from their deposits (exclusive of natural gas or petroleum), all tunnel operations, all caisson operations, all mills, ore houses and treatment plants in close proximity to mine openings, and all quarries, pits, open-cut workings, strippings, placer mines, sand, gravel and similar banks."

It is apparent from a reading of the above statute that the contemplated operation is a mining operation as that term is defined in Section 63-3-1, supra, and therefore falls within the constitutional prohibition.

Your attention is called, to Sections 59-6-1 through 59-6-15, N.M.S.A., 1953 Compilation, which set out certain requirements to be followed in the employment of children under the age of 21, such as maximum hours, labor permit certificates, etc.

Your second question, we feel, can be answered by careful study and analysis of the definition section of the New Mexico Wage and Hour Act. Section 59-3-21, N.M.S.A., 1953 Compilation, (1957 P. S.) provides in part:

"(d) 'Employee' includes any individual employed by any employer, but shall not include --

* * *

(6) Salesmen or **employees compensated upon piecework**, flat-rate schedules or commission basis;" (Emphasis ours)

Standard Dictionaries define piece-work as "work done or paid for by the piece or quantity". See **Calascibett v. Highway Freight Co.**, 18 N.J. Misc. 144, 11 A. 2nd 408, which adopted this definition with approval.

We therefore, conclude that the compensation of employees for the separation of mica on the basis of so much per 100 or 200 pounds constitutes the employment of labor on a piece-work basis and is, therefore, exempt from the requirements of the New Mexico Wage and Hour Act, being Sections 59-3-20 through 59-3-27, N.M.S.A., 1953 Compilation, (1957 P.S.).