

No. A11-1788

STATE OF MINNESOTA

IN COURT OF APPEALS

Daley Farm of Lewiston, L.L.P.,

Petitioner,

vs.

Minnesota Department of
Labor and Industry,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. Was there substantial evidence to support the Assistant Commissioner of the Minnesota Department of Labor and Industry's determination that Petitioner Daley Farm violated the Minnesota Fair Labor Standards Act's requirement to pay overtime compensation to hourly employees who worked in excess of 48 hours per week?

The Assistant Commissioner found that Petitioner did violate Minnesota's overtime compensation statute with respect to the subject employees.

Apposite authorities:

Minn. Stat. §§ 177.23, subd. 7, .25 (2010)

Minn. R. 5200.0211 (2011)

Frieler v. Carlson Marketing Group, Inc., 751 N.W.2d 558 (Minn. 2008)

Wenigar v. Johnson, 712 N.W.2d 190 (Minn. Ct. App. 2006)

- II. Does federal law preempt application of Minnesota's overtime compensation law to Petitioner's employees?

The Assistant Commissioner found that federal law did not preempt Minnesota's law.

Apposite authorities:

29 U.S.C. § 218(a)

Howe v. City of St. Cloud, 515 N.W.2d 77 (Minn. Ct. App. 1994)

STATEMENT OF THE CASE

Respondent Minnesota Department of Labor and Industry (DLI) determined that Petitioner Daley Farm of Lewiston violated the Minnesota Fair Labor Standards Act (Minnesota FLSA) by failing to pay its hourly employees overtime wages for work performed in excess of 48 hours in a workweek. DLI brought a contested case proceeding at the Office of Administrative Hearings (OAH) seeking back wages for the subject employees, liquidated damages, and other relief.

On April 28, 2011, Administrative Law Judge Barbara L. Nielson (the ALJ) issued her Findings of Fact, Conclusions and Recommendation recommending that DLI's Commissioner order Daley Farm to pay the subject employees back pay to compensate them for unpaid overtime and an additional equal amount as liquidated damages. Petitioner's Addendum (Pet. Add.) at 6.

On September 7, 2011, Assistant Commissioner Gary Hall issued DLI's final decision, ordering Daley Farm to cease and desist from failing to pay its employees overtime and to pay its employees back pay and an equal amount of liquidated damages. Pet. Add. at 1. Daley Farm appealed to this Court.

STATEMENT OF FACTS

Daley Farm is a dairy farm near Lewiston, Minnesota. T.78.¹ In 2005, Michelle Dreier, a senior labor investigator with DLI's Labor Standards Division, requested Daley Farm's wage and hour records for its employees for a period from approximately April

¹ "T" refers to the transcript of proceedings before ALJ Nielson on March 29, 2011.

2003 to March 2005 as part of what DLI considers a “self-audit.” T.16-17; Hrg. Ex. 4. Daley Farm submitted an Establishment Information form indicating that it had 41 employees on May 20, 2005, that it engaged in interstate business, and that its gross revenue was in excess of \$500,000. Hrg. Ex. 3. DLI thereafter deemed Daley Farm a large employer for purposes of Minn. Stat. ch. 177. T.20. Daley Farm also gave DLI Minimum Wage/Overtime Computation forms for its employees. *See, e.g.*, Hrg. Ex. 4. Ms. Dreier was unsatisfied with Daley Farm’s response so she changed the self audit to a department audit. T. 23. A department audit involves the DLI investigator reviewing payroll records, timecards, check stubs, earnings statements, and other information necessary to determine whether the employer complied with Minnesota overtime law. T.23-24.

Ms. Dreier used the Minimum Wage/Overtime Computation sheets Daley Farm had filled out to calculate whether Daley Farm owed overtime to its employees. T.28; Hrg. Ex. 4. Ms. Dreier decided that employees such as Joseph Schriber, who were paid the same amount every pay period, were salaried and thus were not owed overtime. T.29, Hrg. Ex. 6-001. Mr. Schriber’s payroll stubs also indicated that he received a “salary.” T.29; Hrg. Ex. 6-001 to 6-025; *see also* Respondent’s Appendix (RA) at 66-67. The payroll stubs for Mr. Schriber did not report the number of hours he worked in the pay period.² T.30; Hrg. Ex. 6-001. This is in contrast to employees Ms. Dreier determined were hourly and not salaried, such as Michael Wolford and Viktor Saenko. Their payroll

² Daley Farm paid its employees twice per month, so paystubs do not reflect the hours worked per week. *See* Hrg. Ex. 5.

stubs indicate they were paid “hourly.” Hrg. Ex. 5; *see, e.g.*, RA15-RA26, RA33-RA52. The number of hours they worked in a pay period were reflected on their payroll stubs and their wages per pay period varied widely from pay period to pay period. Hrg. Ex. 5.

Ms. Dreier was aware of the agricultural exemption to overtime requirements but she did not apply it to Daley Farm’s hourly employees because she believed they were not paid a salary under the definition in Minnesota Rules. T.49. But she did apply the exemption to Mr. Schriber, for instance, because he was salaried and received more than the statutory minimum rate of salary. T.49-50; RA66-RA67.

Using Daley Farm’s Minimum Wage/Overtime Computation sheets to calculate the amount of hours each hourly employee worked in a pay period, and using the pay stubs to verify that they had not been paid overtime for hours worked in excess of 48 hours per week, Ms. Dreier determined the amount of overtime due to Daley Farm’s hourly employees and filled out a Master Sheet reflecting her calculation of back wages due to each. T.21-22, 30-31.

On October 16, 2006, DLI served Daley Farm with an Order to Comply: Labor Law Violation, alleging that Daley Farm violated Minn. Stat. § 177.25 by paying its employees less than time and a half for hours worked in excess of 48 hours in workweek. Petitioner’s Appendix (Pet. App.) at 3. DLI ordered that Daley Farm pay the affected employees back wages. *Id.*

Daley Farm objected to the Order to Comply. DLI issued a Notice and Order for Pre-hearing Conference and referred the matter to OAH for a contested case proceeding.

On or about June 12, 2008, Daley Farm filed a motion for summary disposition.

In support of its motion, Daley Farm submitted the Affidavit of Michelle DePestel. The exhibits attached to her affidavit demonstrated that the subject employees did not receive a fixed salary, rather their pay varied widely from pay period to pay period. *See, e.g.,* DePestel Aff., Ex. B.3. The letter of Daley Farm's counsel also demonstrated that its employees were paid by the hour. Hrg. Ex. 9.

On August 27, 2008, ALJ Nielsen issued her Recommendation and Order on Motion for Summary Disposition recommending that DLI's Commissioner grant Daley Farm's motion and dismiss DLI's Order to Comply. Pet. Add. at 24. She determined that she was bound to follow what she believed was the holding of *Wenigar v. Johnson*, 712 N.W.2d 190 (Minn. Ct. App. 2006), a case in which neither Daley Farm nor DLI were participants and in which the Court did not explicitly address the issues at the root of the instant case. Pet. Add. at 28-29.

On October 6, 2008, DLI filed exceptions, arguing that *Wenigar* was not binding on the Assistant Commissioner and that he should not curtail his enforcement of the Minnesota FLSA absent an explicit ruling on the merits from a Minnesota appellate court. Pet. App. at 70, 73.

On December 22, 2008, Assistant Commissioner Patricia Todd issued the Commissioner's Order rejecting the ALJ's recommendation and denying Daley Farm's motion for summary disposition. Pet. App. at 102. The Assistant Commissioner determined that Minn. Stat. § 177.23, subd. 7(2)'s exemption for workers employed in agriculture and paid a "salary," read in conjunction with the definition of "salary" in Minn. R. 5200.0211 were clear and unambiguous. *Id.* at 108. She found that because

Daley Farm's subject employees were paid on an hourly basis without a predetermined wage for each workweek, they were not excluded from the Minnesota FLSA's overtime provisions as a matter of law. *Id.* The Assistant Commissioner also noted that *Wenigar* was not controlling; instead this Court's decision in *Wiebusch v. City of Champlin*, 2003 WL 21220047 (Minn. Ct. App. May 27, 2003) (unpublished), was the only Minnesota case directly addressing the definition of "salary" under the Minnesota FLSA. *Id.* at 105-08.

At the time of its summary disposition motion, Daley Farm questioned the accuracy of Ms. Dreier's calculations and had submitted copies of Minimum Wage/Overtime Computation sheets to the ALJ. T.33; *see also* Pet. App. at 56; DePestel Aff., Ex. B.1; Sween Aff., Ex. H. Ms. Dreier eventually reviewed the documents Daley Farm had presented with its summary disposition motion and learned that the differences between her calculations and Daley Farm's were due in part to Daley Farm having submitted different versions of the Minimum Wage/Overtime Computation sheets to the ALJ than the ones Daley Farm submitted to Ms. Dreier during her investigation.³ T.35; *compare* Hrg. Ex. 4 with DePestel Aff., B.1.

The case eventually went back to the ALJ for an evidentiary hearing. Before the hearing commenced, Sara Elliott, another senior labor investigator, took over the case. Because of the conflicting Minimum Wage/Overtime Computation sheets submitted by

³ It is not clear why Daley Farm's bookkeeper prepared two different sets of overtime computation sheets or why Daley Farm submitted a different set of sheets to the ALJ than it had provided to DLI's investigator. T.109-19. But it does not appear to have been done intentionally to mislead the ALJ. T.119.

Daley Farm, Ms. Elliott undertook a more thorough review of Daley Farm's records to calculate the overtime wages owed to hourly employees. T.54. With the assistance of another DLI employee, Ms. Elliott reviewed Daley Farm's timecards to calculate the hours worked each week. T.54-55. This was challenging because there was a significant period of time where the time clock malfunctioned and became stuck in the month of March, making the timecards more difficult to interpret. T.56; Hrg. Ex. 7.

Ms. Elliott calculated the number of hours worked in each work week for the hourly employees and checked the number of hours worked and the employees' pay rate against the employees' paystubs to verify whether they were paid overtime. T.59-62. She decided that some hourly employees were not entitled to overtime because they did not work enough hours and she put their records aside. T.63-64. She decided that the subject employees were entitled to overtime pay because they worked more than 48 hours per week and received only their regular rate of pay for the hours over 48. T.63. She determined that the subject employees were not salaried and thus were not exempt because their paystubs indicated they were "hourly" and they earned different amounts every pay period based on the number of hours they worked. T. 63-64. Ms. Elliott summarized her calculations and the amount of back wages due on spreadsheets. T.64; Hrg. Ex. 10. She summarized the total back wages due to each employee on Master Sheets. T.66; Hrg. Ex. 11.

Daley Farm's owner testified that the farm has never paid overtime to its employees because in his opinion he pays his employees "quite well." T.83. Daley also

noted that an employee once sued him in conciliation court and Daley argued that he was exempt and he won the case.⁴ T.83-86.

Michelle DePestel performed Daley Farm's bookkeeping. T.88. She testified that Daley Farm only had three employees who were designated as receiving a salary on Daley Farm's summary payroll records that Daley Farm submitted as hearing Exhibit 101. T.125. They were the only employees who received consistent compensation in each pay period. T.126; *see, e.g.*, RA57-RA67. DePestel testified that none of the employees on whose behalf DLI was seeking overtime pay (the subject employees) received the same pay every pay period. T.126. She admitted that their wages fluctuated based upon how many hours they worked. T.126; *see, e.g.*, Hrg. Ex. 5. Daley Farm argued that some subject employees were paid health benefits, but DePestel testified that Daley Farm only offered health care to full time employees who had worked there for more than three months. T.128-29. Thus a significant portion of the subject employees received no health care.⁵ T.126-128.

On April 28, 2011, the ALJ issued her Findings of Fact, Conclusions and Recommendation, recommending that DLI's Commissioner order Daley Farm to pay the

⁴ The conciliation court case involved an employee who is not one of the subject employees in this proceeding. T.86. Daley Farm had once attempted to use that conciliation court case to argue that the instant enforcement action by DLI was barred by collateral estoppel or res judicata. The Assistant Commissioner rejected that argument in her order denying summary disposition. Pet. App. at 104. Daley Farm has subsequently waived that argument.

⁵ It should be noted that an employer's provision of health care benefits is not grounds for an exemption from the Minnesota FLSA under Minn. Stat. § 177.23. The dollar amount of an employee's hourly wage and other benefits provided are also irrelevant to the (Footnote Continued On Next Page)

subject employees back pay to compensate them for unpaid overtime and an additional equal amount as liquidated damages. Pet. Add. at 6.

On September 7, 2011, Assistant Commissioner Gary Hall issued DLI's final decision, ordering Daley Farm to cease and desist from failing to pay its employees overtime and to pay its employees back pay and an equal amount of liquidated damages. Pet. Add. at 1.

SCOPE OF REVIEW

An agency's final decision may be overturned only upon a showing that it violated the Constitution, was in excess of statutory authority, was affected by an error of law, was unsupported by substantial evidence in view of the entire record as submitted, was made upon unlawful procedure, or was arbitrary and capricious. *See* Minn. Stat. § 14.69 (2010). Deference should be given to the Assistant Commissioner's expertise in administering and enforcing the Minnesota FLSA. As the Supreme Court stated:

When reviewing the agency decisions we "adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." The agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority and judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing. We defer to the agency's conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony.

requirement that the employer pay time and one-half for overtime hours. Minn. Stat. § 177.25.

In the Matter of the Excess Surplus Status of Blue Cross & Blue Shield of Minn. ("Blue Cross"), 624 N.W.2d 264, 278 (Minn. 2001) (footnote and citations omitted). If the ruling by the Assistant Commissioner is "supported by substantial evidence, it must be affirmed." *Id.* at 279. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 274 (quoting *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 668 (Minn. 1984)).

ARGUMENT

The Assistant Commissioner's decision that Daley Farm was legally required to pay its hourly employees overtime is supported by substantial evidence in the administrative record and by applicable law. There is no dispute that Daley Farm employed workers who were paid an hourly rate, who were not guaranteed a consistent wage every pay period, and who worked more than 48 hours in a workweek without receiving overtime pay. Daley Farm does not qualify for an exemption from Minnesota's overtime requirement because those employees were not "paid a salary" as a matter of fact or law.

I. THE MINNESOTA FLSA EXCLUDES CERTAIN AGRICULTURAL WORKERS FROM ITS DEFINITION OF "EMPLOYEE" IF THEY ARE PAID A SALARY RATHER THAN AN HOURLY WAGE.

In the instant case, DLI alleged that Daley Farm violated the overtime provisions in the Minnesota FLSA. Section 177.25 provides:

No employer may employ an employee for a workweek longer than 48 hours, unless the employee receives compensation for employment in excess of 48 hours in a workweek at a rate of at least 1-1/2 times the regular rate at which the employee is employed.

Minn. Stat. § 177.25, subd. 1 (2010). The Minnesota FLSA requires that an employer pay an employee time and a half for any hours worked after an employee has exceeded 48 hours in a workweek. It defines “[e]mployee” as “any individual employed by an employer.”⁶ Minn. Stat. § 177.23, subd. 7 (2010).

The Minnesota FLSA “establishes minimum wage and overtime compensation standards that apply to all employees who are not specifically exempt from the requirements of the Act. *Milner v. Farmers Ins. Exchange*, 748 N.W. 2d 608, 611 (Minn. 2008). Minnesota Statutes Section 177.23, subdivision 7, excludes certain individuals employed in agricultural operations from the definition of “employee” and thus from the overtime pay requirements. Among those individuals excluded are:

- (1) two or fewer specified individuals employed at any given time in agriculture on a farming unit or operation who are paid a salary;
- (2) any individual employed in agriculture on a farming unit or operation who is *paid a salary* greater than the individual would be paid if the individual worked 48 hours at the state minimum wage plus 17 hours at 1-1/2 times the state minimum wage per week.

Minn. Stat. § 177.23, subd. 7 (emphasis added). The Minnesota FLSA thus excludes certain salaried agricultural employees. Daley Farm employed 41 individuals on the farm. DLI’s investigators determined that Daley Farm had three salaried employees who were exempt from the Minnesota FLSA because they were paid a consistent, predetermined wage. No back wages were calculated for those employees. But the

⁶ “Employer” is defined at Minn. Stat. § 177.23, subd. 6 (2010). “Employ” is defined at Minn. Stat. § 177.23, subd. 5 (2010), as “to permit to work.” “Salary” is not defined in the Minnesota FLSA, but it is defined by Minn. R. 5200.0211, subp. 1.

investigators also determined that the employees whose back wages are the subject of this case were paid on an hourly basis and thus were not paid a salary.

Daley Farm has asserted that the second exclusion applied to its hourly employees because it paid its hourly employees amounts that met or exceeded the monetary threshold set forth in Subdivision 7(2). In effect, Daley Farm argues that “salary” as used in Subdivision 7(2) has no particular meaning, despite its definition in Minnesota Rule.

This Court has held that the employer bears the burden of proving that an exemption to the requirements of Minnesota’s overtime law applies. *Becker v. F & H Restaurant Group, Inc.*, 413 N.W.2d 202, 205 (Minn. Ct. App. 1987). Daley Farm failed to prove that Subdivision 7’s exemption for salaried agricultural employees applies to its subject employees. The fact that they are paid by the hour and are not guaranteed any particular compensation per pay period is sufficient, in and of itself, to affirm the Assistant Commissioner’s decision.

A. The Plain Language Of The Minnesota FLSA Requires That Only Certain Agricultural Workers Who Are Paid A Salary Are Exempt From Minnesota’s Overtime Pay Law.

The issue of whether the subject Daley Farm’s workers are subject to the Subdivision 7(2) exclusion is primarily one of statutory construction. The object of statutory construction is to ascertain and effectuate the intention of the Legislature. *See* Minn. Stat. § 645.16 (2010). When the words of a statute are unambiguous, those words must be followed. *Id.* Only when the words of a law are not explicit may a court consider other matters in order to ascertain the intention of the Legislature. *Id.* Where a statute’s language is clear and unambiguous, “further construction is neither necessary

nor permitted.” *Owens ex. rel. Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736 (Minn. 2000). As shown below, the language of the Minnesota FLSA is clear and free from ambiguity and exempts certain salaried, not hourly, agricultural workers from its coverage.

In order for its workers to be excluded from overtime payment requirements under Minn. Stat. § 177.23, subd. 7(2), an employer must prove the following:

1. The worker is employed in agriculture;
2. The worker is employed on a farming unit or operation;
3. The worker is “paid a salary;” and
4. The salary is in an amount greater than 48 hours at minimum wage and 17 hours at 1 ½ times minimum wage.

Minn. Stat. § 177.23, subd. 7(2).

Under Minnesota wage and hour law, a determination of whether an employee is salaried is crucial to a determination of whether an exclusion of an employee from overtime pay is allowed. A look at other exclusions from the “employee” definition is instructive. For example, Minn. Stat. § 177.23, subd. 7(6) excludes “any individual employed in a bona fide executive, administrative, or professional capacity” Even though the definition itself makes no reference to “salary” in that exclusion provision, the rules providing details for these exclusions make it clear that the duties of the employee, the type of payment (salary or fee), and the amount of the payment, are all requirements that must be met in order for the exclusion to be applicable. *See* Minn. R. 5200.0190-.0210 (2011). Another example in the agricultural field is Minn. Stat. § 177.23, subd. 7(1) which excludes, “two or fewer specified individuals employed . . . in

agriculture on a farming unit or operation who are paid a salary.” The salary test is also required for this Subdivision 7(1) exemption to apply.

Other Minnesota appellate cases have directly analyzed the hourly versus salaried distinction in Minnesota labor standards contexts. For instance, in *Wiebusch v. City of Champlin*, 2003 WL 21220047 (Minn. Ct. App. May 27, 2003) (unpublished) at RA68, an employee sued his former employer for accrued comp time. The employer moved for summary judgment, arguing that the employee had been in an exempt position. This Court noted that under both the Minnesota FLSA and the federal FLSA, salaried administrative, executive, and professional employees are exempt employees. *Id.* at *2 (citing Minn. Stat. § 177.23, subd. 7(6) and 29 U.S.C. § 213(a)(1)). The employee asserted that he was not salaried and thus was not exempt. *Id.* The Court quoted Minn. R. 5200.0211, subp. 1, in support of the Court’s statement that “An hourly wage does not qualify as a ‘salary’ under the rules.” *Id.*

In the instant case there was no fact dispute as to the key issue of whether the subject employees were salaried or hourly. It was undisputed that they were paid by the hour. Because they were not salaried, they fell outside the exemption.

B. The Plain Language Of Minn. R. 5200.0211 Provides That A Worker Who Is Paid An Hourly Wage Cannot Be Deemed To Be Paid A Salary.

The Commissioner’s Rules further demonstrate that Daley Farm’s subject employees are not exempt from the Minnesota FLSA. “Salary” is not defined in Minn. Stat. § 177.23. But the Commissioner promulgated a rule defining “salary” for purposes of minimum wage and overtime pay. “Salary” is defined by Rule as follows:

A salary is not an hourly rate. An employee is paid a salary if the employee, through agreement with an employer, is guaranteed a predetermined wage for each workweek. An employee may still be salaried even if complete days absent are deducted from salary for reasons other than no work available. Should those deductions reduce the salary for the workweek below the minimum salary required by Minnesota Statutes, section 177.23, subdivision 7, clause (2), or parts 5200.0190 to 5200.0210, the employer will lose the exemption in that workweek.

Minn. R. 5200.0211, subp. 1 (2011). The Rule was promulgated under Minn. Stat. § 177.28, which provides for the Commissioner to adopt rules, “including definitions of terms, to carry out the purposes of sections 177.21 to 177.44, to prevent the circumvention or evasion of those sections, and to safeguard the minimum wage and overtime rates established by sections 177.24 and 177.25.” Minn. Stat. § 177.28 (2010).

Rule 5200.0211 has the force and effect of law. Minn. Stat. § 14.38, subd. 1 (2010). The Rule clearly and unambiguously provides that a worker who is paid an hourly wage cannot be considered to be “paid a salary” for the purposes of Minnesota’s overtime wage law. In addition, the Rule’s reference to the subject exception makes clear that the Commissioner drafted the Rule’s definition of “salary” with the agricultural exemptions in mind. Minnesota appellate courts accord great weight to an agency’s construction of a statute it administers when the agency promulgates a formal rule. *See U.S. West Material Resources, Inc. v. Commissioner of Revenue*, 511 N.W.2d 17, 20 n.2 (Minn. 1994).

DLI’s Statement of Need and Reasonableness (SONAR) for Minn. R. 5200.0211 also supports DLI’s interpretation of the salary requirement of Subdivision 7(2). The SONAR provides, “This proposed amendment defines salary for the purpose of determining when employees are exempt from the act as either bona fide executive,

administrative, professional employees *or as agricultural workers.*” Hrg. Ex. 12 at 9 (emphasis added) at RA9. The SONAR further refers to “requiring a salary as part of the test to determine when an employee is exempt.” *Id.* The SONAR makes clear that for a worker to be exempt, “the predetermined amount of salary must be for a period of not less than a workweek. To allow an employer to deduct for lack of work in a given day in effect allows the employer to pay by the hour and thus would defeat the purpose of requiring a salary as part of the test to determine when an employee is exempt.”⁷ *Id.*

It should be noted that the exemption at Minn. Stat. § 177.23, subd. 7(2) also parallels the structure of other parts of Minnesota FLSA law that require specific duties, a specific type of payment, *and* specific amounts of payment for an employee to be excluded. *See* Minn. R. 5200.0190-.0210.

The Minnesota FLSA makes clear that an examination of whether an employee is paid a “salary” as defined by Minnesota Rule is critical to a determination of whether an employee is excluded from overtime pay under that law. The governing law clearly provides, “A salary is not an hourly rate.” Minn. R. 5200.0211, subp. 1. Thus the Assistant Commissioner appropriately found that Daley Farm failed to meet its burden of demonstrating that the Minn. Stat. § 177.23, subd. 7(2) exemption applies.

⁷ This mirrors federal law. “Salary basis” is the terminology used by federal wage and hour law to define some workers exempted from that law. Federal law considers employees to be paid on a “salary basis” “if the employee regularly receives each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” 29 C.F.R. § 541.602.

**C. Even If The Statute And The Rule Were Deemed To Be Ambiguous,
This Court Should Construe Minnesota’s Fair Labor Statute Liberally.**

Even if the Court deems the language of Minn. Stat. § 177.23, subd. 7(2), to be unclear or ambiguous, the Court should then utilize the construction of laws provision in Minnesota Statutes and find in DLI’s favor. “The object of all interpretation and construction of laws is to ascertain the intention of the legislature.” Minn. Stat. § 645.16. When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the law;
- (2) The circumstances under which it was enacted;
- (3) The mischief to be remedied;
- (4) The object to be obtained;
- (5) The former law, if any, including other laws upon the same or similar subjects;
- (6) The consequences of a particular interpretation;
- (7) The contemporaneous legislative history; and
- (8) Legislative and administrative interpretation of the statute.

Id.

The wage and hour provisions of Chapter 177 have been found by the Minnesota appellate courts to be remedial in nature. *See Milner*, 748 N.W. 2d at 611 (citing Minn. Stat. § 177.22 and noting that the overall purpose of the Minnesota FLSA is “to ensure ‘compensation standards that maintain workers’ health, efficiency, and general well-being”). And Minnesota appellate courts have consistently held that remedial provisions are to be liberally construed and any provisions disqualifying persons from their protections are to be narrowly construed. *See Garcia v. Alstom Signaling Inc.*, 729 N.W.2d 30, 32 (Minn. Ct. App. 2007); *Jenkins v. American Exp. Financial Corp.*, 721 N.W.2d 286, 289 (Minn. 2006).

1. This Court Should Construe Subdivision 7(2) In Accordance With DLI's Longstanding Application.

Even if Subdivision 7(2) were somehow found to be ambiguous, the Court should not impose Daley Farm's interpretation of the statute on DLI. *See Chevron, USA, Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 843-44 (1984). DLI's interpretation of the Subdivision would still prevail. "An agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature." *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558, 567 (Minn. 2008) (quoting *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988)). In the instant case, DLI's interpretation of Subdivision 7(2) is in accord with both the plain language of the Minnesota FLSA and the purposes of Minnesota's overtime pay law.

2. The Legislative History of Minn. Stat. § 177.23, Subd. 7(2) Reflects The Legislature's Intention To Limit The Application Of The Exemption To Salaried Employees.

It is appropriate to consider the occasion and necessity for the current version of Minn. Stat. § 177.23, subd. 7(2) in determining its effect. *See* Minn. Stat. § 645.16(1). The Legislature's intent was to exempt only workers who are paid a fixed salary and not workers paid an hourly wage. A prior version of the statute exempted "any individual employed in agriculture on a farming unit or operation who is *paid on a salaried basis* an amount in excess of what the individual would be paid if the individual worked 48 hours at the state minimum wage plus 17 hours at 1 ½ times the state minimum wage per week." Minn. Stat. § 177.23, subd. 7(1a) (Supp. 1983) (emphasis added). In 1984, a Minnesota Revisor bill gave Minn. Stat. § 177.23, subd. 7(2) its current language and

numbering. The changes were made for the stated purpose to “remove redundant and obsolete language, to simplify grammar and syntax and to improve the style of language *without causing changes in the meaning* of the laws affected.” 1984 Minn. Laws ch. 628 (preamble) (emphasis added) at RA5. The exemption for agricultural workers was then amended to read as follows: “~~(1a)~~ (2) any individual employed in agriculture on a farming unit or operation who is paid ~~on a salaried basis an amount in excess of what a~~ salary greater than the individual would be paid if the individual worked 48 hours at the state minimum wage plus 17 hours at 1-½ times the state minimum wage per week.” 1984 Minn. Laws ch. 628, art. 4, sec. 1, at RA7. The Legislature clearly intended to preserve the difference in exemption status as between salaried and hourly workers.

3. Other Canons Of Construction Weigh In Favor Of DLI’s Interpretation Of The Exemption.

The Minnesota FLSA should be construed in a manner that furthers its purposes.

The Legislature enunciated the purpose of the Minnesota FLSA as follows:

The purpose of the Minnesota Fair Labor Standards Act is: (1) to establish minimum wage and overtime compensation standards that maintain workers' health, efficiency, and general well-being; (2) to safeguard existing minimum wage and overtime compensation standards that maintain workers' health, efficiency, and general well-being against the unfair competition of wage and hour standards that do not; and (3) to sustain purchasing power and increase employment opportunities.

Minn. Stat. § 177.22 (2010). As the Minnesota Supreme Court explained about the similar federal law, “The purpose of the act is clear, i.e., the legislative intent was to prescribe maximum hours of labor per week. To help effectuate that purpose, the additional burden was cast upon employers of labor to pay overtime if the workman was engaged beyond the statutory limit.” *McMillan v. Wilson & Co., Inc.*,

212 Minn. 142, 145, 2 N.W.2d 838, 839 (1942). Affirming the Assistant Commissioner's decision and determining that an hourly worker is not a salaried worker would further the purposes of Minnesota's overtime pay law.

D. This Court Is Not Bound To Follow The Purported Result In *Wenigar* And Should Not Do So.

Daley Farm has argued that the subject workers were paid more in total during the relevant periods than the minimum amount required for agricultural workers under Minn. Stat. § 177.23, subd. 7(2) and thus they are not “employees” subject to the overtime pay requirements of the Minnesota FLSA. Daley Farm relies on *Wenigar v. Johnson*, 712 N.W.2d 190 (Minn. Ct. App. 2006). As stated above, the plain meaning of the Minnesota FLSA and the Minnesota Rule mandate that “salary” must apply to workers who receive something other than an hourly wage. And Daley Farm's reliance on *Wenigar* is telling, because Daley Farm is forced to rely upon what they seem to argue is an implied holding of that case, rather than any actual analysis from *Wenigar*. *Wenigar* contains no analysis that is relevant to the instant case. The *Wenigar* Court neither reviewed nor cited the law that defines “salary,” nor provided any explicit holding as to whether an hourly employee is a salaried employee.

Wenigar was a factually complicated case, involving a number of legal issues. Johnson, an elderly pig farmer with a number of businesses, employed Wenigar, a 57-year-old man with an I.Q. of 54. Wenigar had a difficult life before being hired by Johnson to perform assorted chores. Wenigar testified that his job included sleeping at the farm as a sort of night watchman. Johnson disagreed with Wenigar as to Wenigar's job duties and work hours. Wenigar testified that the relationship became abusive, with

Johnson teasing and insulting Wenigar because of his low I.Q. and refusing to let him take breaks or vacation. Wenigar also testified that his residence at the farm was uninhabitable, with no heat or air conditioning, and no refrigeration or electrical outlets. Several doctors testified as to the emotional and psychological damage Wenigar incurred, as well as his fear of being terminated by Johnson if he complained. *Wenigar*, 712 N.W.2d at 197-99. Wenigar brought an action against Johnson in district court for disability discrimination under the Minnesota Human Rights Act. He also brought a tort claim for intentional infliction of emotional distress, a claim under the Federal Fair Labor Standards Act, claims under Minn. Stat. ch. 181, and a claim for violation of Minn. Stat. ch. 177. *Wenigar*, 712 N.W.2d at 199.

The district court in *Wenigar* held a court trial and then found that Wenigar was disabled, that Johnson discriminated against Wenigar on the basis of his disability, and that Wenigar was subject to a hostile work environment because of his disability. *Id.* The court also found that Wenigar suffered the tort of intentional infliction of emotional distress and that Johnson violated the Federal and Minnesota Fair Labor Standards Acts by failing to pay Wenigar overtime. *Id.* (The court found that Wenigar failed to meet his burden of showing a violation of Minn. Stat. § 181.13).

On appeal, the Court of Appeals focused on the human rights claim. The only holding in the Court's syllabus was the holding that, under the Minnesota Human Rights Act, a plaintiff may allege a hostile work environment claim based on an individual's disability. *Id.* at 195-96. As this was the only holding articulated in the court's syllabus,

it was presumably the reason the Court decided to publish its decision. *See* Minn. Stat. § 480A.08, subd. 3.

When it came to addressing the fair labor standards claims, the *Wenigar* Court engaged in considerable analysis regarding whether Johnson was employed in agriculture. The Court framed its analysis as if application of both the federal and state statutes depended upon that issue alone. *See Wenigar*, 712 N.W.2d at 200 (noting that Johnson argued that Wenigar was employed in agriculture and that individuals employed in agriculture are exempt from receiving overtime pay). Johnson failed to point out that the Minnesota exemption requires both that a worker be employed in agriculture *and* be guaranteed a steady predetermined salary. *Id.*; *see also* Appellant's Brief, 2005 WL 3973623 (Minn. Ct. App. May 24, 2005).

Wenigar's brief also failed to educate the Court regarding the requirements for an agricultural exemption under Minnesota law. Wenigar's argument regarding the Minnesota FLSA was buried in a lengthy brief, with no separate heading, and the entire argument was only one paragraph long. *See* Respondent's Brief, 2005 WL 3973621 (Minn. Ct. App. June 27, 2005) at *24. In that paragraph, Wenigar argued that the Minn. Stat. § 177.23, subd. 7(2), exemption was raised by Johnson for the first time on appeal. *Id.* Wenigar also argued that he had been paid overtime in the past, thus the exemption did not apply. *Id.* While Wenigar appropriately recognized that the exemption applies only to workers paid a "salary," and while Wenigar implied that a salary was a contract for a fixed dollar amount, Wenigar failed to explicitly so argue, failed to cite any legal authority defining salary, and failed to cite the Minnesota Rule on point. *Id.* DLI was not

a party to the *Wenigar* case and thus had no opportunity to put Minn. R. 5200.0211 before the Court. Johnson's reply brief once again failed to address the requirement that an exempt agricultural worker receive a salary. *See* Appellant's Reply Brief, 2005 WL 3973622 (Minn. Ct. App. June 11, 2005).

The Court briefly referenced the Minn. Stat. § 177.23, subd. 7(2), exemption in its opinion in *Wenigar*. 712 N.W.2d at 204-05. Having already determined via lengthy analysis that the Johnson operation was agricultural, the Court simply quoted the statutory provision in Subdivision 7(2), performed basic mathematic calculations regarding the minimum wage, and compared the resulting sum to Wenigar's total earnings for the relevant periods. *Id.* The Court then concluded, "Because respondent was paid a salary greater than he would have earned if he were paid for 48 hours at the state minimum wage plus 17 hours at one and a half times the state minimum wage per week, he is not an employee for purposes of the state FLSA." *Id.* at 205. The Court treated Wenigar as a salaried employee without reviewing the issue, reviewing the relevant law, or explicitly holding that he was one. The Court failed to engage in any independent legal analysis on the issue, and instead apparently relied upon the parties who had failed to cite the Minnesota Rule or other authorities. The *Wenigar* case involved appellate review of a record after trial. It is possible that there was other evidence, not summarized in the Court's opinion, that led the Court to its conclusion. However, because the Court states in its decision that Wenigar was paid an hourly rate, it is more likely that the Court never considered the issue of how to define "salary" because neither party briefed it as a disputed issue.

In the instant case, DLI asserted that Daley Farm had failed to pay statutorily-required overtime pay to a number of employees. DLI established that the subject employees were paid by the hour, rather than by a guaranteed, predetermined salary. Daley Farm has admitted that its subject employees were paid an hourly wage. Minnesota Rule 5200.0211 provides: “A salary is not an hourly rate.” Minn. R. 5200.0211, subp. 1. The Rule also provides other detail that a salary is a predetermined wage for each work week. *Id.* DLI asserted that because the Daley Farm workers were paid an hourly rate, they could not be salaried, and thus could not be excluded by the Section 177.23, subd. 7(2) exemption. The Assistant Commissioner’s hands were not tied by *Wenigar*. His decision was appropriately governed by DLI’s expertise in the field of labor laws. *See Frieler*, 751 N.W.2d at 567.

As stated above, this Court should apply the plain meanings of the Statute and the Rule and find that Daley Farm failed to meet its burden of demonstrating that the Minn. Stat. § 177.23, subd. 7(2) exemption applies. The *Wenigar* case should not change that result. *Wenigar* does not trump the principles of statutory and rule construction or interpretation. The *Wenigar* Court did not interpret “salary” as used in the Minnesota FLSA--nor was it asked to by the parties before it. Had the issue regarding the definition of “salary” been briefed to the *Wenigar* Court, and had the Court ruled upon that issue, the Court would have presumably followed the analysis as outlined above and would have determined that a worker earning an hourly wage, such as most of the subject workers in this case, cannot be deemed to be “paid a salary” under Minn. Stat. § 177.23, subd. 7(2). Unfortunately, that key issue was neither briefed nor ruled upon in *Wenigar*.

Even if this Court finds that the *Wenigar* Court held that an hourly employee could somehow be considered to be salaried, this Court should not follow that result in the instant case. While the doctrine of stare decisis makes courts reluctant to overturn long-standing explicit precedent that may have been relied upon by parties in their business affairs, courts will not follow a decision made in error. *See Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) (quotation omitted) (noting that the fact that an error was made in the past does not provide grounds for repeating or perpetuating the error). Again, DLI does not believe that *Wenigar* contains an explicit holding or analysis that binds either the Commissioner or this Court in the instant case. But to the extent that an implied holding may be read into the *Wenigar* opinion, this Court could, and should, reach a different result in this case, which presents different facts, different parties, and different legal arguments. This Court should use this case as an opportunity to clarify that the *Wenigar* opinion did not rewrite either Subdivision 7(2) or Minn. R. 5200.0211.

E. The ALJ's Comment Regarding Policy Reasons For *Wenigar* Are Incorrect And Irrelevant.

Daley Farm relies upon the ALJ's comment in her first recommendation that, in her opinion, there is a "rational policy reason" for the *Wenigar* Court's "interpretation of the statute."⁸ Pet. Br. at 16; Pet. Add. at 29. There are several reasons why this is

⁸ In the ALJ's recommendation regarding Daley Farm's summary disposition motion, she failed to address most of the legal issues before her. For instance, she failed to determine what facts must be proven under Section 177.23, subd. 7(2), for there to be an exemption to the overtime pay requirement. She failed to address either the plain meaning of the statute or any possible construction of the statute. She mentioned DLI's Rule, but did not apply it. In fact, she indicated that if she had performed that analysis, she would have found in DLI's favor. After quoting Minn. R. 5200.0211, the ALJ stated, "While it (Footnote Continued On Next Page)

unpersuasive. First, to the extent that this Court should defer to any administrative body, it is the Commissioner, not the ALJ who the legislature empowered to set fair labor standards policy. The ALJ is merely the fact finder, and in this case, there were almost no facts in dispute. Second, the ALJ made her comment after stating that she felt bound by *Wenigar*, and she erred in believing that *Wenigar* was somehow the “law of the case.” Third, the ALJ erred in believing that the *Wenigar* Court had provided any such interpretation where the *Wenigar* Court did not address the issue of whether Mr. Wenigar was paid a “salary” as that term is defined by the Rule and therefore it did not conduct an analysis let alone provide an interpretation of the salary requirement set out in the exemption. Fourth, as also argued above, the language of the Statute and Rule and the public policy codified therein is plain and does not require interpretation based upon the ALJ’s purported policy reason. Finally, the “rational policy reason” articulated by the ALJ misstates how the Statute and Rule work.

Under the Minnesota FSLA, employers are required to pay their hourly employees at least the minimum wage rate for all hours worked in a workweek up to 48 hours and

appears that an hourly worker would be considered an employee subject to the overtime payment provisions if the rule’s definition of “salary” were strictly applied, the Court of Appeals took a different view of the statute in *Wenig[a]r*.” Pet. Add. at 28. The Assistant Commissioner was not bound by the ALJ’s erroneous initial recommendation. See *Matter of Sentry Ins. Payback Program Filing*, 447 N.W.2d 454, 460 (Minn. Ct. App. 1989) (noting that rejection of a hearing officer’s recommendation is not arbitrary and capricious if the agency decision-maker explains why its decision is different). The ALJ’s second recommendation following the Assistant Commissioner’s denial of Daley Farm’s motion for summary disposition determined the amounts due to the subject employees and did not revisit the legal issues already determined by the Assistant Commissioner. Pet. Add. at 6.

overtime at least 1½ times the minimum wage rate for all hours worked in a workweek after 48. The total wages paid an hourly rate employee per workweek is determined by the number of hours he or she works during that workweek. The more hours he or she works, the greater total wages he or she will be paid. The fewer hours he or she works, the less total wages he or she will be paid. On the other hand, an agricultural employee who is paid a salary and not an hourly rate must be “guaranteed a predetermined wage for each workweek” no matter the number of hours worked other than “complete days absent . . . for reasons other than no work available.” Minn. R. 5200.0211, subp. 1.

Contrary to the ALJ’s comments, employers may not simply “call all of their employees salaried” and “pay them less.” The agricultural worker exemption set out in Minn. Stat. § 177.23, subd. 7(2), requires employers to pay a guaranteed predetermined amount, no how many hours worked and that amount has to be at least equal to the wages an hourly worker would be paid if he or she has actually worked a 65 hour workweek at minimum wage. It is not sufficient that the employer pay the employee more than that minimum wage during the weeks the employee worked overtime. The employee must have the benefit of being guaranteed that steady compensation in every workweek.

Daley Farm has attempted to write the requirement that the salaried wage be predetermined from Minnesota law. Daley Farm argues that its employees who consistently work more than 48 hours and receive only their regular hourly rate still make more than they would have made if they had been paid minimum wage and received overtime. The fact that Daley Farm pays some employees substantially more per hour than minimum wage is irrelevant to this case, for this case concerns violation of the

Minnesota FLSA's overtime law, not its minimum wage law. The overtime law has no exception for employers who pay more than minimum wage. Minn. Stat. § 177.25. In order to demonstrate that it met the agricultural exemption, Daley Farm would need to show that it paid its employees a predetermined gross amount of wages per pay period, as it did for salaried employees Schriber and Tews. RA57-RA67. By contrast, the paystubs for subject employees such as Wolford and Saenko demonstrate that their wages varied widely from pay period to pay period, thus they were not salaried.⁹ RA15-RA26, RA33-RA52; Hrg. Ex. 5.

Failure to give effect to the statutory requirement that employees must be paid a "salary" in order for the agriculture exemption to apply will result in agricultural employees losing the benefit of being guaranteed a predetermined total wage per workweek that is in an amount at least equal to the statutory minimum no matter the number of hours worked, while employers will gain the benefit of only being required to pay employees for hours they have work for them to do, and of not being required to pay them overtime for hours they work over 48. The Assistant Commissioner properly adhered to the public policy codified in the Statute and Rule and his decision should be affirmed.

⁹ It should also be noted that while Saenko, by virtue of typically working well over 50 hours per pay period, earned a substantial amount per week, other subject employees such as Wolford usually earned much less and did not receive overtime compensation in the weeks when they worked over 48 hours. RA10-RA56. Daley Farm appears to argue that employees such as Wolford are salaried employees when they work more than 48 hours a week but they are not salaried employees when they work only 25 or 30 hours per week.

II. FEDERAL LAW DOES NOT PREEMPT DLI FROM APPLYING THE MINNESOTA FLSA TO DALEY FARM.

Unlike certain other federal statutes, the federal FLSA contains no express preemption provision, and it does not "occupy the field" of wage and hour regulation. To the contrary, it expressly permits states like Minnesota to adopt more generous wage-and-hour standards for employees. The Federal Fair Labor Standards Act (FLSA) provides:

No provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter

29 U.S.C. § 218(a). State and federal courts interpreting this section have uniformly concluded that Congress intended that the federal FLSA not be read to preempt or otherwise disturb any state or local wage and hour regulations that are more generous than those set out in the federal law. The courts have upheld state laws that provide for higher wage rates, state laws that cover employees that would be exempt under the federal law, and state laws which prohibit deductions that would be permitted under federal law. *See, e.g., Howe v. City of St. Cloud*, 515 N.W.2d 77, 80 (Minn. Ct. App. 1994) (holding that with regard to overtime pay for firefighters on military leave “the FLSA does not prevent a state from applying a more generous overtime or minimum wage law”); *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1418-20 (9th Cir. 1990), *cert. denied*, 504 U.S. 979 (1992) (state could regulate overtime pay for seaman who were exempt under federal law and apply a state overtime law more generous to seamen); *Berry v. KRTV Communications, Inc.*, 262 Mont. 415, 426, 865 P.2d 1104, 1111 (1993) (finding Montana’s overtime law not preempted by the federal FLSA).

For instance, in *Soler v. G & U, Inc.*, 768 F.Supp. 452 (S.D.N.Y. 1991), the federal court decided that, under the anti-preemption provision in the federal FLSA, it was obligated to give effect to a New York state law which prohibited employers from deducting the cost of heating fuel for employee housing from wages required to be paid, despite the fact that such deductions were expressly permitted under the federal act. The court reasoned that, under 29 U.S.C. § 218(a), state law rather than federal law governs if the effect of the state law is that the workers' minimum wage would be higher. *Id.* at 462-63.

More recently, the Minnesota Supreme Court, in *Milner v. Farmers Ins. Exchange*, 748 N.W.2d 608 (Minn. 2008), cited with approval DLI's pamphlet explaining overtime law:

The areas of minimum wage and overtime are subject to dual regulation by the state and federal governments. Minn. Dep't of Labor & Indus., Overtime Law, <http://www.doli.state.mn.us/overtime.html> (last visited May 2, 2008). If the employment falls within the jurisdiction of both state and federal law, the employer must comply with the law that sets the higher standard. *Id.* According to the Minnesota Department of Labor and Industry, for certain employment, Minnesota's overtime laws and regulations set the higher standard. *Id.*

748 N.W.2d at 611 n.1.

Daley Farm recognizes that state law can be “more generous” than federal law. Pet. Br. at 20. Remarkably, Daley Farm argues that this means that state law can be more protective of the rights of *employers*. *Id.* at 21. Daley Farm appears to believe that the state and federal labor standards laws were designed to protect the rights of *employers*, rather than *employees*. *Id.* Daley Farm cites Minn. Stat. § 177.22 in support of this astonishing argument. As explained earlier, Section 177.22 provides that the purposes

of the Minnesota FLSA are: (1) to establish minimum wage and overtime compensation standards that maintain workers' health, efficiency, and general well-being; (2) to safeguard existing minimum wage and overtime compensation standards that maintain workers' health, efficiency, and general well-being against the unfair competition of wage and hour standards that do not; and (3) to sustain purchasing power and increase employment opportunities. Minn. Stat. § 177.22. Daley Farm's attempt to quote part of Section 177.22 out of context does not change the Act's clear purpose of establishing and safeguarding overtime standards to maintain the well-being of *workers* so that *workers* have increased purchasing power and increased opportunities. The Legislature gave the Commissioner and his Labor Standards Division authority to enforce the Minnesota FLSA and to promulgate rules to safeguard overtime rates established by the Minnesota Legislature. Minn. Stat. §§ 177.26-.28 (2010). Daley Farm's proposition that the overtime compensation law was intended to benefit employers is at odds with the entire statutory scheme of Chapter 177.

As the above courts have held, the federal FLSA allows for the states to enact laws that are more protective than the federal law. Therefore, Minnesota's agricultural exemption, which is more limited than the federal agricultural exemption, and results in a greater number of Minnesota agricultural workers having a right to overtime, is not preempted by federal law.

III. THERE IS SUBSTANTIAL RECORD EVIDENCE SUPPORTING THE ASSISTANT COMMISSIONER'S DECISION.

Because the Assistant Commissioner's decision is supported by substantial evidence, it must be affirmed. *See Blue Cross*, 624 N.W.2d at 279. There is no dispute in this case that Daley Farm did not pay its subject workers a salary at a predetermined fixed rate, and instead paid them by the hour. The exemption provided in Minn. Stat. § 177.23, subd. 7(2) does not apply to employees paid on an hourly basis. There is also no dispute regarding the ALJ's determination of the back wages owed, and the Assistant Commissioner's adoption of that determination. Daley Farm should be compelled to pay each of its subject employees the amount of back wages as determined by the ALJ. In addition, there is no dispute that each of Daley Farm's employees are entitled to an equal amount of liquidated damages pursuant to Minn. Stat. § 177.28 (2010). And given Daley Farm's admission to having never paid hourly employees overtime, the Assistant Commissioner's order that Daley Farm cease and desist from that unlawful practice was clearly appropriate. The Assistant Commissioner's decision was supported by all the facts and law and should be affirmed in all respects.

CONCLUSION

For the reasons explained above, Respondent Minnesota Department of Labor and Industry respectfully requests that the decision of the Assistant Commissioner be affirmed.

Dated: 1-23-12

Respectfully submitted,

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