

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Order to Comply:
Labor Law Violation of Daley Farm of
Lewiston

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson at 9:30 a.m. on March 29, 2011, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, MN 55101. The OAH record closed at the conclusion of the hearing.

Kelly S. Kemp Assistant Attorney General, appeared on behalf of the Department of Labor and Industry (Department). Meghan A. Burroughs, Attorney at Law, appeared on behalf of Daley Farm of Lewiston (Daley Farm or Respondent).

STATEMENT OF ISSUES

The issue presented in this case is whether Daley Farm owes back overtime wages and liquidated damages to the employees identified in Exhibit B attached to the Amended Notice of Hearing, and whether any further relief should be ordered.

The Administrative Law Judge concludes that Daley Farm owes the identified employees back pay for unpaid overtime and liquidated damages, but recommends minor adjustments in the amounts to be paid to two employees.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Factual Background

1. Daley Farm is a 3,500-acre family-owned dairy and feed operation located in Lewiston, Minnesota. Daley Farm regularly employs individuals to assist with the farm's operation. It currently employs 43 people, but the number of employees fluctuates on a seasonal basis. These employees perform a

variety of tasks, including milking the cows, caring for the animals, and cleaning the stalls.¹

2. Mark Daley is a partner and the Dairy Manager of Daley Farm.²

3. Mr. Daley's sister, Michelle DePestel, is a partner and the CFO of Daley Farm. Ms. DePestel is also the Office Manager of Daley Farm and has performed the book-keeping and payroll duties for the farm since approximately 2004.³

4. In 2005, Daley Farm employed 41 employees. Its employees were paid twice a month.⁴

5. The Minnesota Fair Labor Standards Act (FLSA)⁵ generally requires that covered employees be paid a minimum wage⁶ and, if they work more than 48 hours in a workweek, they be paid overtime for the extra hours at a rate of at least 1-1/2 times the regular rate.⁷ The Department is responsible for enforcing the FLSA.⁸

6. The Department employs three basic approaches when conducting FLSA investigations: "inform and educate" investigations, Departmental investigations, and self-audit investigations. Under the "self-audit" approach, an employer is given a packet of information and a copy of the statute and is asked to perform a calculation regarding minimum wage and/or overtime paid and any balance due.⁹

7. It is undisputed that Daley Farm pays its employees more than the state minimum hourly wage. Full-time employees receive paid vacation and are eligible to receive milk and beef from the farm. Daley Farm also provides full health care coverage for full-time employees who have been employed at Daley Farm for at least three months.¹⁰

8. Daley Farm has never paid its employees overtime wages. Daley Farm believes its employees are exempt from the FLSA under Minn. Stat. § 177.23, subd. 7(2), because they are employed in agriculture on a farming operation and are paid a salary greater than the individual would be paid if they worked 48 hours at the state minimum wage plus 17 hours at 1-1/2 times the

¹ Testimony of Mark Daley.

² Testimony of M. Daley.

³ Testimony of Michelle DePestel.

⁴ Testimony of Michelle Dreier; Ex. 3.

⁵ Minn. Stat. §§ 177.21–177.35. Unless otherwise noted, all references to Minnesota Statutes are to the 2010 compilation.

⁶ Minn. Stat. § 177.24.

⁷ Minn. Stat. § 177.25.

⁸ Minn. Stat. §§ 177.177.26-177.27.

⁹ Testimony of M. Dreier.

¹⁰ Testimony of M. DePestel; Testimony of M. Daley; Testimony of M. Dreier.

state minimum wage per week. Daley Farm bases its position in part on a 2005 decision in its favor in a conciliation court case in Minnesota's Third Judicial District and a 2007 decision by the Minnesota Court of Appeals involving a different employer.¹¹

9. For the purposes of this case only, the Department stipulated that the employees of Daley Farm for whom back pay is sought were employed in agriculture.¹²

Department's Investigation

10. In 2005, after receiving a complaint regarding the Respondent's overtime practices, the Department assigned Michelle Dreier, a Senior Labor Investigator, to conduct the investigation as a self-audit. Ms. Dreier initially sent a packet of self-audit forms to Daley Farm (including a Master Sheet form and a Minimum Wage/Overtime Computation form) and asked Daley Farm to complete them. Daley Farm filled out the self-audit forms in a manner that indicated the number of hours worked by its employees on a bi-monthly basis and returned the forms to the Department in June of 2005. Because the Department considers a seven-day consecutive period to be a work week, Ms. Dreier asked Daley Farm to repeat the self-audit on a weekly basis. Daley Farm thereafter resubmitted the self-audit forms but did not provide a Master Sheet.¹³

11. After reviewing Daley Farm's second response and supporting materials, Ms. Dreier concluded that the salaried employees all made over the thresholds set forth in the statute and were not owed any overtime, but certain hourly employees were working more than 48 hours per week and were owed overtime. Because some of the materials provided by Daley Farm were difficult to decipher and Daley Farm had not submitted a Master Sheet, Ms. Dreier decided to change the audit approach to a Departmental audit rather than a self-audit. She sent Daley Farm a records request and also sought the names and addresses of its employees.¹⁴ Daley Farm subsequently provided copies of pay stubs and time cards to the Department.¹⁵

12. Ms. Dreier calculated the hours worked by Daley Farm employees during the audit period using a seven-day work week. She deducted from hours worked a one-hour lunch break and any vacation time taken by the employee.

¹¹ Testimony of M. Daley; Testimony of M. DePestel; Exhibit 100; *Douglas v. Daley Farm of Lewiston, LLP*, No. S7-05-39 (Winona County April 15, 2005); *Wenigar v. Johnson*, 712 N.W.2d 190, 197 (Minn. App. 2006). Daley Farm also argues that the State cannot make workers subject to overtime requirements if those workers are exempt under the Federal Fair Labor Standards Act, and contends that the principle of collateral estoppel bars the State's claim.

¹² Stipulation of Department during March 29, 2011, hearing.

¹³ Testimony of M. Dreier; Exs. 1-4.

¹⁴ Testimony of M. Dreier.

¹⁵ Testimony of M. Dreier; Exs. 5-7.

Based upon her review of the materials provided by Daley Farm, Ms. Drier concluded that overtime was owed to certain hourly employees.¹⁶

Procedural History

13. On October 16, 2006, the Department served Respondent with an Order to Comply: Labor Law Violation alleging that Respondent had failed to pay certain of its employees time-and-a-half for all hours worked over 48 in a work week during the audit period of April 1, 2003, to April 1, 2005. The Department also provided Respondent with a copy of a Master Sheet it had prepared showing the amount of overtime due to each employee.¹⁷

14. On March 18, 2008, after attempts to resolve the issues in this matter were unsuccessful, the Department issued a Notice and Order for Hearing and Pre-Hearing Conference initiating this contested case proceeding.

15. On June 12, 2008, Daley Farm brought a Motion for Summary Disposition arguing that its employees are not subject to the FLSA's overtime pay provision. Citing *Wenigar v. Johnson*,¹⁸ Daley Farm argued that its workers were excluded from the definition of "employee" set forth in Minn. Stat. § 177.23, subd. 7(2), because they were paid more on an hourly basis than they would have been paid if they had worked 48 hours at the applicable state minimum wage plus 17 hours at 1-1/2 times the state minimum wage per week. They further contended that they fell within the agricultural worker exemption in the federal Fair Labor Standards Act and Minnesota could not render them subject to overtime requirements. Finally, Daley Farm asserted that the principle of collateral estoppel barred the Department's claim based on a prior conciliation court decision.

16. Oral argument on the motion was heard on July 24, 2008. The OAH record with respect to the motion closed on that date.

17. On August 27, 2008, the Administrative Law Judge issued a decision recommending that the Commissioner of Labor and Industry grant the Respondent's motion for summary disposition and dismiss the Department's Order to Comply: Labor Violation. Based on the holding in *Weniger*, the Administrative Law Judge concluded that the Daley Farm workers at issue in this case were exempt from the overtime requirements of the Minnesota FLSA under Minn. Stat. § 177.23, subd. 7(2).

18. On October 6, 2008, the Department filed exceptions to the Administrative Law Judge's Recommended Order.

¹⁶ Testimony of M. Dreier.

¹⁷ Ex. 8; Testimony of M. Dreier; see also Minn. Stat. § 177.27, subd. 4.

¹⁸ 712 N.W.2d 190, 197 (Minn. App. 2006).

19. On December 22, 2008, Assistant Commissioner Patricia Todd issued an Order in which she did not adopt the Administrative Law Judge's recommendation and instead denied the Respondent's motion for summary disposition and affirmed the Department's Order to Comply: Labor Law Violation. The Assistant Commissioner determined that Respondent's employees are not excluded from the Minnesota FLSA's overtime provisions as a matter of law. On January 25, 2009, Assistant Commissioner Todd issued an Amended Order in which she corrected a typographical error.

20. Respondent thereafter petitioned the Court of Appeals for a Writ of Certiorari to review the Assistant Commissioner's Order. On February 10, 2009, the Minnesota Court of Appeals granted the Department's motion to dismiss the appeal and discharged the writ of certiorari. The Court noted that, if the Commissioner finds an employer violated the FLSA, the Commissioner is required under Minn. Stat. § 177.27, subd. 7, to order the employer to pay the aggrieved parties back pay, gratuities, and compensatory damages (less any amount actually paid to the employee by the employer), as well as an additional equal amount as liquidated damages. Because the award of damages to the employees and the amount of civil penalty and costs, if any, against the Respondent had not been determined, the Court determined the December 22nd Order was interlocutory in nature and the appeal was premature.¹⁹

21. On May 8, 2009, in response to an inquiry from OAH staff, the Department provided the Office of Administrative Hearings with copies of the Assistant Commissioner's decisions and the appellate record.

22. On September 22, 2010, the Department returned the official record in this matter to the Office of Administrative Hearings for further proceedings.

23. On September 23, 2010, the Department issued an Amended Notice and Order for Prehearing Conference. The Amended Notice indicated that the issue of whether the Respondent had violated the overtime requirements set forth in Minn. Stat. § 177.25 was already decided by the Assistant Commissioner's Order. It identified the remaining issues for hearing as (1) whether the Respondent owed back wages/compensatory damages to the individuals identified in Exhibit B attached to the Notice in the amounts identified therein; and (2) whether the Respondent owed an equal amount as additional liquidated damages. This matter was subsequently scheduled for hearing on March 29, 2011.

24. Prior to the hearing, Sara Elliott (then a Senior Labor Investigator for the Department) and Marlene Burges (then a Lead Worker for the Department's Labor Standards Division) used the records provided by Daley Farm to recalculate the amount of overtime due. They used the time cards

¹⁹ Order of the Court of Appeals in *In the Matter of the Order to Comply Labor Law Violation of Daley Farm of Lewiston*, Docket No. A09-112 (Feb. 10, 2009).

provided by Respondent to determine the hours worked by each employee, and the pay stubs provided by Respondent to verify the rate of pay. They based their calculations on a seven-day work week that ran from Sunday to Saturday. Like Ms. Dreier, they did not count a one-hour lunch break or vacation hours in the hours worked by each employee. Ms. Elliott double-checked the calculations in the weeks prior to the hearing and corrected certain errors. Hearing Exhibit 10 provides the Department's best estimate of the amount the Department believes is owed. Hearing Exhibit 11 summarizes the totals from Exhibit 10.²⁰

25. During the hearing on March 29, 2011, the parties noted that some of the materials filed in this matter identify private employee data, such as social security numbers, and requested that those materials be considered to have been filed under seal. The request was granted by the Administrative Law Judge.

Overtime Pay Computation

26. The Department submitted minimum wage and overtime pay computations for Daley Farm employees who worked more than 48 hours in a workweek during the audit period. The Department arrived at these figures by comparing Daley Farm employee time cards with pay stubs and other records. The task was complicated by the fact that for several months during the audit period the Daley Farm employee time punch clock malfunctioned and incorrectly date-stamped every entry as having occurred in March.²¹

27. At the close of the hearing the parties agreed that, with the exception of two employees (Istel DeWet and Gerhard DeWet), the computations in Exhibits 10 and 11 accurately reflect the rate of pay and hours worked by the identified Daley Farm employees. Daley Farm does not dispute the accuracy of the Department's calculations.

28. Based on these calculations and the December 22, 2008, Order and January 25, 2009, Amended Order of the Assistant Commissioner in this matter, the Administrative Law Judge finds that Daley Farm owes the following employees back pay for unpaid overtime in the amounts listed below:

Employee	Amount of Unpaid Overtime Due	Employee	Amount of Unpaid Overtime Due
Ashley Appel	\$50.64	Johannes Badenhorst	\$128.79
Alicia Becker	\$4.01	Andrew Borck	\$65.79

²⁰ Testimony of Sara Elliott; Exhibits 10-11.

²¹ Testimony of M. Dreier and M. DePestel.

Employee	Amount of Unpaid Overtime Due	Employee	Amount of Unpaid Overtime Due
Carol Borck	\$482.76	Ken Borck	\$1,474.18
Lance Christie	\$1,339.55	Sonja Daley	\$414.36
Michelle DePestel	\$182.96	Istel DeWet	\$1,358.49
Gerhard DeWet	\$1,899.30	Brian Duane	\$2,585.61
Steve DuBois	\$731.23	Gina Echeverry	\$180.05
Lisa Ellinghuysen	\$145.73	Joe Filla	\$582.74
Jasmine Garcia	\$156.99	Kamen Georgiev	\$538.05
Courtney Hager	\$14.90	Wendy Henkes	\$8,424.83
Reagan Hulbert	\$78.15	Michael Hyland	\$100.66
Ryan Jacobs	\$798.27	Elena Kravchenico	\$173.66
Yevgeniy Kravchenico	\$333.42	Andrew Lea	\$14.40
Stefanie Kruger	\$3,817.40	Brandon Leuhmann	\$562.50
Christina Mann	\$149.86	Bill McNally	\$464.95
Kyle Mollert	\$2,321.94	Kary Mueller	\$81.10
Christian Oliver	\$2,699.18	Tammy Reps	\$276.28
Kevin Reps	\$114.15	Nichole Rettman	\$1,356.31
Tom Rodgers	\$152.48	Svetlana Saenko	\$365.34
Viktor Saenko	\$4,646.71	Daniel Sass	\$55.05
Steve Schultz	\$610.58	Dean Spaeth	\$357.08
Derrick Swanson	\$11.45	Andrei Tarassov	\$2,891.06

Employee	Amount of Unpaid Overtime Due	Employee	Amount of Unpaid Overtime Due
Vasily Velikarnov	\$1,691.46	Michael Wolford	\$469.03 ²²

29. The evidence at the hearing established that the last two paychecks attributed to Gerhard DeWet in Exhibit 10 for the weeks of May 22 and May 29, 2004, instead should have been attributed to his wife, Istel DeWet. It was undisputed that Gerhard DeWet's last day of employment at Daley Farm was May 15, 2004, and that Istel DeWet began employment with Daley Farm the following week at the same rate of pay.²³ Accordingly, the overtime amounts for those two weeks (\$37.57 and \$11.44) were subtracted from Gerhard DeWet's total back wages due and added to Istel DeWet's total back wages due.

30. As noted in the Conclusions below, the FLSA requires that the Commissioner "shall" also order payment to each employee listed above of an additional equal amount as liquidated damages. Therefore, Daley Farm owes Ashley Appel the total amount of \$101.28, Johannes Badenhorst the total amount of \$257.58, and so on for each employee.²⁴

31. The Department is not seeking a civil penalty in this matter.

32. The Department requested injunctive relief in the form of an order directing Daley Farm to start paying its employees overtime wages.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner are authorized to consider this matter under Minn. Stat. §§ 14.50 and 177.27, subd. 4.

2. Respondent received due, proper and timely notice of the hearing and this matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

²² Exs. 10-11.

²³ Testimony of M. DePestel

²⁴ Minn. Stat. § 177.27, subd. 7.

4. Minnesota Statutes § 177.25, subd. 1, provides, in part:

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 1½ times the regular rate at which the employee is employed.²⁵

5. Minnesota's FLSA defines "employee" as "any individual employed by an employer" but specifically excludes from the definition:

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 week²⁶

6. Individuals who meet the above exemption are also exempted from the FLSA's overtime pay requirements.

7. Minn. R. 5200.0211, subp. 1, defines salary, in part, 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.

8. Because the employees at issue in this matter were paid an hourly wage and not a salary, the Department concluded in its December 22, 2008 Order issued in this proceeding that the employees did not meet the exception described in Minn. Stat. § 177.23, subd. 7, and that they are covered by the overtime wage provisions of the FLSA. The Department concluded further that, by not paying its employees overtime pay, Daley Farm violated the FLSA.

9. If an employer is found to have violated provisions of the FLSA, the Commissioner shall order the employer to cease and desist from engaging in the violative practice and to pay the aggrieved parties back pay, gratuities, and compensatory damages, less any amount actually paid to the employee by the employer, as well as an additional equal amount as liquidated damages.²⁷

10. With the exception of the adjustments made to the compensation amounts calculated for Istel and Gerhard DeWet, the Department has accurately calculated the overtime back pay compensation owed the Daley Farm employees identified in Exhibit B of the Amended Notice of Hearing.

11. Based on its December 22, 2008, Order and the evidence presented at the March 29, 2011, hearing, the Department has established that

²⁵ Minn. Stat. § 177.25, subd. 1 (2005).

²⁶ Minn. Stat. § 177.23, subd. 7(2) (emphasis added).

²⁷ Minn. Stat. § 177.27, subd. 7.

Daley Farm owes the identified employees the overtime wages listed in Finding 28, and an additional equal amount as liquidated damages.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner order Daley Farm to pay each of the subject employees (1) back pay in the amounts listed in Finding 28 above to compensate them for unpaid overtime, and (2) an additional equal amount as liquidated damages.

Dated: April 28, 2011

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Digitally recorded (no transcript prepared).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least ten (10) days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Ken Peterson, Commissioner, Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155, or call the Department at (651) 284-5005, to learn about the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

MEMORANDUM

The Assistant Commissioner has already decided the legal issue presented in this case, and has determined that the FLSA exemption for agricultural workers does not apply to the Daley Farm employees involved in this case. The only issues currently before the Administrative Law Judge are the computation of overtime wages and liquidated damages. During the hearing, Daley Farm agreed that the Department's calculation as reflected in Exhibits 10 and 11 accurately reflected the hours worked and the rate of pay for the identified Daley Farm employees, with the exception of minor adjustments to the amounts calculated for two employees. The recommendation of the Administrative Law Judge sets forth the final calculations, as adjusted.

Although the Department is not seeking to impose an additional civil penalty in this matter, it is seeking an award of unpaid overtime and liquidated damages for the affected employees. Daley Farm alleges that it will be harmed if it is required to pay a penalty above and beyond the amount of unpaid overtime, and will be forced to cut back on building upkeep, feed expenses, or labor expenses. Daley Farm argues that it reasonably relied on court decisions in determining that it did not have to pay overtime, and contends that it would be unfair for the Department to punish it under the circumstances, particularly since it provides ample compensation and benefits to its employees. However, the Minnesota FLSA specifies that the Commissioner "shall" award an additional amount equal to each individual employee's back pay as liquidated damages. Therefore, it does not appear that the Commissioner may waive that award.

The Commissioner has the further authority to order the Respondent to cease and desist from failing to pay overtime wages. Under the circumstances, the Commissioner may wish to consider staying any such order until the disputed legal issues have been resolved on appeal.

B. L. N.