Case No. C079670

COURT OF APPEAL, STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
DIVISION TWO

YORK CLAIMS SERVICE WAGE AND HOUR CASES

On Appeal from Superior Court of the State of California
Sacramento County Coordinated Case No. JCCP4560
Hon. Michael P. Kenny

RESPONDENT'S BRIEF

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SUMMARY OF ARGUMENT

This case comes to the Court following a trial. As such, the Court must affirm the judgment as long as there is any substantial evidence "contradicted or uncontradicted, which will support the judgment." Nordquist v. McGraw-Hill Broadcasting Co., 32 Cal. App. 4th 555, 561 (1995). When "the evidence is in conflict," this Court must "not disturb the trial court's findings" and "must consider the evidence in the light most favorable" to Plaintiffs, giving Plaintiffs "the benefit of every reasonable inference and resolving conflicts in support of the judgment." Id.

Ignoring the prism through which this Court must view the evidence, when York makes evidentiary citations, it cites only evidence it believes supports its position. This York cannot do. "An appellant challenging a factual finding cannot selectively cite only evidence favorable to the appellant. Instead, the appellant must summarize the evidence supporting the judgment and explain why such evidence is insufficient." Bell v. H.F.Cox, Inc., 209 Cal. App. 4th 62, 80 (2012). "An appellant ... who cites and discusses only evidence in her favor fails to demonstrate any error and waives the contention that the evidence is insufficient to support the judgment." Rayii v. Gatica, 218 Cal. App. 4th 1402, 1409 (2013). York cannot attempt to fix this failure in its reply. Reichart v. Hoffman, 52 Cal. App. 4th 754, 764 (1997). When one views the evidence presented at trial according to the appropriate standards, the conclusion reached is that

substantial evidence supports all of the trial court's findings. As such, this Court must affirm the judgment.

To support its cause, York opens its brief with the assertion that "the entire insurance industry routinely classifies claims adjusters" as exempt employees under the administrative exemption. In addition to being devoid of evidentiary citation, this assertion is not true. It is not accurate when one considers either the insurance industry in general, e.g., Jiminez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014)("In 2005, Allstate shifted all of its California-based claims adjusters to hourly status from exempt, or salaried, positions."), or the facts of this case.

York too employs claims adjusters that it classifies as non-exempt even though they perform the same tasks as class members perform. (RT859:26-866:20) Both Plaintiffs also testified that at their claims adjuster jobs both before and after York, at Nationwide, USAA, Liberty Mutual, Allied, and Esurance, their employers classified them as non-exempt. (RT324:7-28; 428:26-430:16).

Hence, the generalization York espouses, i.e., all employees with the title claims adjuster are automatically exempt administrative employees, has no support. Harris v. Superior Court, 53 Cal. 4th 170 (2011), did not espouse this generalization. Rather, Harris "express[ed] no opinion on the strength of the parties' relative positions." Id. at 190. Harris also explained that it was not holding that the production dichotomy analysis used in Bell v. Farmers

Ins, Exchange, 115 Cal. App. 4th 715 (2004), "can never be used as an analytical tool," emphasizing that all its decision stands for is that "in resolving whether work qualifies as administrative, courts must consider the *particular facts before them* and apply the language of the statutes and wage orders at issue." Id. (Emphasis added.)

The Harris instruction is not new. Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 802 (1999), explained that it is not the employee's title that determines exempt status; rather, the "trial court should consider, first and foremost, how the employee actually spends his or her time." The trial court did this. It looked at the actual work performed by class members and found, over and over, that York failed to meet its burden of proof.

York does not mention its burden of proof. Ramirez confirmed that the *employer* has *always* borne the burden of proving an employee's exemption from the overtime laws. 20 Cal. 4th at 794. The application of an exemption "is limited to those employees *plainly and unmistakably* within their terms." Nordquist, 32 Cal. App. 4th at 563 (1995)(emphasis added). As the elements of the exemption are stated in the conjunctive, an employer must prove *all elements*. Harris, 53 Cal. 4th at 182. The employer's failure to prove *even one element* requires the exemption to fail. Nordquist, 32 Cal. App. 4th at 570-74.

At trial, York also ignored its burden of proof. Although the crux of this case is how class members spent their time during their work day, York

did not call a single class member to testify. York contended that "what the employee does is not the issue," asserting that only the employer's expectations matter. (RT939:4-7) York took this position even though it had to establish that during the work day, class members "were primarily engaged in duties which meet the test for the exemption," meaning they performed exempt work more than 50% of their work day. Harris, 53 Cal. 4th at 178, n.3. York presented *no evidence* on this point.

York did not ask a single class member how much time they spent on any task. York did not conduct a survey to determine how class members spent their time. One finds only one citation to this element, on page 42 of York's brief, where York represents: "undisputed testimony showed that claims adjusters spend the 'majority' or at least '75 percent' of their time adjusting claims." The testimony cited does not stand for this proposition. The cited testimony, at RT987:4-23, *does not ask* the witness how class members *actually* spend their time, but asks what York's "expecations" were. York had to phrase the question in this manner because the witness never worked in a California office, never supervised class members, and class members never reported to him. (RT1013:24-1014:25; 1019:4-5; 1020:27-1021:1) This witness had no personal knowledge of how much time class members spent on any task.

York followed this approach with other elements of the exemption. York was also required to prove that class members worked "*only* under

general supervision." York asked no class members any questions on this point. Only Plaintiffs addressed this issue, presenting evidence that class members operated under constant supervision. This Court "must presume that the evidence supports the trial court's factual findings unless the appellant affirmatvely demonstrates to the contrary." Bell, 209 Cal. App. 4th at 80. York's failure to present *any evidence* on these elements is fatal, making its arguments regarding other elements irrelevant.

As for Plaintiffs' burden of proof, York asserts Plaintiffs did not produce substantial evidence of either a policy requiring class members to work overtime or their hours worked. York ignores the evidence Plaintiffs presented and its failure to produce contrary evidence. York's Regional Vice President in charge of California operations testified York *requires* claims adjusters to work overtime as needed. (RT853:14-855:2; 897:3-6) All confirmed this requirement, attesting York expects adjusters to work overtime when needed, including mandatory work on Saturdays. (RT1429:17-21; 1456:2-10; 1485:14-1487:2; 351:3-352:18; 443:23-444:6)

Because it classified class members as exempt, York did not keep records of their hours worked. (RA2362, 2368; RT701:6-11; 814:23-815:19, 837:27-838:21) As such, Plaintiffs had to use an alternative method of proof. Courts explain: "[w]hen an employer fails to maintain records of hours worked, the courts should not penalize employees for an inability to prove the precise number of hours." Anderson v. Mt. Clemens

Pottery Co., 328 U.S. 680, 687-688 (1945). Duran v. U.S. Bank Nat'l Ass'n, 59 Cal. 4th 1, 40-41 (2014), quoting Anderson, confirmed: "when an employer's records are inaccurate or incomplete, the employee carries [their] burden by proving the amount and extent of work performed 'as a matter of just and reasonable inference.' The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. Under this burden-shifting framework, an employer is not allowed to benefit from its own poor recordkeeping."

Faced with a lack of records regarding hours worked, Plaintiffs retained Dr. Dwight Steward to prepare a survey to determine hours worked, a tool routinely used in class actions. Duran, 59 Cal. 4th at 40-41; The Federal Judicial Center's Reference Manual on Scientific Evidence ("Reference Manual"), at pp. 363-367, n. 19-31 (RA2403-2413); Manual for Complex Litigation, 4th ed., section 23.1, p. 613-614 (2014).

York did not contest Dr. Steward's qualifications, (RT1112:8-17; 447:18-451:28) agreed he appropriately designed the survey, that the wording of the survey was acceptable, that a telephone survey was appropriate, and that he surveyed the correct population. (RT1112:18-20,

1113:24-25, 1114:4-10) York did not complain about the response rate, (RT1115:16-18) agreed Dr. Steward conducted appropriate statistical tests to ensure there was no non-response bias, and could not identify any additional tests that Dr. Steward should have run. (RT1115:19-20, 1116:11-17) York did not conduct a survey of its own or present *any evidence* of class members' hours worked.

York's complaint with Dr. Steward's survey was that survey respondents' identities remained confidential. What York fails to address is that in so doing Dr. Steward followed accepted protocol in the scientific community. Reference Manual, p. 417-418. (RA2450-2451) To do otherwise would have violated ethical standards applicable to survey professionals. Id. (citing The CASRO Code, Section A(3); AAPOR Code and Best Practices Section II(D)(6)). Dr. Jon Krosnick, whom York's expert identified as "a leading national expert on survey science, if not the preeminent expert on survey research," (RT1142:12-1143:7) concurred that the industry standard is to keep survey respondent's identifying information confidential. (RA1472-1473)

York's assertion that it was precluded from obtaining this information is not true. York did not seek to obtain respondents' identities from Heffler, the third party who conducted the survey, until the middle of trial. (RT527:26-529:7) It also did not follow the trial court's instruction on how to address this issue with its expert at trial to potentially obtain this

information. (RT531:3-532:1, 536:24-537:4; 613:10-12)

As for the jury trial issue, before trial, the trial court stated it believed that the decision as to the order of proof, i.e., whether to try the equitable claims to the court before presenting any legal claims to a jury, was discretionary with the trial court and that the preference articulated by the appellate courts is to try equitable issues first. (RT255:4-25) York *agreed* with the trial court, stating:

> You do have discretion. You may choose not to try the equitable case first. The upper court has not said you shall try it first. They may say they have a preference. They don't say it is a dictate. With all of that, your Honor, *there is no question you have the discretion to make this decision.* (RT255:28-256:5)(emphasis added.)

The trial court identified the decisions on which it relied: Raedeke v. Gibraltar Savings and Loan Assoc., 10 Cal. 3d 665 (1974); Hodge v. Superior Court, 145 Cal. App. 4th 278 (2006), and Hoopes v. Dolan, 168 Cal. App. 4th 146 (2008). All parties knew these decisions instruct:

> It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury . . . and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury.

Raedeke, 10 Cal. 3d at 671. The decisions emphasize that deciding equitable issues first is the "better practice" because "the trial of the equitable issues may dispense with the legal issues and end the case. In short, 'trial of equitable issues first may promote judicial ecomony.'" Hoopes, 168 Cal. App. 4th at 157.

York cannot tell the trial court one thing and then argue the exact opposite on appeal. As Martinez v. Scott Specialty Gases, Inc., 83 Cal. App. 4th 1236, 1249 (2000), confirmed, "it is axiomatic" that an "argument or theory will generally not be considered if it is raised for the first time on appeal." An appellant waives his right to assert error "by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal." Mesecher v. County of San Diego, 9 Cal. App. 4th 1677, 1685 (1992).

"The arguments available to defendant on appeal are limited by what he argued in the trial court" to "encourage parties to bring errors to the attention of the trial court, so that they may be corrected." Oiye v. Fox, 211 Cal. App. 4th 1036, 1065 (2012). "It is clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal." Id. at 1066. "It would be unfair to allow counsel to lull the trial court and opposing counsel into believing" that a procedure is acceptable "and thereafter to take advantage of an error on appeal although it could have been corrected at trial." Sperber v. Robinson, 26 Cal. App. 4th 736, 744 (1994).

York attempts to employ the strategy the courts forbid. York *agreed* that the trial court had the discretion to decide whether to try the legal or equitable claims first. York also *agreed* that the courts instruct that trying equitable issues first is the better practice. York provided no authority contrary to this proposition. By failing to present the argument to the trial court on which it now relies, and agreeing that the trial court was following the correct procedure, York deprived the trial court of the opportunity to cure any error that may have arisen from its choice. York also deprived Plaintiffs of the opportunity to simply dismiss the legal claim, so that there would be no question as to which claim should proceed first.

The trial court did not make awards that are not recoverable under the equitable claims. The trial court found that York owed class members for unpaid overtime in the amount proved at trial. (AA15, 233) Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 178 (2000), explains: "an order that a business pay to an employee wages unlawfully withheld" is an appropriate restitutionary award under California's Unfair Business and Professions Code section 17200, et seq. The fact that the statement of decision makes reference to damages does not change this fact. Having failed to object to the statement of decision on this ground, and give the trial court an opportunity to cure this reference, York cannot now assert this as a basis for error. Sperber, 26 Cal. App. 4th at 744.

The trial court's award of attorneys' fees and interest was also appropriate. Opposing Plantiffs' motions for attorneys' fees under the equitable common fund theory, York stated: "[b]ecause statutory fees are available here, there is no basis for an additional application for 'common fund' fees." (RA1135:26-27) Statutory fees were available under Labor Code section 2699(g)(1), the Labor Code Private Attorney General of 2004 ("PAGA"), an equitable claim. Although York asserted that the amount of fees requested was excessive, it never argued that Plaintiffs were not entitled to recover fees. (RA1136:12-18) York also never argued that the trial court could not award interest. This is no doubt because trial courts always have the discretionary power to award interest. M&F Fishing, Inc. v. Sea-Pack Ins. Managers, Inc., 202 Cal. App. 4th 1509, 1539 (2012). Again, the failure to present these arguments below bars York from now asserting them. Martinez, 83 Cal. App. 4th at 1249.

The trial court also did not err regarding the penalties awarded for inaccurate wage statements. Labor Code section 226(a) requires employers to furnish wage statements showing gross and net wages *earned* and total hours worked. The trial court found York violated section 226 in two ways. It misclassified class members and did not keep track of hours worked or pay for overtime worked; therefore, it did not depict class members' gross and net wages earned or hours worked. York additionally failed to list all gross wages earned because it did not list accrued vacation.

Section 226 mandates that employers "shall" show gross wages "earned." Labor Code section 200 defines wages as "all amounts for labor performed by employees of *every description*,..." (Emphasis added.) Vacation pay is wages that vests when it is earned. Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774, 779-80 (1982); Paton v. Advanced Micro Devices, Inc., 197 Cal. App. 4th 1505, 1519 (2011). As the accrued vacation was *earned* wages, and York did not list it on wage statements, the trial court properly held this violated section 226.

York had years to prepare for trial. Even though it knew the main issues would be how class members spent their time during their workday and how many hours they worked, York made the strategic decision not to present evidence on either point. York also agreed to procedures the trial court followed, to which it now objects, and failed to object to actions by the trial court of which it now asserts constitute error. The purpose of appellate review is not to reward such strategic decisions. As substantial evidence supports the trial court's finding that Plaintiffs met their burden of proof and York failed to meet its, Plaintiffs request that this Court affirm the judgment.

TRIAL COURT PROCEEDINGS AND EVIDENCE PRESENTED

I. Proceedings At The Trial Court

Plaintiffs filed this action on June 17, 2008. (RA24) The operative complaint presents three causes of action: the first under the California Labor Code for failure to pay overtime; the second under California Business and Professions Code section 17200, et seq., seeking restitution for unpaid wages and injunctive relief; and, the third under PAGA for civil penalties. (AA188-194)

York filed its answer on October 29, 2009, pleading seventy-five affirmative defenses. York did not plead an exemption as an affirmative defense. (RA38-52) York did seek to add this affirmative defense until years later. In March of 2013, the trial court granted York's request to amend its answer to include the administrative exemption as its seventy-sixth affirmative defense. (RA58-59) Although it filed an amended answer to the Johnsons' individual claims, York never filed an amended answer including the administrative exemption as an affirmative defense. (RA478-494)

II. Evidence Presented

A. York's Corporate Structure And Duties Class Members Do Not Perform

York is not an insurance company. It is a third party administrator whose purpose is to handle claims of third parties. (RT743:23-744:9) The

work class members[1] perform is governed by the procedures in York's Quality Assurance Guide ("QAG"), (RA1606-2235) that York requires class members to follow. (RT731:20-732:11)

The QAG states that York's goal is to provide "product" consistency, by adhering to core "product" standards. (RA1609) Mr. Bentz, the branch manager in charge of York's Northern California office, attested that York's product is its claims files and adjusters' job is to maintain the files. (RT773:8-774:4) Class members are at the bottom of York's organization chart, reporting to supervisors and unit managers, who report to branch managers, who in turn reports to vice presidents. (RT825:26-826:5, 954:2-25)

Class members neither set nor have any involvement in the creation of York's policies. (RT792:26-793:21, 944:16-25) Class members do not write or create any of York's manuals. (RT404:22-26, 442:14-18, 1435:14-24, 1456:11-19) York and its clients set the claims handling procedures and class members follow them. (RT828:4-12) Class members do not conduct audits. (RT966:23-967:14, 902:6-12) Class members do not supervise anyone or have any ability to hire or fire employees. (RT793:27-794:1, 794:16-20) They have no job duties relating to human resources or labor relations. (RT795:6-796:5) They have no duties regarding purchasing,

[1] York refers to class members as both adjusters and examiners, using the term interchangeably. (RT720:23-28; 726:10-20)

procurement, computer networking, or databases. (RT794:24-795:3, 795:22-27)

B. York Presented No Evidence That Class Members Spend More Than 50% Of Their Time Performing Exempt Tasks

York never asked class members how much time they spent performing any task. Mr. O'Brian, York's Vice President of Human Resources, confirmed that York never undertook an analysis to determine the duties and responsibilities of the claims adjusters and compare that to any exemption requirements. York never performed any analysis, written or otherwise, of the specific job duties and responsibilities of claims adjusters. (RT819:28-820:17, 946:3-947:12)

C. Class Members Do Not "Customarily And Regularly Exercise Discretion And Independent Judgment"

1. York Requires Adjusters To Follow Strict, Uniform Procedures

York provides all adjusters and examiners, irrespective of whether it classifies them as exempt or non-exempt, with the same training (RT866:16-20) and they perform the same duties. (RT859:26-866:14) Someone above the adjuster assigns the claim. Claims adjusters, irrespective of whether York classifies them as exempt or non-exempt, have no say as to which claims York assigns them. (RT329:12-18, 718:2-22, 1452:21-1453:2)

Before the claim is sent to an adjuster, the intake person inputs all information regarding coverage, i.e., dates of applicable policies, dates of loss, automobile at issue or residence, etc. (RT330:8-21, 727:11-728:19) Supervisors also receive notification of all new claims to ensure adjusters are checking for new assignments. (RT719:12-720:12, 721:28-722:5) York mandates that all data regarding claims be input into Claims Connect, its electronic system, and instructs claims adjusters to check several times per day for new assignments. (RT721:2-25)

York requires all adjusters to follow the same steps when they receive notification of a new claim. The first step is to check client instructions, as each client provides instructions regarding how it wants York to handle its claims, from which claims adjusters cannot deviate. (RT328:3-329:9, 434:6-21, 724:14-725:8, 1402:13-15) The next step is what York calls "confirming coverage." While York attempts to make much of this task, it is a straightforward process, essentially checking the accuracy of the initial information input into the system. For example, in a claim involving a vehicle, the adjuster checks the vehicle's make, model, and VIN. Once the adjuster takes this step, York requires them to note having done so in Claims Connect. (RT411:22-412:7, 727:11-729:19, 1028:1-10, 1503:16-28)

The next step is for the claims adjuster to attempt to contact parties and/or witnesses and take statements. The first attempt at contact must be

made within 24 hours. Adjusters must document all contacts in Claims Connect, even failed attempts. (RT335:9-23, 437:9-19, 774:18-775:2, 1038:11-1039:6, 1043:18-1044:5, 1412:11-18, 1453:21-1454:5, 1478:3-22)

While York places much emphasis on adjusters taking statements, the evidence establishes that there is nothing about this process that constitutes an exempt task. First, this was done in a very small amount of the claims. (RT438:2-8; 664:18-23) Second, taking a statement at York means claims adjusters ask the person questions that are provided by York and writes down the answers. All York adjusters, irrespective of their exempt status, perform this task and input the content of the conversation into Claims Connect. York provides lists of required questions for claims adjusters to ask, which vary only by type of claim and the person to whom they are speaking. (RT398:15-17, 405:17-406:5, 437:20-438:1, 664:25-665:6, 1454:6-12, 1479:11-28, 1494:7-12)

York gives adjusters strict deadlines by which they must respond to communications: five business days for written communications, and one business day for telephone contact. (RT1412:24-27, 1414:9-26) York expects adjusters to comply with all deadlines. (RT783:13-26) York also gives specific writing instruction, dictating that adjusters must use proper grammar, avoid opinions, and avoid usage of acronyms and abbreviations. (RT1415:4-12)

York and its clients dictate what documents claims adjusters must obtain. If there is a police report, claims adjusters must request it. If there are bodily injuries, adjusters must keep track of medical reports and bills. (RT335:26-336:8, 410:1-3, 671:4-14, 1045:10-17, 1454:13-27) Adjusters must run all claimants through the ISO index. (RT775:3-19) If there is vehicle or property damage, adjusters must instruct the insured to go to a pre-approved appraiser for a damage assessment, as claims adjusters do not make these estimates. Either the client selects the appraiser, or the adjuster chooses an appraiser from York's approved list. Adjusters cannot select a vendor that York has not pre-approved. (RT336:14-338:9, 387:28-388:14, 406:6-407:6, 414:1-9, 438:13-439:1, 689:16-25, 1045:10-28; 1481:22-28)

York required claims adjusters to draft Claims Management Reviews ("CMRs") at prescribed intervals. The QAG mandates what information CMRs must contain, with some of it auto-populated, down to the captions and dates. Supervisors must approve all CMRs. (RT1048:3-15, 1050:6-1051:9, 1052:20-1053:4, 1406:14-1407:9) Adjusters cannot send out denial or reservation of rights letters without approval from both the supervisor and the client, and must include client-supplied language. (RT1400:12-1402:12)

Once claims adjusters complete these prescribed steps, his or her duty is to close the file. While York focuses on what it calls the adjuster's ability to "settle cases," the evidence established that adjusters can not

settle a case for whatever amounts they please without supervisor approval. (RT1407:10-25)

Plaintiff Green's supervisor required her to review every claim with the supervisor. Plaintiff Green's supervisor would advise her on what step to take next. On bodily injury claims Plaintiff Green handled, she had no ability to determine if medical bills were appropriate. Ms. Green's supervisor would instruct her to send medical records to a third party that would determine whether costs were appropriate. (RT341:3-14, 342:10-14) Plaintiff Green could not take any steps to resolve a claim without her supervisor's approval. (RT338:16-339:19, 341:24-342:15, 343:6-20, 402:21-27, 411:1-17) Plaintiff Green did not engage in settlement negotiations with claimants and had no dealings with lawyers. (RT400:6-11, 402:21-27, 342:15-17)

York ignores Plaintiff Williams' testimony where she explained that her "settlement authority" was constrained by the dollar amount on the damage estimate submitted by the claimant. If the damage estimate was within her settlement authority, she could issue a check to the claimant *only for the amount on the estimate*. Plaintiff Williams was clear that if the claimant desired some other amount of money, even if that amount was within her authority, she needed to obtain approval from her supervisor. If the estimate was over her authority, she had to obtain supervisor approval. (RT441:4-442:8, 688:18-689:15)

On bodily injury claims Plaintiff Williams handled, she was instructed to obtain the medical bills and apply a settlement formula provided by her supervisor, essentially a multiplier, to the total dollar amount of the bills. (RT660:9-661:17) Ms. Williams explained the extent of her "negotiating with claimants" was limited to "on occasion [she] would offer to settle claims pursuant to the client's specific instructions and within her $5,000 limit, or with supervisor approval." (AA239) If a lawyer was involved on behalf of the claimant, which happened rarely, Ms. Williams was required to consult with her supervisor as to all interactions. (RT442:24-443:22, 664:2-11, 658:28-659:5) York has a separate litigation team that supervises all litigated claims. (RT715:24-27; 758:20-759:6) Ms. Williams explained that the only decisions she made that were not constrained by York were decisions as to which task to do first: return voicemails or make contact on new claims. (RT665:16-666:5)

2. York Reinforces Its Strict Adherence To Procedure Through Its Audits

York conducts frequent claim file audits to ensure adjusters are doing what the clients want. (RT902:13-22) York's requirements for the claims files are in the QAG. (RT732:8-11, 1016:5-12) York's purpose in having the QAG standards is to "establish product consistency" across all claim files because York demands that adjusters handle all claims in a consistent manner. (RT773:8-774:7) York uses audits to evaluate adjusters' job

performance. (RT763:5-27; 1482:14-20) There are over 40 areas that auditors review to determine whether the file meets standards. (RT1034:1-1035:25)

One of the areas in which auditors grade a file is "effective supervision," for which auditors review supervisors' file notes as well as the supervisor's diary, to ensure supervisors provide the required guidance and enforce deadlines. (RT1041:15-1043:17) The auditors look for minutiae such as whether supervisors approved CMR forms, (RT1048:3-26) score whether adjusters make contacts at proscibed times, (RT1038:11-1039:6, 1043:18-1044:5, 1412:1414:26) look for timely and accurate file notes, (RT1038:17-1039:14, 1044:6-15, 1049:3-15, 1414:27-1415:3) and confirm that adjusters use proper grammar, do not express opinions, and do not use acronyms or abbreviations. (RT415:4-12) The QAG instructs adjusters to obtain and upload required documents into the claim files, such as police reports and damage appraisals. This, too, is an area by which auditors score the file. (RT1482:14-1484:6)

D. Class Members Do Not Operate "Under *Only* General Supervision"

1. Supervisors Constantly Supervise Class Members

Supervisors and claims adjusters interact constantly throughout the day, working in close proximity to each other on the same floor, with adjusters in cubicles on the open floor and supervisors typically in nearby

offices. (RT334:26-335:8, 430:28-433:11, 1436:4-21, 1452:1-16, 1480:5-19) Plaintiff Green testified that she was required to meet with her supervisor throughout the day to review every claim assigned to her. (RT331:18-333:28, 365:17-18, 386:9-23) Plainitff Williams had frequent daily contact with her supervisors about pending claims. (RT434:22-435:4; 439:19-440:8) Class member Morgan spoke to her supervisor "pretty much all day long" and class member Aschinger spoke to her supervisors throughout the day on a daily basis about pending claims. (RT1452:17-20, 1480:1-4) Supervisors' notes came in "all day every day." (RT352:7-9)

2. York Requires Supervisors To Exercise "Effective Supervision" Over The Class Members

As stated, York's audit standards include a category called "effective supervision." Each file must reflect "effective supervision" by the supervisor. (RT1408:25-1409:7, 1043:9-17) "Effective supervision" requires evidence of supervisor's guidance on every aspect of the claim. (RT1410:3-1411:17) Supervisors have access to adjusters' files and demonstrate effective supervision through their file notes in each file. (RT767:16-24, 778:28-779:10, 1041:9-1043:1, 1436:26-1437:11) Supervisors also maintain their own diaries for each adjusters' file to ensure each claim receives proper attention. (RT723:1-25)

The supervisors' file notes are not just for show for the auditors. York required adjusters to follow supervisors' instructions set forth in the

claims file and to document having done so in Claims Connect. (RT351:9-352:16, 439:19-440:8, 1408:3-24, 1480:20-1481:7)

3. York Strictly Monitors Class Members' Work Hours

York strictly monitored class members' work day. This monitoring included requiring set start and end times, forbidding class members from working through lunch, requiring class members to "make up" time if they did not meet alloted time requirements, deducting time from accrued sick or vacation days, and, in some instances, docking pay if class members did not work the minimum hours. (RA2391, 2393, RT839:20-840:13)

York expects adjusters to work a minimum of 40 hours per week and be at the office during regular business hours. (RT734:15-26, 826:7-10, 837:27-839:12; 945:2-5) Any adjuster who seeks a different schedule must obtain supervisor's permission. (RT848:10-16) Class members confirmed that York expected them to work at least 40 hours per week, and that York required them to make up time if they did not reach this minimum. Class members likewise attest that supervisors required them to ask permission to be absent from the office for any period of time, no matter how minor. (RT343:21-350:3, 1455:11-1456:1, 1484:16-1485:13; RA2375-2377)

Plainitiff Green's supervisor told her York would dock her pay if she did not make up time to assure she worked at least 40 hours per week. (RT361:4-10, 363:18-364:1, RA725-726) Plaintiff Green received a

disciplinary write up for failing to make up time and for arriving at work after the set start time. (RA2376) Plaintiff Green's supervisor told Green that she could not skip lunches to make up her "missed" time. (RA2393; RT344:16-345:23) These policies applied to all class members. A former branch manager instructed five supervisors that she wanted to make sure that: "if someone in your unit is coming in late (more than 15-30 minutes) that you are documenting it and having the time made up." (RA2391)

E. York Does Not Require Special Experience Or Licensure Prior To Hire, And Class Members Perform The Same Work Irrespective Of Any Subsequent Licensure

To be an adjuster at York, one need not have any prior experience. (RT732:26-733:26) One need not possess any licenses prior to hire, and any licensure requirements apply equally to class members and adjusters whom York classifies as non-exempt. (RT867:16-868:1-8)

None of the class members who testified at trial possessed a license prior to hire. (RT325:24-326:1, 353:18-19, 368:17-18, 430:17-27, 1451:10-12, 1474:24-27) Some had no prior experience adjusting claims or even insurance generally prior to their hire. (RT1450:5-1451:20, 1473:17-1474:8-13) Many never held a California adjuster's license. (RT325:24-326:1, 353:18-23, 368:17-18, 1451:19-28, 1472:9-12, 1474:24-1475:2) Plaintiff Williams worked at least six months at York prior to obtaining her California license, and did the same work *irrespective* of whether she held the license. (RT668:19-669:10)

F. Class Members Did Not Perform Work Pertaining To York's Management Policies and Business Operations

To the extent York addressed this element, it elicited testimony on York's expectations as opposed to what work class members actually performed. York attempts to dress up the work class members perform by arguing that they made "recommendations" to management and are therefore exempt. When asked, however, class members testified that they did not do this. (RT659:6-16; 666:13-21)

The same is true with respect to "negotiations." Although York argues that class members engaged in negotiations, the evidence does not support this assertion. Plaintiff Green attested that when it came time to resolve a claim, her supervisor instructed her on what to do, and that she did not negotiate with claimants. (RT338:16-340:3, 400:6-11, 401:1-7, 401:22-402:4) Plaintiff Williams explained that the resolution of claims was based solely on the amount of the damage estimate received; any attempt by a claimant to deviate from this amount had to be done with the supervisor's approval. (RT441:4-442:8, 688:18-689:15)

York's attestation that class members meet this requirement because they "settle" claims or "interview" witnesses is inapplicable. Plaintiff Green was resolute, explaining: "I didn't settle the claim for York. I was instructed how to settle the claim for York." (RT401:1-7, 401:26-402:4) Green explained that she did not have the authority to settle claims for

York, (RT402:21-27) and that no check could be written to settle any claim without getting supervisor approval. (RT411:14-17). As for interviewing witnesses, all attest that when this occurred, the "interview" consisted of asking questions provided by York. (RT438:2-8, 398:15-17, 405:17-406:5, 437:20-438:1, 664:25-665:6, 1454:6-12, 1479:11-28, 1494:7-12)

G. York Required Class Members To Work Overtime As Needed, But Failed To Keep Records of Hours Worked

York required class members to work *a minimum* of 40 hours per week and 8 hours per day, (RT344:6-15; 734:18-26; 826:7-10; 837:27-838:13; 1484:16-21; 1455:11-16), to work overtime as needed (RT853:14-854:25; 897:3-6; 350:5-351:8; 359:14-16; 408:1-24; 443:23-444:6; 1425:18-23; 1456:2-10; 1486:13-16; 1486:27-1487:5), and, never paid class members for overtime worked. (RT937:8-18) York did not keep records of class members' hours worked. (RA2362, 2368, RT838:9-21)

H. The Survey Dr. Steward Prepared

Because York kept no records of class members' hours worked, Dr. Steward prepared a survey to be conducted of the *entire* class to determine hours worked. He did not conduct a stastical sample as was present in Duran. (RT468:11-27)

Dr. Steward was qualified to create the survey. (RT447:18-451:28) Jeffrey Petersen, PhD, whom York called to challenge the survey, admitted this. (RT1112:8-17) Dr. Peterson agreed that Dr. Steward appropriately

designed the survey instrument, the wording of the instrument was acceptable, a telephone survey was appropriate, and the correct population was surveyed. (RT1112:18-20, 1113:24-25, 1114:4-10)

Following industry standards, Dr. Steward instructed that a third party conduct the survey. This entity would then provide the results of the survey, without survey respondents' identities, to Dr. Steward so that he could perform calculations. Dr. Steward interviewed Heffler to make his own independent analysis as to whether Heffler had the infrastructure and resources necessary to perform the survey. (RT469:21-470:8; RA1412-1413)

York states that Heffler asked class members interview questions "shortly after class members received the class notice." (OB21) This is not true. The trial court entered the order granting class certification on September 7, 2012. (AA199) Pursuant to the order, which attached the class notice, York had to provide the contact information within ten (10) days of entry of the order so that notice could be sent to the class. (AA199) Hence, notice was sent to the class in September of 2012. As York's Exhibit JJ establishes, Dr. Stewart had not completed the survey documents as of June of 2013. (RA2513) Heffler could not have contacted class members regarding the survey until after this time, some ten (10) months after class members received the class notice.

Heffler attempted to contact the entire class population York

identified. Given the entire population was surveyed, and a statistical sample was not used, the issues in Duran pertaining to the representative nature of a *sample* population were not at issue. (RT468:14-23) The survey questionnaire does not refer to any "potential recovery." (OB22) Rather, Heffler asked the class members about their hours worked. (AA244-251) Heffler kept the responding class members' identifying information confidential, not transmitting it to Dr. Steward. (RA1412-1413)

Dr. Petersen agreed that keeping the identity of survey respondents confidential "is appropriate in the vast majority of the surveys conducted." (RT1120:7-1121:7) The scientific literature also establishes that Dr. Steward conducted the survey in accordance with established survey science standards. (RT463:13:467:4, 467:19-22; RA569, 1296-1297, 1472-1473, 2450-2451)

I. The Survey Results

53.28% of the class, or 65 class members, responded to the survey; (RT476:12-478:1) an excellent response rate of which Dr. Petersen had no complaint. (RT1115:16-18) Based on the survey responses, Dr. Steward determined that the average number of overtime hours worked per week was 8.61 hours, a number that he computed after following standard procedures and removing outlier responses. Through this process, those reporting 80 hours worked per week were not included in the average. (RT478:27-480:12, AA253)

The applicable confidence interval is 7.2 hours to 9.71 hours of overtime, meaning Dr. Steward is 95% certain that the average number of overtime hours worked is within this range. (RT480:13-481:18, 608:18-27) The average is consistent with the number of overtime hours both Plaintiffs attested they typically worked. (RT350:5-7, 351:3-8, 443:23-444:8)

York asserts that the survey responses reveal that some class members "stated that they did not work any overtime at all." (OB 22) This is not accurate, as the survey reports what class members worked "on average" per week. Working an average of 40 hours per week does not preclude class members from working overtime, it just means that the average, considering all weeks, was 40 hours per week for a few.

Dr. Steward conducted industry standard testing on the results to ensure there was no non-response bias and no statistically significant differences among the respondents (RT474:10-476:11, 608:28-609:15) and ran tests to assure the respondents were representative. (RT475:19-476:11) Dr. Petersen could not identify any additional tests Dr. Steward should have ran. (RT1115:6-1116:17)

Dr. Steward used the class data York produced to multiply the average number of overtime hours per week, 8.61, by class members' applicable rates of pay and periods of employment to determine the overtime wages owed and calculated applicable penalties. (RT481:19-483:5; RA1201-1208). The only calculation Dr. Petersen performed was to check

Dr. Steward's calculation of the average overtime hours worked, which he agreed was correct. (RT1108:12-1109:1)

J. York Did Not Seek Respondent's Identifying Information Until Trial

York states it "attempted to obtain through discovery allowing it to match respondents with their identities, but Plaintiffs refused to provide such information," citing AA165. (OB22) This is not true. York never addressed such a discovery request to Plaintiffs. York never asked Heffler to produce the identifying information. York cites to the deposition notice of Dr. Steward. Dr. Steward attests that he never possessed the respondent's identifying information. (RA164-166)

York did not request to obtain the respondents' identifying information from Heffler until the middle of trial, asserting it was surprised to learn the information existed. (RT527:26-530:7) As the interview script makes clear that Heffler possessed the identifying information, the trial court stated it seemed "somewhat patent to this Court that, in fact, there is raw data and that it has existed for some substantial period of time," (RT531:3-532:1) iterating it was incumbent on York to seek this information before trial. (RT531:12-533:18) When queried by the trial court as to why it did not conduct further discovery on this issue, York's counsel admitted: "we talked about it," but decided not to take further action. (RT532:12-27)

The trial court did bar York from conducting further inquiry into this

area. The trial court deferred deciding the issue, telling York's counsel: "If you want to lay a further foundation for why you believe this is such a surprise when you have your expert on the witness stand, ask your expert about raw data and its existence and we will see what your expert says." (RT536:24-537:3) Later, the trial court again stated: "As I previously indicated, bring Dr. Petersen in and if you can show there is some measure of surprise, then you can pursue it." In response to this instruction, York's counsel said "Okay." (RT613:10-13) York failed to follow up on this line of inquiry.

K. Proceedings Following Trial

The parties submitted voluminous post-trial briefing, (AA133-171; RA497-1592) including Plaintiffs' requests for attorneys' fees. (RA904-925, 1112-1131, 1210-1220, 1222-1232) York never argued Plaintiffs were not entitled to recover attorneys' fees. Objecting to Plaintiffs' request for attorneys' fees under the common fund theory, York stated: "[b]ecause statutory fees are available here, there is no basis for an additional application for 'common fund' fees as well." (RA1135:26-27) York's arguments opposing Plaintiffs' requests pertained *solely* to its assertion that the fees were excessive. (RA1150-1154)

Plaintiffs submited a proposed plan of distribution and a proposed judgment. Both set forth recovery for attorneys' fees, under statutory and equitable grounds, and interest. (RA754-762, 2515-2591) In its objections

to both, York never asserted that Plaintiffs were not entitled to recover interest or attorneys' fees. (RA839-902)

STANDARD OF REVIEW

Determining whether an employee is exempt is a "mixed question of law and fact." Ramirez, 20 Cal. 4th at 794. "Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence." Heyen v. Safeway, 216 Cal. App. 4th 795, 817 (2013). The appellate court's "authority begins and ends with a determination whether, on the entire record, there is any substantial evidence--that is, of 'ponderable legal significance,' reasonable, credible and of solid value--contradicted or uncontradicted, which will support the judgment. As long as there is such evidence, we must affirm." Norquist, 32 Cal. App. 4th at 561.

When "the evidence is in conflict, the appellate court will not disturb the trial court's findings. The court must consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment." Id. (Citing Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 507 (1979)). "If the appealed judgment or order is correct on any theory, then it must be affirmed regardless of the trial court's reasoning, whether such basis was actually invoked." Hoover v. American Income Life Ins. Co., 206 Cal. App. 4th 1193, 1201 (2012).

ARGUMENT

I. Analytic Framework For Addressing Exemptions

"In light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." Ramirez, 20 Cal. 4th at 794; Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 340 (2004). "Under California law, exemptions from statutory mandatory overtime provisions are to be narrowly construed." Ramirez, at 794. Courts *must* interpret statutes governing the conditions of employment broadly "in favor of protecting employees." Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004, 1053, 1026-27 (2012).

II. Plaintiffs Met Their Burden of Proof

Plaintiffs had to prove by a preponderance of the evidence: (1) class members worked for York during the class period; (2) the number of hours class members worked; (3) York did not compensate class members for overtime hours worked; and, (4) the loss arising from York's failure to compensate the class for hours worked. Heyen, 216 Cal. App. 4th at 811.

York' attack regarding Plaintiffs' prima facie case is the method of proof Plaintiffs used to present hours worked, asserting Plaintiffs did not show York had a "policy" of requiring overtime, or present any evidence, besides Dr. Steward's survey, that the class worked overtime. The record

belies this assertion.

York required class members to work a *minimum* of 40 hours per week and 8 hours per day, to work overtime as needed, did not pay class members for overtime worked, and did not keep records of class members' hours worked. *See* s*upra*, p.15, 17. As Duran explained, because York did not keep records of hours worked, Plaintiffs had to use an alternative method to prove the "amount and extent" of the work performed.

Plaintiffs' method of proof is not new. Both Dr. Krosnick, a leading expert on survey science, the courts, and treatises confirm this truism. (RA1465-1471, RA2403-2407). Duran recognizes that courts permit the use of statistical methods to present evidence of hours worked when employers fail to maintain records of employees' hours worked. Id. at 40-41 (citing Anderson). Courts allow this proof because: "[w]hen an employer fails to maintain records of hours worked, the courts should not penalize employees for an inability to prove the precise number of hours." Anderson, 328 U.S. at 687-688.

Anderson emphasized: "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the

reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, *even though the result be only approximate*." Id. at 687-88 (emphasis added).

To penalize Plaintiffs for York's failure to keep hours worked "would place a premium on [its] failure to keep proper records in conformity with [its] statutory duty; it would allow [York] to keep the benefits of [class members'] labors without paying due compensation…" 328 U.S. at 687. Plaintiffs produced "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." The burden shifted to York "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." This York failed to do. Given York's failure, the trial court had discretion to award damages "even though the result be only approximate." Id. at 687-88. Duran affirmed this approach. 59 Cal. 4th at 40-41.

Other California courts concur. See Hernandez v. Mendoza, 199 Cal. App. 3d 721, 726-728 (1988)(quoting Anderson); Aguiar v. Cintas Corp. No. 2, 144 Cal. App. 4th 121, 134-135 (2006) (quoting Hernandez); Ghazaryan v. Diva Limousine, Ltd., 169 Cal. App. 4th 1524, 1536 n. 11 (2008) (citing Aguiar); Brinker, 53 Cal. 4th at 1053, n.1, 1054 (citing Anderson, reminded California courts: "[r]epresentative testimony,

surveys, and statistical evidence are all available as tools to render manageable determinations…"); Sav-On, 34 Cal. 4th at 333; Bell v. Farmer's Ins. Exchange, 115 Cal. App. 4th 715, 747 (2004)(citing Anderson, upheld statistical proof of hours worked.)

Nothing in Tyson Foods, Inc. v. PEG Bouaphakeo, et al., 136 S. Ct. 1036 (2016), changes this reality. Upholding the use of representative testimony to established hours worked, Tyson embraced Anderson's holding which explained that the "'remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'" Tyson, at 1045, 1047, (quoting Anderson, at 687).

The question is not whether surveys are the type of evidence that is admissible, the focus is whether the survey is administered according to recognized standards in the scientific community. Dr. Steward's work does just that.

The Reference Manual addresses this issue, stating: "[t]he respondents questioned in a survey generally do not testify in legal proceedings and are unavailable for cross-examination," (RA2450) explaining:

> Conflicts may arise when an opposing party asks for survey respondents' names and addresses in order to re-interview some respondents. The party introducing the survey or the survey organization that conducted the research generally resists supplying such information. Professional surveyors as a rule guarantee

> confidentiality in an effort to increase the participation rates and to encourage candid responses. . . . Because failure to extend confidentiality may bias both the willingness of potential respondents to participate in a survey and their responses the professional standards for survey researchers generally prohibit disclosure of respondents' identities. **'The use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-identifiable information or lessen the importance of Respondent anonymity.'** Although no surveyor-respondent privilege currently is recognized, **the need for surveys and the availability of other means to examine and ensure their trustworthiness argue for deference to legitimate claims for confidentiality in order to avoid seriously compromising the ability of surveys to produce accurate information.**
>
> Copies of all questionnaires should be made available upon request so that the opposing party has an opportunity to evaluate the raw data. All identifying information, such as the respondent's name, address, and telephone number, should be removed to ensure respondent confidentiality. (Emphasis added.)(RA2450-2451)

The Reference Manual quotes ethical prohibitions established by CASRO and AAPOR, professional research associations. See Section A(3) of the CASRO Code (RA569); Section I(A) of the AAPOR Code. (RA1296-1297)

Citing these rules and publications, courts recognize the importance of maintaining the confidentiality of survey respondents' identities. In Applera Corp. v. MJ Research, Inc., 389 F. Supp. 2d 344, 350 (D. Conn. 2005), denying a motion for new trial complaining about not receiving survey respondents' identities, the court observed:

> researchers are prohibited by ethical rules from disclosing the actual individual identities of the survey respondents and instructed to defend against Court orders compelling disclosure,. . . . The

> Reference Manual for Scientific Evidence published by the Federal Judicial Center instructs that, because of such ethical obligations, identifying information such as names and addresses should be removed from survey data before it is provided to opposing counsel, . . .

In State of Oklahoma v. Tyson Foods, Inc., 2009 U.S. Dist. Lexis 133533 (N.D. Okla. Mar. 11, 2009), the court cited to Applera, the AAPOR and CASRO code of ethics, and the Research Manual, and rejected defendant's request for survey respondents' identifying information, explaining defendants had "ample material to prepare a defense against" the study: defendants could attack the sample size, survey questions and design, sampling techniques and use other scientific challenges to the adequacy of the survey and the methodology used. Id. at *67. Citing Tyson Foods, the court in Medlock v. Taco Bell Corp., 2015 U.S. Dist. LEXIS 118642, *4 (E.D. Cal. 2015), reached the same conclusion, stating defendants could conduct a survey of their own to test the survey results. See, also, Lampshire v. Procter & Gamble Co., 94 F.R.D. 58, 60 (N.D. Ga. 1982).

Neither Pittsburgh Press Club v. Unites States, 579 F.2d 751, 758 (1978), nor Lutheran Mut. Life Ins. Co. v. United States, 816 F.2d 376, 378 (1987), aid York's cause. Neither involve an employer failing to comply with its statutory duty to keep records of hours worked. Both confirm that the trial court properly admitted the survey results, explaining that survey results are admissible so long as they are "conducted in accordance with generally accepted survey principles." There is no question that Dr. Steward

followed accepted scientific protocols.

The additional cases York cites are equally inapplicable. At issue in these cases is a circumstance of *complete anonymity*, a circumstance we do not have here, as survey respondents knew Heffler held their identifying information. (RA1408-1411, RA1471-1472) Confusing this concept, York cites Schrieber v. Federal Express Corp., 2010 U.S. Dist. Lexis 25806 (N.D. Okla. Mar. 18, 2010), because the court excluded a purported "anonymous survey," where respondents never provided identifying information to anyone.

In Schrieber, a single party discrimination case, the plaintiff sought to introduce responses to what FedEx called "surveys" completed anonymously by employees pursuant to a "Survey/Feedback/Action Program." Id. at 8-9. Schrieber did not involve the administration of a scientific survey pursuant to accepted scientific protocols. Schrieber cited to Crumpacker v. Kansas Dep't of Human Resources, 2004 U.S. Dist. Lexis 16405 (D. Kan. Oct. 6, 2004), to which York also cites. Crumpacker is also a single party discrimination case addressing the same type of "evidence" at issue in Schrieber. 2004 U.S. Dist. Lexis 16405, at 11.

People ex rel Lockyer v. R.J. Reynolds Tobacco Co., 116 Cal. App. 4th 1253, 1269 (2004), does not address the issues before this court. Further, when admitting the survey at issue, the court recognized an expert may rely on any material "whether or not admissible, that is of a type that reasonably

may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates;" the precise type of material on which Dr. Steward relied. Neither I-CA Enters., Inc. v. Palram American, Inc., 235 Cal. App. 4th 257 (2015), People v. Coleman, 38 Cal. 3d 69 (1985), Korsak v. Atlas Hotels, Inc., 2 Cal. App. 4th 1516 (1992), nor Garibay v. Hemmat, 161 Cal. App. 4th 735 (2008), apply, as none discuss surveys.

York now objects to the survey because class members were informed of this litigation and who conducted the survey. The principle cited for this proposition has no bearing in this case. As this is a class action, class members have knowledge about the suit, as they must receive notice and an opportunity to opt out.

York also seems to complain, for the first time, about class members being offered small incentives for their participation, e.g., $20.00. Dr. Petersen did not mention this issue. This no doubt is because, as Dr. Steward explains, offering small incentives for survey participation is standard procedure. (RA1416) York also now complains that the survey asked class members questions covering the entire class period. As Dr. Steward explains, the scientific literature supports using surveys to report such events, particularly those reporting tasks that are done with frequency, and reports no lack of recall for such events despite the span of time. (RA1413-1415) Further, Dr. Steward attested that "no statistically significant variation existed between the responses for hours worked based

on whether the respondents were reporting hours worked in recent times or for work performed years in the past." (RA1415)

While York may take issue with the scientific community's stance on the confidentiality of respondents' identifying information, there is no question Plaintiffs produced evidence "of 'ponderable legal significance,' reasonable, credible and of solid value--contradicted or uncontradicted" to establish hours worked. As such, this Court must affirm the judgment. Norquist, 32 Cal. App. 4th at 561.

III. York Failed To Demonstrate Class Members "Plainly And Unmistakably" Fall Within The Administrative Exemption

York bore the burden of proving class members were exempt from the overtime laws. Ramirez, 20 Cal. 4th at 794. It had to prove class members fell *plainly and unmistakably* within the exemption's terms. Nordquist, 32 Cal. App. 4th at 563. York had to prove *all elements* of the exemption. Harris, 53 Cal. 4th at 182. Its failure to prove *even one element* requires the exemption to fail. Nordquist, 32 Cal. App. 4th at 570-74. York failed to meet its burden. On some elements, York failed to produce *any* evidence.

Wage Order 4-2001 provides, in pertinent part:

> "[a] person employed in an administrative capacity means an employee whose duties and responsibilities involve either:
>
> (a)(i) The performance of office or non-manual work directly

> related to management policies or general business operations of his employer or his employer's customers…;
>
> *and*, (b) Who customarily and regularly exercises discretion and independent judgment;
>
> *and*, (c) Who regularly and directly assists a proprietor, or another employee who is employed in a bona fide executive or administrative capacity
>
> or, (d) Who performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge;
>
> or, (e) Who executes, under only general supervision, special assignments and tasks;
>
> *and*, (f) Who is primarily engaged in duties which meet the test for the exemption.

Subdivision (2)(N) of Wage Order 4-2001 defines "primarily" to mean "more than one-half the employee's work time."

York focuses its assertion of error on the first element of the exemption asserting the trial court erred in addressing this element, because it did not look to the entirety of section (f) that instructs: "the activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215." York also asserts that the trial court used an impermissible analysis when addressing this issue.

York is wrong. First, Harris did not hold that the production dichotomy "can never be used as an analytical tool." Second, the trial court looked to both the Harris and Bell decisions in reaching its decision. (AA60-62) Third, under any test, substantial evidence exists supporting the trial court's finding that York did not meet its burden of proof. Finally, York's complaint regarding the trial court's approach to the first element is not dispositive. York presented *no evidence* as to other elements of the exemption. As such, the exemption fails and this Court must affirm the judgment. Harris, 53 Cal. 4th at 182; Hoover, 206 Cal. App. 4th at 1201 (ruling affirmed so long as it can be supported by any legal theory.)

A. York Presented No Evidence That Class Members Spent More Than 50% Of Their Time Performing Exempt Tasks

York never asked class members how much time they spent performing any task. York never asked *any witness* how much time class members spent on any task. York did not conduct a survey to determine how much time class members spent on any task. York did not address this element at all.

The only evidentiary citation York presents on this point is found on page 42 of its brief, a citation to York's "expectations." York's expectations do not answer the question. As Ramirez and Wage Order 4-2001 outline, the critical inquiry is "first and foremost, how the employee

actually spends his or her time." 20 Cal. 4th at 802; 8 Cal. Code Regs. § 11040(1)(A)(2)(f).

The Court need go no further. The trial court's finding that York "failed to prove that the plaintiffs and class members spend more than fifty perceont of their time performing exempt tasks" is correct. (AA231-232) As such, the exemption fails. Harris, 53 Cal. 4th at 182.

B. Substantial Evidence Supports The Trial Court's Finding That York Failed To Prove Class Members Worked Only Under General Supervision

York also had to prove class members performed "under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge." York did not address this at trial. Now, York ignores substantial evidence that class members operated under constant, and close, supervision.

Plaintiff Green testified that she was required to meet with her supervisor on a daily basis to review every claim assigned to her. Other class members testified that they spoke to supervisors "pretty much all day long." York *requires* that supervisors engage in "effective supervision." Each claim file must reflect "effective supervision" on every aspect of the claim. As one class member put it: supervisors' notes came in "all day every day."

York also strictly monitored class members' work day. This

monitoring included requiring class members to work a set schedule, forbidding class members from working through lunch, requiring class members to "make up" time if they did not meet alloted time requirements, deducting time from accrued sick or vacation days, and, in some instances, docking pay if they did not work the minimum hours. Class members attest that supervisors required them to ask permission to be absent from the office for any period of time, no matter how minor, during normal business hours. One branch manager instructed supervisors to make sure that: "if someone in your unit is coming in late (more than 15-30 minutes) that you are documenting it and having the time made up." *See* s*upra*, p.14-15.

For the administrative exemption to apply, an employee must be subject to *only* "general" supervision. The trial court explained: "'general supervision' does not describe the class member/supervisor relationships at issue," as "the evidence showed that class members were constantly monitored in all aspects of their employment with York." (AA229) While York asserts that there is no support for the premise that constant supervision is the opposite of general supervision, the authorities concur with the trial court.

The Department of Labor ("DOL") addressed this issue in a 2005 Opinion Letter. Debunking York's generalization that all claims adjusters are exempt, the DOL found that one group of claims adjusters working for a third party administrator like York, was not exempt. The DOL found that

this group of adjusters was not exempt because they "perform their duties under close supervion by their managers." DOL Op. Ltr., FLSA2005-25, at 5-6 (Aug. 26, 2005)(attached hereto). The DOL relied on the fact that most of the tasks adjusters performed were done "in consultation with and under the supervision" of supervisors and adjusters were periodically reviewed "for completeness in order to ensure that the files are handled properly." The circumstances before the DOL, which the In re Farmers Ins. Exch., 481 F.3d 1119, 1130 (9th Cir. 2007), court found were not before it, are present here.

Other courts juxtapose "general" supervision with constant supervision. In Hogan v. Allstate Ins. Co., 361 F.3d 621, 628 (11th Cir. 2004), the court found general supervision where the employee's supervisor visited the office just once a month, and the employee was otherwise in charge. In Blanchar v. Std. Ins. Co., 2012 U.S. Dist. LEXIS 88982, *34-36 (S.D. Ind. June 27, 2012), the plaintiff was subject to only "minimal supervision" where his supervision was "almost zero," he interacted in person with his supervisor once per year if both happened to travel to the same city, and he never needed management approval.

Courts hold that York's behavior is not consistent with exempt status. In Whitesides v. U-Haul Co. of Alaska, 16 P.3d 729, 734 (Alaska 2001), addressing a statute virtually identical to Wage Order 4-2001, the Alaska Supreme Court held that subjecting employees to strict office schedules, and sanctions for not complying with the schedule, treats the employees like

hourly, not exempt employees. Whitesides cited with approval the analysis undertaken by the Washington Supreme Court in Drinkwitz v. Alliant Techsystems, Inc., 996 P.2d 582 (Wash. 2000). There, the court held, "requiring employees to work a weekly quota of 40 or more hours is generally inconsistent with salaried employment. 'Salary is a mark of [exempt] status because the salaried employee must decide for himself the number of hours to devote to a particular task. The salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it.'" Id. at 588 (quoting Brock v. Claridge Hotel & Casino, 846 F.2d 180, 184 (3d Cir. 1988)). Drinkwitz explained that requiring employees to "'make up' the difference between the time worked and the expected workweek is inconsistent with salaried employment…'Make up' through working additional hours may be repugnant to salaried employment…" Id.

York presented no evidence that class members operated only under general supervision, and cites to no such evidence. While York mentions the general supervision requirement on page 39 of its brief, the cases it sites are inapplicable. See, e.g., Robinson-Smith v. GEICO, 590 F.3d 886, 894 (D.C. Cir. 2010)(adjusters "worked in the absence of immediate supervision the majority of the time."); Maddox v. Continental Cas. Co., 2011 U.S. Dist. LEXIS 151085, *22 (C.D. Cal. Dec. 22, 2011)(employee "was free to manage his own time" and worked with "very little assistance or oversight.")

C. Substantial Evidence Supports The Trial Court's Finding That York Failed To Prove Class Members "Customarily And Regularly Exercise Discretion And Independent Judgment"

In its 2005 Opinion letter, the DOL explained that the adjusters were "so closely supervised by [their] manager in the performance of [their] duties" that they did not "have the authority to make independent choices that are free from immediate direction or supervision." As such, the DOL found the adjusters' work did not meet the "requisite degree of discretion and independent judgment with regard to matters of significance contemplated under the revised regulations." Id. at p.6. The same is true here.

Finding York did not meet its burden of proof on this element, the trial court explained: "class members followed strict guidelines and instructions in almost every aspect of their day to day work. Their compliance with these instructions was monitored not only by their supervisors, but by the claims files audits." (AA229) The trial court detailed the evidence supporting its finding that class members did not regularly exercise discretion and independent judgment. (AA226-229) The trial court also found that class members "were constantly monitored in all aspects of their employment with York." (AA229) Plaintiffs outline this evidence at pages 13-15, *supra*. Hence, Plaintiffs presented substantial that class members did not have "authority or power to make an independent

choice, free from immediate direction or supervision," the test under 29 C.F.R. § 541.207(a), to which York cites.

The cases on which York relies address different facts and therefore the jurisprudential nuggets York gleans from these cases have no application. Unlike class members, the adjusters in Bucklin v. American Zurich Ins. Co., 2013 U.S. Dist. LEXIS 86342, *4-5 (C.D. Cal. June 19, 2013), were responsible for retaining outside counsel, deciding which attorney to hire, developing a litigation strategy, supervising the course of litigation, including whether to conduct discovery and depositions or to retain experts, among other tasks that the class members here did not perform. Id. at *6-8.

The same is true for Robinson-Smith, where adjusters "worked with lawyers and evaluated claims for lost wages, comparative negligence, and personal injury," "appraised damaged vehicles and estimated repair costs," and independently negotiated and settled claims with body shops. 590 F.3d at 888. Class members did not perform these tasks. Also, GEICO did not have a set policy requiring adjusters to consult supervisors if a settlement offer was above the estimate, directly opposite of what occurred here. Id. at 890. Ms. Williams testified that she could not make any independent decisions regarding an offer to settle that was above a damage estimate—no matter how small the amount. Also, GEICO adjusters "worked in the

absence of immediate supervision the majority of the time," a circumstance not present here. 590 F.3d at 894-895.

Maddox, did not address adjusters, but rather pertained to underwriters who were "empowered with actual authority to bind CNA to insurance contracts" and who managed, with "minimal or general supervision" "their own book of business with very little assistance or oversight." 2011 U.S. Dist. LEXIS 151085, *5, 21-22. In Roe-Midgett v. CC Services, Inc., 512 F.2d 865, 867 (7th Cir. 2008), appraisers spent much of their time in the field "without direct supervision" and had "the leeway to deviate from the adjusting manual;" not allowed by York. Id. at 875. In McAllister v. Transamerica Occidental Life Ins. Co., 325 F.3d 997, 998 (8th Cir. Mo. 2003), the claims coordinator "independently handled the most complex life claims" through use of her "professional knowledge and experience to act independently to achieve objectives." She also "had to train and coach other examiners," things class members did not do.

D. Substantial Evidence Supports The Trial Court's Finding That Class Members Did Not Perform Work Pertaining To York's Management Policies and Business Operations

York argues that the trial trial court erred when it considered the production dichotomy when analyzing whether York met its burden of proof to establish class members performed work pertaining to its management policies and business operations, or that of its clients. York asserts that this error mandates reversal. This assertion fails for many reasons.

First, York failed to produce any evidence on some elements of the exemption, and substantial evidence exists to support the trial court's finding that it failed to meet its burden of proof on others. As such, the exemption fails, and the Court need not even address this element. Harris, 53 Cal. 4th at 182. Second, Harris did not hold that the production dichotomy "can never be used as an analytical tool." 53 Cal. 4th at 190.

Third, the trial court analyzed this element pursuant to both the production dichotomy and, "under the more fact specific analysis required by the Harris court." (AA225) Fourth, under any test, substantial evidence supports the trial court's finding that York failed to prove class members "*plainly and unmistakably*" met this element.

York primarily asserts that the trial court did not consider whether class members advised management, engaged in negotiations, and settled claims, the type of activities listed in 29 C.F.R. § 541.205(b). This is not true. Plaintiffs presented substantial evidence that class members *do not* engage in these activities. Class members repeatedly testified that they did not make recommendations to or advise management. Their role was to follow York's instructions, report to their supervisors, and supervisors would advise class members on how to proceed. *See supra*, p.10-13, 16-17.

While York cites to evidence it believes supports its position, this does not mean substantial evidence does not support the trial court's decision. Importantly, the bulk of York's citations are to testimony of

witnesses who *did not* supervise class members. Mr. Trimarchi never worked in California, never supervised class members, and they never reported to him. Mr. Baber likewise did not supervise class members. (RT855:4-7) As such, these witness have no personal knowledge of what class members do or don't do.

York relies heavily on the fact that class members interview witnesses. (OB44) As class members explained, this consisted of class members asking questions York provided, from which they could not deviate. Citing the DOL 2005 Opinion Letter, Roe-Midgett recognized that when claims adjusters conduct scripted interviews over the telephone, they do not engage in exempt work. 512 F.2d at 875.

While asserting class members review "factual information to prepare damage estimates," (OB45) York does not cite to a single class members' testimony to support this proposition. This is because class members testified that they *do not* make damage estimates, as they rely solely on outside vendors to perform this task. Class members also confirmed that they could not choose the vendor, as all vendors came from pre-approved lists.

Although York attests class members evaluate and make "recommendations" regarding coverage of claims, (OB45) it cites only once to what it asserts is a class members' testimony. Otherwise, it ignores class members. This is so because class members uniformly testified that

they *do not* make recommendations; rather, they report facts and supervisors instructed tell them how to proceed.

York asserts class members make "recommendations regarding litigation," again not citing to a single class members' testimony. (OB47) This failure is because class members are clear that they had little or no involvement in any litigation, if a lawyer was involved they had to get direction from their supervisor, and there is a completely separate litigation unit that supervised all litigation. *See* s*upra*, p.12-13. The same is true for "negotiating settlements." Class members testified that this simply did not happen. *See* s*upra*, p.12-13. Even under the standards on which York relies, class members do not perform the work required to meet this element of the exemption. *See* s*upra*, p.9-13.

It was appropriate for the trial court to look to the production dichotomy because York described its work in this manner, referring to the claim files as its "product." The QAG states that York's goal is to provide "product" consistency, by adhering to core "product" standards. (RA1609) York confirmed that its product is its claim files and adjusters' job is to maintain the files. (RT773:8-774:4)

Courts still use the production dichotomy to determine if employees meet the exemption. The Eicher v. Advanced Business Integrators, Inc., 151 Cal. App. 4th 1363, 1370 (2007), court confirmed that an employer that asserts application of the exemption must demonstrate that

the employee's job duties relate *to running the employer's business*, not just carrying out the business's daily activities. Bothell v. Phase Metrics, Inc., held that an exempt administrator is an employee who "'engages in running the business itself or determining its overall course or policies,' not just in the day-to-day carrying out of the business' affairs." 299 F.3d 1120, 1125 (9th Cir. 2002). See, e.g., Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 535-36 (2d Cir. 2009)(citing Bothell, affirmed denial of summary judgment because underwriters "had no involvement in determining the future strategy or direction of the business,"); In re Enterprise Rental Car Co., 2012 U.S. Dist. LEXIS 136252, *62-65 (W.D. Pa. Sept. 24, 2012)(finding "[t]he administrative-production dichotomy turns on whether the services or goods provided by the employee constitute the marketplace offerings of the employer, or whether they contribute to the running of the business itself"); Calderon v. GEICO, 809 F.3d 111 (4th Cir. 2015)(citing Bothell and applying the dichotomy).

The trial court correctly looked to both the production dichotomy *and* the more fact specific analysis in Harris. The cases York cites that do not apply the dichotomy also establish that the trial court's decision was correct. York cites often to the Ninth Circuit's decision in Farmers. The facts in Farmers, like the other cases on which York relies, are different from those here. Farmers found dispositive the facts that adjusters communicated with opposing counsel and Farmers' counsel, sought additional authority from

supervisors, which was granted 75-100 percent of the time, negotiated settlements, advised Farmers of underwriting risks, assessed credibility of witnesses, made recommendations for reserves in accordance with state law requirements, and made loss determinations. 481 F.3d at 1129. Class members did not perform these tasks. Even Farmers recognized that in a factual situation like that present here, a different conclusion would be reached, citing to the 2005 DOL Opinion Letter. Id. at 1130.

E. The Trial Court Did Not Err When It Tried Plaintiffs' Equitable Claims Prior To Any Remaining Legal Claims

York now argues that the trial court had no discretion to first try the equitable claims, asserting it was mandatory for it to first try York's affirmative defense to a jury. This is a complete about face from what York argued at trial.

The trial court did not hide the ball, informing everyone that it believed the authorities provided to it stood for two propositions: that the court had the discretion to try the equitable claims first and then try any remaining claims to a jury; and, that this was the preferred procedure. York *agreed,* stating:

> You do have discretion. You may choose not to try the equitable case first. The upper court has not said you shall try it first. They may say they have a preference. They don't say it is a dictate. With all of that, your Honor, *there is no question you have the discretion to make*

this decision. (RT255:28-256:5)(emphasis added.)

York did not provide the trial court with the authorities or make the argument on which it now relies. York therefore forfeited the right to make these arguments now.

The courts are clear: "[a] party may not assert theories on appeal which were not raised in the trial court." In re Dakota H., 132 Cal. App. 4th 212, 222 (2005)(citing Fretland v. County of Humboldt, 69 Cal.App.4th 1478, 1489 (1999)). An appellant waives his right to assert error "by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal." Mesecher, 9 Cal. App. 4th at 1685. This is "axiomatic." Martinez, 83 Cal. App. 4th at 1249. If York believed the trial court did not have the discretion to try the equitable claims first, it had to say so. Oiye, 211 Cal. App. 4th at 1065. It is "unfair" to allow York to lull the trial court and Plaintiffs' counsel into believing that the procedure the trial court followed was proper "and thereafter to take advantage of an error on appeal although it could have been corrected at trial." Sperber, 26 Cal. App. 4th at 744. If York had asserted that the trial court did not have the discretion to try the equitable claims first, Plaintiffs would simply have dismissed the legal claim to assure there was no question as to the proper procedure.

In addition to waiving this argument, York is simply incorrect. The California Supreme Court explained:

> It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury . . . and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury.

Raedeke, 10 Cal. 3d at 671. Citing Raedeke, Hoopes explained that deciding the equitable issues first is the "better practice." "The practical reason for this procedure is that the trial of the equitable issues may dispense with the legal issues and end the case. In short, 'trial of equitable issues first may promote judicial ecomony.'" 168 Cal. App. at 157.

This is not an outdated notion. Judicial Council v. Jacobs Facilities, Inc., 239 Cal. App. 4th 882, 915 (2015), confirmed this basic tenet, citing Hoopes. Jacobs explained that even when the equitable issue is a defense to a legal cause of action, that the "proper rule" is for the court to "hear and dispose of the equitable defenses first, before submitting the legal claim to a jury." Id. Citing Hoopes, the court in Hopkins v. Kedzierski, 225 Cal. App. 4th 736, 744-745 (2014), concurred, emphasizing: "with respect to equitable issues, the *trial court* is the trier of fact." (Emphasis in original.) See also Stephen Slesinger, Inc. v. The Walt Disney Co., 155 Cal. App. 4th 736 (2007)("Equitable defenses are tried to the judge alone; the judge's finding may well obviate a jury trial on remaining legal issues, without abridging the right to a jury trial.").

Plaintiffs brought both equitable and legal claims. Through section 17200, et seq., Plaintiffs sought both restitution and injunctive relief. Through the PAGA claims, Plaintiffs sought recovery of penalties. Plaintiffs' claim under Labor Code section 1194 was distinct from their claim under the UCL. As the court explained in Hodge, "the UCL is not simply a legislative conversion of a legal right into an equitable one. It is a separate equitable cause of action." 145 Cal. App. 4th at 284. The remedies available under Labor Code section 1194 (unpaid wages) and under the UCL (restitution and injunctive relief) are separate and distinct. Hodge confirms that a cause of action under the UCL seeking restitution for unpaid wages is a separate and distinct equitable claim that does not carry the right to a jury trial. Id. at 284-285. Hodge also dispensed with the notion that just because the defendant asserts an affirmative defense, on which it bears the burden of proof, that it is entitled to a jury trial. Id. The American Motors Ins. Co. v. Superior Court, 68 Cal. App. 4th 864, 871 (1998), decision confirms that where "the trial court's initial determination of the equitable issues is also dispositive of the legal issues," there is nothing left for trial to a jury.

The cases York cites do not aide its cause. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283 (1951), does not address the issue before the Court. This issue was explained by Raedeke and its progeny. Walton v. Walton, 31 Cal. App. 4th 277, 293 (1995), cited Raedeke and the quote

cited above. Importantly, Walton involved a different circumstance of alternative pleadings and severance. Here, the trial court did not sever any claims. Rather, the trial court, as it has the inherent power to do, set the order of proof, trying the equitable claims first to the court, with any legal claims to follow to a jury—if such was necessary.

The trial court did not make awards that were not recoverable under the equitable claims. The trial court found that York owed class members for unpaid overtime in the amount proved at trial. (AA15, 233) Cortez, 23 Cal. 4th at 178, made clear that this is a proper restitutionary award under section 17200. York failed to object to any reference to damages in the proposed statement of decision and cannot now raise this as error. Sperber, 26 Cal. App. 4th at 744.

The trial court's award of attorneys' fees and interest were also appropriate. Plaintiffs sought fees under the equitable common fund doctrine. In opposition York stated: "[b]ecause statutory fees are available here, there is no basis for an additional application for 'common fund' fees as well." (RA1135:26-27) Statutory fees were available under the PAGA. York's only objection to the fee request was the amount sought, not Plaintiffs' entitlement. (RA1136:12-18) The trial court always has the discretionary power to award interest. M&F Fishing, Inc., 202 Cal. App. 4th at 1539. The failure to present these arguments below bars York from asserting them on appeal. Martinez, 83 Cal. App. 4th at 1249.

F. York's Wage Statements Do Not Comply With Section 226

Section 226(a) provides: "Every employer shall, . . . furnish . . . his . . . employees, . . . an accurate itemized statement in writing showing" "gross wages *earned*," "net wages *earned*," and total hours worked. York's wage statements do not display total hours worked, overtime hours or pay, or accrued vacation. For all three reasons, they do not comply with section 226(a).

Interpreting a statute, courts "must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'" Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th 1094, 1103 (2007). (Citations omitted.) "If the statutory language is clear and unambiguous," the court's inquiry ends. When the Legislature uses the term shall, "'shall' is mandatory." Church v. Jamison, 143 Cal. App. 4th 1568, 1580 (2006).

Hence, when the Legislature stated employers "shall" furnish wage statements showing "gross wages earned," this is what it meant. Courts construe the term "wages" broadly and hold that accrued vacation is wages within the meaning of Labor Code section 200, that defines wages as "all amounts for labor performed by employees of every description." Schachter v. Citigroup, Inc., 47 Cal. 4th 610, 618 (2009). Suastez explained: "vacation pay is not a gratuity or a gift, but is, in effect,

additional wages for services performed," that "vests" as it is earned. 31 Cal. 3d at 779, 781. It is "compensation for past services." Id. at 782. See also Murphy, 40 Cal. 4th at 1103-1104, n.6. Because accrued vacation is earned wages, it must be shown on wage statements.

Although agreeing that accrued vacation is wages, York argues that it need not be listed on wage statements. The two federal district court decisions are not dispositive on this issue as neither follows the dictate that courts *must* interpret statutes governing conditions of employment broadly "in favor of protecting employees." Brinker, 53 Cal. 4th at 1053, 1026-27.

Heinzman v. Home Depot U.S.A., Inc., 2011 U.S. Dist. LEXIS 158762, *9 (C.D. Cal. Jan. 20, 2011), dismissed Suastez, finding it merely stated vacation pay is "like" wages. The California Supreme Court stated no such thing. It held in Suastez and Murphy that accrued vacation *is wages*. Garibaldi v. Bank of Am. Corp., 2014 U.S. Dist. LEXIS 5930 (N.D. Cal. Jan. 15, 2014), simply ignored the plain language of section 226. Federal district court decisions that do not follow California law have no binding effect on this Court. See Yvanova v. New Century Mort. Corp., 62 Cal. 4th 919, 940 (2016).

CONCLUSION

For the foregoing reasons, Ms. Williams and Ms. Green request that the Court affirm the judgment.

Dated: August 2, 2016

WORKMAN LAW FIRM, PC

By: /s/ Robin G. Workman
Robin G. Workman

Attorneys for *Attorneys for Plaintiffs/Respondents Lonnetta Williams, Roshon Green, and all others similarly situated*

WORD COUNT VERIFICATION

I, Robin G. Workman, declare as follows:

I am principal owner of the law firm of Workman Law Firm, PC, counsel for Plaintiffs/Respondents.

Pursuant to Rule of Court 8.204(c)(1), the within brief on does not exceed 14,000 words. All words, including all headings, sub-headings, and any footnotes, have been included in the word count. The exact word count is 13,965 words. The word count calculation was performed by my word processing software.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on August 2, 2016, in San Francisco, California.

/s/Robin G. Workman
Robin G. Workman
Attorneys for *Attorneys for Plaintiffs/Respondents Lonnetta Williams, Roshon Green, and all others similarly situated*

CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rules of Court, Rule 8.208 the undersigned, counsel of record for Plaintiffs/Respondents, certifies that the following listed parties have a direct, pecuniary interest in the outcome of this case. The undersigned also certifies that as of this date, other than the named parties listed below, the undersigned is unaware of any other interested parties.

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Dated: August 2, 2016

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PROOF OF SERVICE

I, Cheryl Porter, hereby declare:

I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Workman Law Firm, PC, 177 Post Street, Suite 900, San Francisco, California.

On August 2, 2016, I served the **RESPONDENT'S BRIEF and APPELLANT'S APPENDIX VOLS. 1-5** on the interested parties in this action by electronic transmission via TrueFiling whose e-filing system will automatically electronically serve the following attorneys of record who have consented to receive electronic service of documents in this matter:

- **Coordination Attorney** (coordination@jud.ca.gov)
- **Fred Rowley** (fred.rowley@mto.com)
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On August 2, 2016, I also served the **RESPONDENT'S BRIEF** via mail on the persons listed below by placing a true copy thereof, enclosed in a sealed envelope following the ordinary business practice of Workman Law Firm, PC. I am personally and readily familiar with the business practice of Workman Law Firm, PC for collection and processing of documents for mailing with the U.S. Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the U.S. Postal Service.

Hon. Michael P. Kenny
Sacramento County Superior Court
720 9th Street, Dept. 31
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 2, 2016, at San Francisco, California.

By: 

ADDENDUM OF STATUTES, RULES AND REGULATIONS

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

August 26, 2005 **FLSA2005-25**

Dear ***Name****,

This is in response to your request for an opinion concerning whether insurance claims adjusters employed by your client qualify for the administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA). You request a reply based on an analysis of the revisions to 29 C.F.R. Part 541, which were published as a final rule in the Federal Register on April 23, 2004 (69 FR 22122), with a scheduled effective date of August 23, 2004. The new Part 541 regulations apply prospectively, beginning August 23, 2004. Our response is applicable under both the old and revised version of the regulations, as there were no substantive changes in the primary duty test requirements for the administrative exemption.

You state that the claims adjusters in question are employed by your client, which acts as a third party administrator. The third party administrator at issue exists to sell claims adjusting and other services to insurance companies, insurance brokers and/or self-insured companies. Your client charges a fee to provide the claims adjusting services, typically based upon the number and complexity of claims handled. A self-insured company may also contract directly with your client to provide claims adjusting services for their self-insured plan.

Your client employs three levels of insurance claims adjusters: (1) Claims Specialist I; (2) Claims Specialist II; and (3) Senior Claims Specialist. They are paid on a salary basis at a rate of at least $455 per week. These Claims Specialists provide claims adjusting services to customers of your client in two areas: workers' compensation and general liability. In your letter you describe the duties and responsibilities of the Claims Specialist I and II and Senior Claims Specialist. Each position is discussed next.

Claims Specialist I

Claims Specialist I's perform non-manual work in an office setting. On the general liability side, Claims Specialist I's primarily handle bodily injury claims stemming from non-employee injuries that occur on the premises of commercial enterprises, and also from product liability claims. On the workers' compensation side, Claims Specialist I's handle employee injury claims.

In handling workers' compensation claims, typically coverage is a foregone conclusion. The Claims Specialist I investigates the facts relating to the claim. This normally involves questioning the claimant, the claimant's employer and the claimant's treating physician. Then, in consultation with the supervisor, the Claims Specialist I sets an initial reserve amount by estimating the ultimate value of the claim. In arriving at this initial reserve amount, the Claims Specialist I relies on his experience and knowledge in adjusting claims and on advice from his supervisor.

The Claims Specialist I maintains and documents the claim file; evaluates the facts and the law to determine compensability and the amounts owed; makes workers' compensation disability determinations; determines whether vocational rehabilitation services are required; determines whether an injured employee can return to work and what, if any, accommodations need to be made at the workplace to facilitate the return; monitors the ongoing need for an accommodation, such as light duty, after the injured worker has returned to work; evaluates the claim for possible subrogation opportunities; evaluates the claim for possible fraud; decides whether additional investigation is needed and attempts to resolve the claim through settlement. Most of these tasks are performed in consultation with and under the supervision of the Claims Specialist I's supervisor.

Each file that is handled by a Claims Specialist I is reviewed by his supervisor periodically for completeness and to make sure that the Claims Specialist I is handling the file appropriately. In addition, while it is within the discretion and judgment of the Claims Specialist I to determine what, if any, additional

investigative actions need to be taken, that discretion and judgment is typically exercised after discussion with the Claims Specialist I's supervisor.

If a more-in-depth investigation is deemed necessary, the Claims Specialist I gathers facts such as the location of injury, time of loss, and the injured worker's previous history of filing workers' compensation claims. The Claims Specialist I, among other steps, also interviews witnesses, determines whether to pursue surveillance of claimant, and when necessary, disputes the treating physician's diagnosis and prognosis by requesting a medical-legal evaluation of the injured worker. Many of these tasks are discussed with the Claims Specialist I's supervisor.

The Claims Specialist I also assists in administering benefits. He communicates with doctors about the injured employee's continued need for treatment, reviews medical and lab reports, decides whether to extend medical payment coverage and makes decisions on approving or challenging medical bills, when appropriate. Throughout this process, the Claims Specialist I consults with his supervisor for advice and guidance.

The Claims Specialist I is responsible for negotiating a full resolution of the claim. The authority levels by which the Claims Specialist I can unilaterally settle are generally $5,000 or less. However, before a Claims Specialist I can settle a claim, he must frequently seek approval from the customer whose account the Claims Specialist I is servicing. The Claims Specialist I also consults frequently with his supervisor to discuss an appropriate amount for which to settle the claim. Once settlement authority is approved, the Claims Specialist I deals directly with either the claimant or the claimant's representative in settling the claim.

The Claims Specialist I on the general liability side performs similar work and has similar responsibility and types of supervision. The two positions differ in that the Claims Specialist I handling liability claims has more leeway in settlement negotiation. This is because state laws sometimes dictate the value of a settlement of workers' compensation claims while no such legal strictures apply to the settlement of general liability claims. Also, Claims Specialist I's on the general liability side spend less time investigating and dealing with vocational rehabilitation and disability issues. Furthermore, Claims Specialists I's who work on the general liability side spend much more time on coverage, subrogation and contribution issues.

Claims Specialist I's on both the workers' compensation and general liability areas tend not to be assigned complex and difficult claims, such as those that could involve litigation or arbitration. In a discussion with a member of the Wage and Hour Division staff on November 4, 2004, you stated that new employees are hired as Claims Specialist I's and after six months to a year of satisfactory employment, Claims Specialist I's are transitioned to the Claims Specialist II position.

Claims Specialist II

The Claims Specialist II job duties are the same as the Claims Specialist I job duties. However, Claims Specialist II employees are not as closely supervised as Claims Specialist I's. Where every claim that a Claims Specialist I handles is subject to review by his supervisor, supervisors only spot-check the work of Claims Specialist II's. Also, while a Claims Specialist I will typically discuss his plans for handling each claim with his supervisor both at the outset and as the claim proceeds, a Claims Specialist II will only have such a discussion with his supervisor when the Claims Specialist II deems it necessary.

In addition, the cases handled by Claims Specialist II's tend to be more complex. Compared to their junior counterparts, Claims Specialist II's are more likely to evaluate independent medical examinations and independent investigations of accident scenes. They are more likely to hire and interact with vocational rehabilitation specialists and nursing services to assist claimants in their return to work or in dealing with their ongoing disabilities. Claims Specialist II's on the general liability side also handle more severe and complex product liability claims, which require a higher level of judgment and knowledge.

Claims Specialist II's handle all claims that are in arbitration or court litigation. Specifically, Claims Specialist II's develop strategies with the attorney assigned to the case as to how the case is to be defended. Claims Specialist II's approve litigation strategy, participate in and approve the hiring of experts to testify and work with counsel for the insured in presenting expert testimony. Along with counsel, Claims Specialist II's act as lead negotiators in any settlement discussions.

Claims Specialist II's spend a significant amount of their time directly "servicing" the customer. Claims Specialist II's meet frequently with the customers of your clients to whom they are providing claims services to discuss trends in their accounts and additional safety precautions that can be undertaken to protect them against further claims, including overall strategies to reduce the costs of claims. Approximately 20% of the Claims Specialist II's time is spent in these discussions that take place on a monthly basis.

Senior Claims Specialist

Senior Claims Specialists perform the same duties as Claims Specialist II's with no more than the same level of supervision. The only difference between the two positions is that the Senior Claims Specialists typically have more experience in handling claims and Senior Claims Specialists tend to handle the most complicated and difficult claims. Senior Claims Specialists also spend at least 20% of their work time preparing for or engaging in client servicing matters as described above.

Analysis

Under the revised regulations at 29 C.F.R. 541.200(a), "the term 'employee employed in a bona fide administrative capacity' in section 13(a)(1) of the Act shall mean any employee:

1) Compensated on a salary or fee basis at a rate of not less than $455 per week ..., exclusive of board, lodging or other facilities;
2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."

The administrative exemption thus has requirements pertaining to both the "type of work performed" and "the level of importance or consequence of the work performed." See 69 FR at 22139. With regard to the type of work performed, the preamble explains that the "exemption is intended to be limited...to employees whose work involves servicing the business itself" and thus inapplicable to employees whose work relates to the "production" operations of the business. 69 FR at 22141. Although the production versus staff dichotomy is illustrative, rather than dispositive, it is a useful tool in appropriate cases to identify employees who are excluded from the administrative exemption.

We discuss below the second criteria of the administrative exemption, which is then followed by an analysis of whether the primary duty of the Claims Specialist I's and II's and Senior Claims Specialists is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

Directly Related to the Management or General Business Operations

"The phrase 'directly related to management or general business operations' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. 541.201(a).

"Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer

network, internet and database administration; legal and regulatory compliance; and similar activities." 29 C.F.R. 541.201(b).

"An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt." 29 C.F.R. 541.201(c).

"The term 'primary duty' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. 541.700(a).

As you represent, in performing work on behalf of a contracting insurance company, the Claims Specialist I's and II's and Senior Claims Specialists service the insurance policies sold by your client's customers. Indeed, for carriers with whom your client contracts, the Claims Specialist I's and II's and Senior Claims Specialists provide claims adjusting services which are necessary to service the insurance policy sold by the insurance company. For your client's other customers, such as insurance brokers, the Claims Specialist I's and II's and Senior Claims Specialists also provide claims adjusting services for the final product that the broker in turn sells to his customer. For the self-insured companies, Claims Specialist I's and II's and Senior Claims Specialists adjust claims brought by employees of the self-insured entity in their every day business activities. In addition, Claims Specialist II's and Senior Claims Specialists frequently discuss certain trends in the customer's account, and provide advice regarding additional safety precautions that the clients could take to reduce the cost of claims.

Thus, the primary duty of the Claims Specialist I's and II's and Senior Claims Specialists in either the workers' compensation or general liability side is servicing the employer's customer's business through the performance of claims adjusting duties, which involve work directly related to the management or general business operations in such functional areas as insurance, safety and health, personnel management, human resources, legal and regulatory compliance. See 29 C.F.R. 541.201(b).

Based on an analysis of the information provided, we believe that the Claims Specialists I and II and Senior Claims Specialist positions meet the second criteria of the administrative exemption test in that their primary duty involves the performance of office or non-manual work directly related to the management or general business of the employer's customers. See Opinion Letters dated November 19, 2002 and August 6, 2002 (copies enclosed).

We proceed with a discussion of the third criteria of the administrative exemption, which is then followed by an analysis of whether the primary duty of the Claims Specialist I's and II's and Senior Claims Specialists includes the exercise of discretion and independent judgment with respect to matters of significance.

Discretion and Independent Judgment

Section 541.202(a) states that in order "[t]o qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed."

As indicated in section 541.202(b):

> "The phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited

> to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances."

Section 541.202(c) describes an employee's exercise of discretion and independent judgment as including the authority to make an independent choice that is free from immediate direction or supervision. However, this section does not imply that an employee does not exercise discretion and independent judgment if the employee's decisions or recommendations are reviewed at a higher level. "The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." Id. Section 541.202(e) further clarifies that the "exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources."

Finally, section 541.203(a) provides that insurance claims adjusters "generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." As noted in the preamble to the revised regulations at 69 FR 22144: "...there must be a case-by-case assessment to determine whether the employee's duties meet the requirement of the exemption."

Claims Specialist I

As described in the prior paragraphs, Claims Specialist I's working in either the workers' compensation or general liability side perform several of the duties and responsibilities of an exempt claims adjuster characterized in section 541.203(a). For example, the Claims Specialist I's interview the claimant, the claimant's employer, and the treating physician. Claims Specialist I's review factual information to set and adjust the initial reserve amount. Also, Claims Specialist I's decide whether additional investigation is needed and attempts to resolve claims through settlement. We note, however, that Claims Specialist I's in both the workers' compensation and general liability areas perform their duties under close supervision by their managers. As mentioned above, a Claims Specialist I must consult with his supervisor in setting the initial reserve amount. Most of the tasks performed after the setting of the initial reserve amount are done in consultation with and under the supervision of the Claims Specialist I's supervisor. In addition, each file handled by a Claims Specialist I is reviewed periodically for completeness in order to ensure that the files are handled appropriately.

If a Claims Specialist I feels that a claim needs additional investigation, the Claims Specialist I must discuss the investigation with his supervisor and seek approval. If such actions are deemed necessary, any steps taken are further discussed with the supervisor. In performing the duties of monitoring the claim and assisting in administering benefits, a Claims Specialist I consults with his supervisor for advice and guidance. Furthermore, in settling a claim, a Claims Specialist I frequently consults with his supervisor to discuss the appropriate amount to settle a claim.

Based on a review of the information provided, we believe that the Claims Specialist I employed in either the workers' compensation or general liability side is so closely supervised by the Claims Specialist I's manager in the performance of his duties that the Claims Specialist I does not have the authority to make independent choices that are free from immediate direction or supervision. See 29 C.F.R. 541.202(c). Thus, the Claims Specialist I's fail to meet the third criteria of the administrative exemption in that the work of Claims Specialist I's does not meet the requisite degree of discretion and independent judgment with regard to matters of significance contemplated under the revised regulations. Therefore, it is our opinion that Claims Specialist I's in either the workers' compensation or general liability side cannot qualify for the administrative exemption under the revised regulations at 29 C.F.R. 541.200. Hence, Claims Specialist I's are covered by the minimum wage and overtime provisions of the FLSA. See Opinion Letter dated January 7, 2005 (copy enclosed); Robinson-Smith v. GEICO, 323 F.Supp.2d 12 (D.D.C. 2004) (automobile damage claims adjusters not exempt because they do not exercise sufficient discretion and independent judgment); In re Farmers Insurance Exchange, 336 F.Supp.2d 1077 (D.Ore. 2004) (automobile and certain property damage adjusters lack adequate discretion and independent judgment, while personal injury and death claims adjusters are exempt).

Claims Specialist II and Senior Claims Specialist

As described in the prior paragraphs, Claims Specialist II's and Senior Claims Specialists working in either the workers' compensation or general liability side perform the activities of an exempt claims adjuster characterized in section 541.203(a). For example, Claims Specialist II's and Senior Claims Specialists interview the claimant, the claimant's employer and the claimant's treating physician; set and adjust the reserve amount; evaluate the facts and the law to determine compensability and the amounts owed; make workers' compensation disability determinations; determine whether vocational rehabilitation services are needed, and also whether an injured employee can return to work and what, if any, accommodations need to be made at the workplace to facilitate the employee's return; identify and pursue subrogation, contribution, indemnification or other opportunities to force third parties to bear part of the settlement burden; evaluate the claim for possible subrogation opportunities and for possible fraud; negotiate settlements; and make recommendations regarding litigation.

In your letter, you state that the claims adjusting services that the Claims Specialist I and II and Senior Claims Specialist provide are important to all of the customers your client serves, which we take to mean, for discussion purposes, as satisfying the requirement that the Claims Specialist II's and Senior Claims Specialists' exercise of discretion and independent judgment involves matters that are significant to your client's customers. See 29 C.F.R. 541.202(a) and 541.202(f) and Opinion Letter dated November 19, 2002.

The discussion necessarily turns to whether a Claims Specialist II and Senior Claims Specialist, in the performance of their claims adjusting duties, have "authority to make an independent choice, free from immediate direction or supervision," and also whether a Claims Specialist II and Senior Claims Specialist's "exercise of discretion and independent judgment" in the performance of their work involves "more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." Sections 541.202(c) and 541.202(e).

With regard to Claims Specialist II's and Senior Claims Specialists working in either the workers' compensation or general liability side, we note that in handling each claim, Claims Specialist II's and Senior Claims Specialists are not as closely supervised compared with their junior counterparts. Supervisors only spot-check their work, and any discussions with supervisors dealing with casework are at the Claims Specialist II's and Senior Claims Specialists' discretion. Claims Specialist II's and Senior Claims Specialists perform their work more independently than Claims Specialist I's, typically without involvement of their supervisor on each claim. Claims Specialist II's and Senior Claims Specialists also handle casework that is in arbitration or litigation. Claims Specialist II's and Senior Claims Specialists determine the strategy and tactics to be used during litigation and in the settlement of litigated claims and also act as lead negotiators in settlement discussions. In addition, Claims Specialist II's and Senior Claims Specialists meet frequently with the employer's customers to whom they are providing claims

services to discuss trends in their account and additional safety precautions that can be undertaken to protect them against further claims and overall strategies to reduce the costs of claims.

After reviewing the information provided, we believe that Claims Specialist II's and Senior Claims Specialists in performing their work have "authority to make an independent choice, free from immediate direction or supervision." 29 C.F.R. 541.202(c).

We also believe that performing the duties and responsibilities of the Claims Specialist II's and Senior Claims Specialists require "more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." 29 C.F.R. 541.202(e). For example, Claims Specialist II's and Senior Claims Specialists, compared to their junior counterparts, handle more complex cases. Claims Specialist II's and Senior Claims Specialists are more likely to evaluate independent medical examinations and independent investigations of accident scenes. Claims Specialist II's and Senior Claims Specialists are also more likely to hire and interact with vocational rehabilitation specialists and nursing services to assist claimants in their return to work or in dealing with ongoing disabilities. Claims Specialists II's and Senior Claims Specialists on the general liability side also handle more severe and complex product liability claims, which require a higher level of judgment and knowledge. Furthermore, as stated earlier, Claims Specialist II's and Senior Claims Specialists handle claims that are in arbitration or court litigation. Specifically, Claims Specialist II's and Senior Claims Specialists approve litigation strategy, participate in and approve the hiring of experts to testify and work with counsel for the insured in presenting expert testimony. Also, along with counsel, Claims Specialist II's and Senior Claims Specialists act as lead negotiators in any settlement discussions.

We conclude that these facts demonstrate that Claims Specialist II's and Senior Claims Specialists exercise a great deal of discretion in deciding how to handle all types of claims. They are not merely using a standardized format for resolving claims, but rather are using their own judgment about what the facts show, who is liable, what a claim is worth, and how to handle the negotiations with the claimant or the claimant's representative in order to achieve a successful resolution. Hence, Claims Specialist II's and Senior Claims Specialists employed in either the workers' compensation or general liability side exercise the requisite discretion and independent judgment in matters of significance in the performance of their work as contemplated in the revised regulations. Claims Specialist II's and Senior Claims Specialists meet all three criteria of the administrative exemption. Therefore, based on the information provided, it is our opinion that Claims Specialist II's and Senior Claims Specialists qualify for the administrative exemption under section 13(a)(1) of the FLSA and its revised implementing regulations at 29 C.F.R. 541.200.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. 259. See 29 C.F.R. 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: Opinion Letters dated January 7, 2005;
November 19, 2002;
August 6, 2002

**Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*