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 IN RESPONSE TO AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE

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SUMMARY OF ARGUMENT

Ignoring California Supreme Court decisions, and the clear directive in the wage orders, the Chambers argue that it matters not how the class members spent their work day. Instead, the Chambers assert that *all* employees with the title claims adjuster are exempt employees, and an analysis of the work the employees actually perform is not necessary. There is no support for this argument. To the contrary, employing this type of approach contravenes specific instruction from the California Supreme Court and the clear directive in the wage orders.

The Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 802 (1999), court 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 Ramirez court was not creating a new standard. Rather, its holding mirrors the language in Wage Order 4 that dictates: "The work actually performed by the employee during the course of the workweek must, *first and foremost*, be examined" . . . when "determining whether the employee satisfies this requirement." Cal. Code Regs., tit. 8, § 11040 (1)(A)(2)(f) (emphasis added).

The trial court followed this directive and, listening to the witnesses, and reviewing the documents presented at trial, evaluated the work that the class members actually perform. The trial court then based its decision on the evidence *actually presented at trial*, not on some notion that all claims

adjusters, by the very nature of their title, are exempt employees and therefore never entitled to overtime compensation.

Even if the trial court had based its decision on a standard in the industry, as opposed to the work that the class members actually perform during the day, the *evidence* on this point *introduced at trial* does not support the notion the Chambers espouse. York itself establishes the illusory nature of this argument as it employs claims adjusters that *it classifies as non-exempt* even though they perform the same tasks that 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). Presumably, these employers, like the trial court, evaluated the work that their claims adjusters perform and, irrespective of job title, classified the claims adjusters as non-exempt employees. See, also, 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.")

Even the Department of Labor ("DOL"), enforcing rules under the Fair Labor Standards Act ("FLSA") to which the Chambers cite, issued an opinion letter reflecting the reality that claims adjusters, depending on their job duties, can be non-exempt employees. The DOL's opinion letter offended neither the precepts of the FLSA nor the need for consistency that

the Chambers advocate. In its 2005 Opinion Letter, 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 supervision by their managers." DOL Op. Ltr., FLSA2005-25, at 5-6 (Aug. 26, 2005)(attached hereto).

Even the court in the In re Farmers Ins. Exch., 481 F.3d 1119, 1130 (9th Cir. 2007), decision, on which the Chambers rely to support their argument, acknowledged the 2005 DOL opinion letter. Rather than stating that the DOL made the wrong conclusion because *all claims adjusters must always be classified as exempt* as the Chambers advocate, the court merely held that the facts before the DOL were not before the court. Id. at 1130. This, of course, is the point. With each group of employees, the courts and enforcement agencies must evaluate the *actual tasks* the employees perform to determine if an exemption applies. Neither can, as the Chambers assert, merely look at the job title and hold, based on title alone, that the employees are exempt.

The Harris v. Superior Court, 53 Cal. 4th 170 (2011), Court also did not accept this generalization. If the Harris Court believed that the wage orders demand the result the Chambers advocate, the Court easily could have held that all claims adjusters, irrespective of what work duties they perform during the day, are exempt employees. It did not do so. Rather, Harris

"express[ed] no opinion on the strength of the parties' relative positions," and remanded the matter to the trial court to make the fact specific determination. 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," as the Chambers argues. Rather, the Court emphasized 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.)

This is precisely what the trial court did. It evaluated the *particular facts before* it, and, based on that *evidence*, determined that York failed to meet its burden of proof. In so doing, the trial court did not just apply the production dichotomy as the Chambers state. Rather, the trial court made clear that it found the class members did not meet the first element of the administrative exemption under both the production dichotomy and "under the more fact specific analysis required by the Harris Court." (AA60-62) The Chambers cite to no authority which holds that applying both approaches constitutes error.

The trial court also did not commit error by allowing Plaintiffs to present evidence of overtime hours worked by the class members through the use of a survey. Allowing this evidence neither violated York's due

process rights nor deprived York from asserting its affirmative defenses as the Chambers argue. Rather, York had an unfettered opportunity to present evidence to contradict the survey, it simply chose not to do so. Given York made this *strategic decision*, this argument, like the Chambers' other attacks on the judgment, has no merit.

Asserting error, the Chambers fail to mention why Plaintiffs had to present evidence of hours worked through a survey. The critical fact that the Chambers ignore is that York *did not comply* with its statutory duty to keep records of hours worked. Faced with York's failure, Plaintiffs had no choice but to present hours worked through an alternative method of proof. (RA2362, 2368; RT701:6-11; 814:23-815:19, 837:27-838:21) The Chambers also ignore the wealth of both California and United States Supreme Court decisions that make clear that an employer cannot fail to comply with its statutory duty to keep track of hours worked and then complain when employees use an alternative method of proof to establish the number of overtime hours worked.

The Courts emphasize that York's approach will not be rewarded, explaining: "[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). Contrary to the Chambers' assertion, Duran v. U.S. Bank Nat'l Ass'n, 59 Cal. 4th 1, 40-41 (2014), did not reject the use of

statistical proof in such a circumstance. Rather, quoting Anderson, the Duran court 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.'" Once employees present this proof, the burden shifts to the employer to come forward with evidence of the precise amount of work performed. As the courts explain, "[i]f 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." Duran, 59 Cal. 4th at 40-41.

Rather than aiding the Chambers' cause, Tyson Foods, Inc. v. PEG Bouaphakeo, et al., 136 S. Ct. 1036 (2016), does not change 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).

Faced with a lack of records, Plaintiffs presented hours worked through an alternative method of proof. Once Plaintiffs presented this evidence, York chose not to present *any contrary evidence* regarding hours

worked. It chose not to call any class members at trial, to perform a survey of its own, or ask class members at depositions any questions regarding their hours worked. It made the *strategic choice* to do nothing to rebut Plaintiffs' proof regarding hours worked other than attempting to attack the methods employed in conducting the survey. Given the survey was performed according to accepted protocol in the scientific community, the trial court correctly rejected York's challenge.

If the Court were to adopt the argument the Chambers espouse, employees in a class action who prove that their employer improperly classifies them as exempt would not be able to prove damages suffered as a result of that misclassification when an employer fails to keep track of hours worked. Such a holding would lead to the result that the Supreme Court in Anderson long ago rejected, when it explained that employers should not be allowed to benefit from their failure to comply with the law. Anderson, at 687.

The trial court's statement of decision establishes that the trial court properly applied the analytical tests required of it. The record establishes that York failed to meet its burden with respect to both the application of the exemption it asserted and to come forth with any evidence of actual hours worked to rebut the evidence Plaintiffs presented. As such, there is no error for the Chambers to assert. Plaintiffs therefore request that the Court affirm the judgment.

ARGUMENT

I. The Chambers Do Not Address The Approach Courts Must Take When Considering Application Of An Exemption

While they argues much about the impact of the FLSA on the administrative exemption, the Chambers ignore the prism though which this Court must analyze the exemption. The Chambers never mention the fact that the wage orders, like other legislative enactments pertaining to hours worked, were promulgated for the purpose of *protecting* employees. This failure no doubt arises because when viewed in this context, it is clear that the trial court committed no error.

The California Supreme Court has made clear that: "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); Mendiola v. CPS Security Solutions, Inc., 60 Cal. 4th 833, 840 (2015)(quoting Sav-On). The Court recently confirmed this instruction, stating: "[t]ime and again, we have characterized that purpose [of the Legislature and the IWC in enacting the statutes and wage orders] as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of

the Labor Code." Augustus v. ABM Security Services, Inc., 2016 Cal. LEXIS 9627, *7-8 (filed Dec. 22, 2016)(citing Mendiola, Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004 (2012), and Ramirez).

Hence, "[u]nder 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, 53 Cal. 4th at 1053, 1026-27. Following this mandate, the trial court narrowly construed the elements of the administrative exemption with an eye toward protecting the class members. This was not error.

When one applies this rule of statutory construction, coupled with the dearth of evidence York presented to meet its burden of proof, it is clear that the trial court properly performed its function and the judgment is supported by substantial evidence. Nordquist v. McGraw-Hill Broadcasting Co., 32 Cal. App. 4th 555, 561 (1995)**;** Heyen v. Safeway, 216 Cal. App. 4th 795, 817 (2013).

II. The Chambers Also Fails To Address The Fact That *York* Had The Burden Of Proving *All* Elements Of The Administrative Exemption

Nowhere in their brief do the Chambers mention the burden of proof. The Chambers fail to address the fact that, in California, the *employer* has the burden of proof to meet *all* of the elements of the exemption it asserts applies. Neither the courts nor the wage order carve

out an exception to this rule for claims adjusters or any other category of employees. Rather, Ramirez emphasized that the *employer* has *always* borne the burden of proving an employee's exemption from the overtime laws. 20 Cal. 4th at 794.

Consistent with the overarching policy that the wage orders and statutes at issue are intended to *protect* employees, the courts also make clear that 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). The only way an employer can establish an employee is "plainly and unmistakably" within the terms of an exemption, is to *actually* set forth the work performed by the employee. This York failed to do. The Chambers cite to no evidence that establishes that the class members fall *plainly and unmistakably* under the administrative exemption.

Also, 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. As the trial court rightly found, York failed to present *any* evidence that the class members performed exempt activities more than 50% of their workday. This failure is fatal to both York's attempts to attack the judgment and any argument the Chambers present.

A. The Elements Of The Administrative Exemption

Wage Order 4-2001 sets forth the elements of the administrative exemption. As the courts make clear, the elements are many, and they are set forth in the conjunctive. As set forth above, this means that York had the burden to prove *all* of the elements. Harris court confirmed that failing to prove even one of the elements precludes application of the exemption. 53 Cal. 4th at 182. The elements of the administrative exemption are as follows:

> "[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."

B. 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. As Ramirez and Wage Order 4-2001 outline, this failure is fatal, as 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). Given York's failure, the trial court correctly found that York "failed to prove that the plaintiffs and class members spend more than fifty perceont of their time performing exempt tasks." (AA231-232)

Given York's failure of proof on this element, the Chambers' arguments as to the other elements of the exemption are of no consequence. York's failure of proof on this element causes the exemption to fail. Harris, 53 Cal. 4th at 182.

C. The Trial Court Did Not Apply An "Unduly Restrictive Interpretation" Of The Requirement That The Class Members Operate Only Under "General Supervision"

Again, like the time worked element of the administrative exemption, York had the burden to prove class members performed "under only general supervision, work along specialized or technical lines

requiring special training, experience, or knowledge." The Chambers cite to no evidence that the class members met this element of the exemption. The Chambers' failure is because, like its failure to present any evidence on how class members actually spent their day, York did not address this element at trial. This too is fatal.

The evidence that the Chambers ignore establishes that, rather than operating only under general supervision, the class members were under constant supervision. The testimony of class members establishes that they could take no steps without instruction from their supervisor. This is the antithesis of "general supervision."

The evidence presented established that 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 likewise testified that she 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 about pending claims. (RT1452:17-20, 1480:1-4) As class members testified,

supervisors' notes came in "all day every day." (RT352:7-9)

This testimony conicides with York's written policies. York's policies reflect that it requires supervisors to exercise what it calls "effective supervision" over the class members. Indeed, York's audit standards include a category called "effective supervision." To pass an audit, 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)

In addition to requiring supervisors to engage in "effective supervision," York also 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) As courts explain, this level of micro management is inconsistent with exempt status.

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 Ms. Green that 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 also told Ms. 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)

Again, for the administrative exemption to apply, an employee must be subject to *only* "general" supervision. As 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) The evidence set forth above establishes the trial court was correct. At a minimum, the evidence Plaintiffs presented establishes that substantial evidence, "contradicted or uncontradicted," supports the judgment. Nordquist, 32 Cal. App. 4th at 561.

Courts and administrative bodies confirm that the trial court's finding was correct. In its 2005 opinion letter, one of the reasons why the DOL found that one group of claims adjusters working for a third party administrator like York, was not exempt, was because they "perform their duties under close supervision 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 at 1130, court found were not before it, are present here.

Other courts juxtapose "general" supervision with constant supervision. For example, 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. Similarly, 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.

When faced with facts similar to those here, courts hold that York's behavior toward the class members 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.

Again, York presented no evidence that class members operated only under general supervision, and the Chambers cite to no such evidence. The cases cited by the Chambers, many of which are the same cases on which York relies, do not support its assertion that the trial court "restrictively" applied the general supervision requirement. For example, in Robinson-Smith v. GEICO, 590 F.3d 886, 894 (D.C. Cir. 2010), the claims adjusters "worked in the absence of immediate supervision the majority of the time." Likewise, in Maddox v. Continental Cas. Co., 2011 U.S. Dist. LEXIS 151085, *22 (C.D. Cal. Dec. 22, 2011), the employee "was free to manage his o0wn time" and worked with "very little assistance or oversight." It is undisputed that nothing of the sort occurred in this case.

Other cases on which the Chambers rely are so factually inapposite that they are of no assistance. The Chambers cites often to In re United Parcel Service Wage and Hour Cases, 190 Cal. App. 1001, 1026 (2010). However, the United Parcel Service case did not involve claims adjusters.

Rather, the plaintiff was a supervisor for UPS who had many duties that the class members did not. For example, the plaintiff supervised employees and had the power to hire and fire them. Class members had no such duties, as they were at the bottom of York's corporate structure and did not supervise anyone. (RT825:26-826:5, 954:2-25) The plaintiff was also in charge of an entire hub, and admitted that he was not constrained by UPS's policies and procedures in most aspects of his employment. Id. at 1027. Nothing of the sort occurred here.

The same is true for Tsyn v. Wells Fargo Advisors, LLC, 2016 U.S. Dist. LEXIS 18587 (C.D. Cal. Feb. 16, 2016). In Tsyn, the plaintiffs were financial advisors, not claims adjusters. In addition to holding different jobs, the plaintiffs each had assistants assigned to them who performed the plaintiffs' non-exempt tasks. Id. at *15-16. Again, given their position in the company, the class members did not supervise anyone and had to perform all of the tasks assigned to them, no matter how rote or menial. (RT793:27-794:1, 794:16-20)

The bottom line is that York failed to present any evidence that would satisfy this element of the exemption. There is no question that Plaintiffs presented substantial evidence--that is, evidence of "'ponderable legal significance,' reasonable, credible and of solid value--contradicted or uncontradicted, which will support the judgment." As such, this Court long must affirm the judgment. Norquist, 32 Cal. App. 4th at 561.

D. The Trial Court Did Not Apply An "Unduly Restrictive Interpretation" Of The Requirement That The Class "Customarily And Regularly Exercise Discretion And Independent Judgment"

In its 2005 Opinion letter, the DOL explained that the claims 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 claims 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) explaining that class members "were constantly monitored in all aspects of their employment with York." (AA229) Again, York presented no contrary evidence at trial and the Chambers cite to no such evidence. As such, substantial evidence was presented at trial to support the trial court's

finding on this point. The Chambers neither address nor dispute the following evidence.

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)

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. York 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)

Plaintiff Green testified that her 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 assigned to Plaintiff Green, 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)

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) 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)

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 Quality Assurance Guide ("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)

It is undisputed that Plaintiffs presented substantial evidence 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 the Chambers cite. Even if York had presented evidence to contradict that which Plaintiffs presented, which it did not, that would not change the fact that substantial evidence supports the trial court's determination that York failed to meet its burden to prove that the class members "plainly and unmistakably," exercised the requisiste amount of independent judgment and discretion to meet this element of the exemption.

Again, the cases on which the Chambers rely address different facts and therefore the jurisprudential nuggets they glean from these cases have no application. For example, unlike class members, in Roe-Midgett v. CC Services, Inc., 512 F.2d 865, 867 (7th Cir. 2008), the appraisers spent much of their time in the field "without direct supervision" and had "the leeway to deviate from the adjusting manual;" something York did not allow. Id. at 875.

The additional cases to which the Chambers cite on this point are, like

its other arguments, so factually dissimilar that they are of no value. For example, the Chambers cites to another case against UPS, Marlo v. United Parcel Service, Inc., 639 F.3d 942 (9th Cir. 2011). Again, in Marlo, the class member was a supervisor. In his capacity as a supervisor, the evidence presented established that the plaintiff: supervised hourly employees and part-time supervisors engaged in unloading, sorting, and loading packages; assigned employees tasks within their defined work areas, provided training to ensure safety and efficiency, monitored employees' performance, and coordinated delivery times and volume. Id. at 944. Class members had no such duties. The discussion regarding policies or procedures to which the Chambers cite occurred in the context of whether the presence of these documents created sufficient predominance to establish the trial court erred when it decertified the class. Id. at 948. The plaintiff did not present the type of evidence as is before the Court, i.e., that the level of strict compliance York required by the class members eliminated any notion of discretion.

The Donovan v. Burger King Corp., 675 F.2d 516 (2nd Cir. 1982), similarly is of no aid. At issue in Donovan was whether assistant managers were improperly classified. The undisputed evidence established that the assistant managers supervised ten to twenty-five teenagers, order supplies in quantities based on their judgments as to future sales, dealt with cash or inventory irregularities, decided how many employees to schedule, oversaw

the preparation of food, and decided what food to throw away. In sum, the evidence established that the assistant managers were "solely in charge of their restaurants and are the 'boss' in title and in fact." Id. at 521-522.

Again, class members performed no such duties. The limited discussion of the procedures applicable to assistant managers does not reflect that Burger King demanded the strict compliance with the procedures as York required here or that Burger King exercised control over every aspect of the assistant managers' duties as did York. As outlined above, the Tsyn, decision is also inapplicable as the plaintiffs were financial advisors, not claims adjusters, and the presented no evidence that they operated under the level of control York asserted here. 2016 U.S. Dist. LEXIS 18587, at *15-16.

The trial court did not find that class members did not exercise independent judgment and discretion merely because they "had to comply with [York's] policies and procedures" as the Chambers assert. (Amicus Brief at 12) Rather, the trial court found that the total control exercised by York over every aspect of the class members' performance of their duties was such that they did not exercise independent judgment or discretion with respect to any this of significance. As York did not present any contrary evidence, and the Chambers cites to none, this finding by the trial court is not a basis to attack the judgment.

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

Although the Chambers assert that the trial court erred in finding that York failed to meet its burden of proof that the class members did not perform work pertaining to York's management policies and business operations, it does not make *a single citation* to any evidence to support its assertion. The Chambers fail to cite to any such evidence because York did not present any. These arguments cannot exist in a vacuum. As set forth above, just because York gave the class members the title of claims adjuster does not mean that they are automatically exempt employees. York had the burden to prove that the class members "*plainly and unmistakably*" met this element of the exemption; something it failed to do.

Again, the Chambers fail to accept that Harris explained 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." Rather, the Court emphasized 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.)

This is what the trial court did. The trial court analyzed this element of the adminsitrative exemption pursuant to *both* the production dichotomy

and, "under the more fact specific analysis required by the Harris court." (AA225) In its statement of decision, the trial court outlined the evidence on which it relied. This analysis reflects the type of "fact specific" analysis the Harris court instructed courts to employ. If the Harris Court believed that allowing courts to use the production dichotomy would wreak the havoc that the Chambers predict, requiring the mass reclassification of every employee in both the insurance industry and the financial markets, it surely would have stated that trial courts cannot use the test. It did not do so. Clearly, the Harris Court did not believe that allowing this analytical tool to survive would cause the sky to fall.

By employing this tool the trial court also did not, as the Chambers suggest, upset some sort of uniform classifications of claims adjusters. Although the Chambers state, without citation to any evidence, that "for years, employers in the insurance industry have classified claims adjusters as exempt adminsitrative employees," (Amicus Brief at 6) we know this is not universally true, as *York* employs claims adjusters that *it classifies as non-exempt*. (RT859:26-866:20) Likewise, Nationwide, USAA, Liberty Mutual, Allied, and Esurance classify their claims adjusters as non-exempt employees (RT324:7-28; 428:26-430:16). Allstate also classifies its claims adjusters as non-exempt. Jiminez v. Allstate Ins. Co., 765 F.3d 1161 (9th Cir. 2014). In a 2005 Opinion Letter, the DOL found that one group of claims adjusters working for a third party administrator like York, was not

exempt. DOL Op. Ltr., FLSA2005-25, at 5-6 (Aug. 26, 2005)(attached hereto). What this reality shows is that for claims adjusters, just like any other employee, their classification depends on their duties. Sometimes their duties are such that they are properly classified as exempt employees, sometimes they are not. Nothing about this truism is remarkable.

The bottom line is that Plaintiffs presented substantial evidence that class members *do not* engage in the activities the Chambers cite as exempt activities. There is no evidence that class members "inspected property damage," "prepared property damage estimates," or "made recommendations regarding coverage of claims;" the type of activities to which the Chambers cites. (Amicus Brief at 5) Class members testified that 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)

Class members also repeatedly testified that they do not make recommendations to or advise management. (RT659:6-16; 666:13-21) Their role was to follow York's instructions, report to their supervisors, and supervisors would advise class members on how to proceed. The same is

true with respect to "negotiations." 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)

When challenged, 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) Ms. 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) 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.

Contrary to the Chambers' assertion, courts still use the production dichotomy to determine if employees meet the first element of the administrative 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).

As the trial court conducted a fact specific analysis of the actual duties the class members performed during their work day, exactly what the Harris court instructed it to do, the Chambers' assertion of error have no merit.

III. Plaintiffs' Use Of A Survey To Prove Hours Worked Did Not Violate York's Due Process Rights

Although it string cites many cases that discuss the basic premise that parties have due process rights and that depriving a party of a right to present affirmative defenses violates those rights, the Chambers fail to cite a single case that stands for the proposition that when an employer fails to comply with its statutory duty to keep track of hours worked that the due process rights of the employer precludes a class of employees from presenting evidence of hours worked through use of a survey or other statistical means. This is because no such case exists.

A. Courts Approve The Use Of Statistical Methods Of Proof In Class Actions

In Sav-On, 34 Cal. 4th at 333, the California Supreme Court specifically approved the use of statistical evidence to prove damages in class cases, explaining that "the use of statistical sampling in an overtime class action 'does not dispense with proof of damages but rather offers a different method of proof.'" (quoting Bell v. Farmers Ins. Exchange, 115 Cal.App.4th at 750.)

Even more directly on point, the Duran court explained that when an employer fails to keep records of hours worked, Plaintiffs must use an alternative method to prove the "amount and extent" of the work performed. Quoting Anderson, the Duran court 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.'" Duran, 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…"); Bell v. Farmer's Ins. Exchange, 115 Cal. App. 4th at 747 (citing Anderson, upheld statistical proof of hours worked.) The Chambers ignore this plethora of authorities.

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). Nothing about this method of proof violates an employer's due process rights.

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.

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).

B. Plaintiffs' Survey Was Performed In Accordance With Accepted Scientific Standards

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 assert that surveys can never be used to present damages, as its expert had prepared surveys in employment cases. 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 had just one complaint with Dr. Steward's survey. This complaint was that survey respondents' identities remained confidential.

Like York, the Chambers fail to recognize 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)

The scientific literature is united on this point. The Reference Manual states: "[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).

As the literature and the courts make clear, contrary to the Chambers' assertions, Dr. Steward conducted the survey in accordance accepted scientific standards in the industry. When faced with this survey evidence, York had every opportunity to put forth contrary evidence. It could have called class members at trial to ask them questions regarding their hours worked. It could have cross-examined the class members that Plaintiffs called at trial regarding their hours worked. It could have performed a survey of its own to rebut Plaintiffs' evidence regarding hours worked. York did none of these things.

If York truly believed that the hours worked reflected in the survey results were excessive or in any way incorrect, it surely would have called class members to testify at trial as to their hours worked to undercut the credibility of the survey results. York's failure to do so does not mean York

did not have the opportunity to present its affirmative defenses. It simply means that York made the strategic decision not to do so. This does not constitute error.

CONCLUSION

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

Dated: January 17, 2017

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 9,133 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 January 17, 2017, 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*

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 January 17, 2017, I served the **RESPONDENT'S BRIEF IN RESPONSE TO AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE** 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)
- **Joshua Patashnik** (josh.patashnik@mto.com)
- **Malcolm Heinicke** (malcolm.heinicke@mto.com)
- **Margaret Maraschino** (Margaret.Maraschino@mto.com)
- **Mark Thierman** (mark@thiermanbuck.com)
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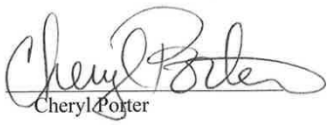
- **Justin Goodwin** (jgoodwin@gibsondunn.com)
- **Heather Wallace** (heather.wallace@calchamber.com)
- **Janet Galeria** (JGaleria@USChamber.com)

On January 18, 2017, I also served the **RESPONDENT'S BRIEF IN RESPONSE TO AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE** 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 January 17, 2017, at San Francisco, California.



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).*