

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

KENNETH HODGE et al.,

Plaintiffs and Appellants,

v.

AON INSURANCE SERVICES et al.,

Defendants and Respondents.

B217156

(Los Angeles County
Super. Ct. No. BC265725)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Ronald M. Sabraw, Judge. (Retired judge of the L.A. Sup.Ct. assigned by the Chief
Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Marlin & Saltzman, Stanley D. Saltzman; R. Rex Parris Law Firm, R. Rex Parris;
The Quisenberry Law Firm, John N. Quisenberry; The Ehrlich Law Firm, and Jeffrey
Isaac Ehrlich for Plaintiffs and Appellants.

DLA Piper, Shand S. Stephens, Erin P. Gibson and Eric S. Beane for Defendants
and Respondents.

The Industrial Welfare Commission (IWC) has adopted a wage order, commonly known as “Wage Order No. 4,” regulating the wages, hours and working conditions for professional, technical, clerical, mechanical, and similar occupations. (See Cal. Code Regs., tit. 8, § 11040.)¹ In its broadest terms, Wage Order No. 4 requires an employer to pay overtime when an employee works more than eight hours in a workday or 40 hours in a work week. (§ 11040, subd. 3.) At the same time, Wage Order No. 4 provides that its overtime rules “shall not apply to persons employed in administrative, executive, or professional capacities.” (§ 11040, subd. 1(A).)

The appeal before us today arises from a class action in which claims adjusters currently or previously employed by a third party administrator (TPA)² allege that their employer unlawfully designated them as exempt administrative employees as defined by Wage Order No. 4. The parties tried the case to the trial court, and the court concluded that the employer had not violated the overtime regulations because the claims adjusters were exempt administrative employees. We affirm the trial court’s judgment.

FACTS

As a TPA, Cambridge Integrated Services Group, Inc.³ contracts with self-insured businesses, governmental agencies, and insurance companies to adjust claims involving those entities. In the context of its contracts with self-insured businesses or government agencies, Cambridge adjusts claims made directly against those entities. In the context of its contracts with insurance companies or the California Insurance Guarantee Association or “CIGA” (which takes over policies from insolvent insurers), Cambridge adjusts claims

¹ All further references to section 11040 are to title 8 of the California Code of Regulations.

² A TPA is an entity that processes insurance claims or specified aspects of employee benefit plans for a separate entity. In other words, a TPA is an “outside” firm, not an insurer and not an employer providing a benefit plan.

³ Our references to Cambridge include AON Insurance Services, AON Corporation and AON Service Corporation, which, according to the operative complaint, own and operate one or more “Cambridge locations” in California.

made under the insurance policies issued by those entities. Depending on the entity with which it contracts, and terms of their contract, Cambridge adjusts general liability claims, vehicle-related claims, and claims for benefits under the workers' compensation law.

Between December 1997 and the present, Cambridge employed Kenneth Hodge and the other class representatives and class members as claims adjusters in a number of different offices in California.⁴ During the course of his employment, Hodge routinely worked more than eight hours in a single workday and/or worked more than 40 hours in a work week, but was not paid overtime compensation because Cambridge designated him as an exempt administrative employee. The details of the parties' employment relationship, including the adjusters' working conditions and assignments, are discussed more fully below in addressing their claims on appeal.

In December 2001, Hodge initiated a class action against Cambridge. He filed his operative first amended complaint in December 2003. As noted above, the predominant claim in Hodge's action is that Cambridge failed to pay overtime wages required under Wage Order No. 4. He originally pressed this claim in a cause of action authorized under Labor Code section 1194 (private right of enforcement of the Labor Code), and in a cause of action under the Unfair Competition Law or UCL (Bus. & Prof. Code, § 17200) based on the alleged violation of Wage Order No. 4.

The action was tried to a jury in 2005, but a mistrial was declared when the jury failed to reach a verdict.⁵ Hodge thereafter dismissed all of his causes of action except his cause of action alleging a violation of the UCL. "Plaintiffs' stated rationale was strategic; they wanted a bench trial instead of a jury trial." (*Hodge v. Superior Court*, *supra*, 145 Cal.App.4th at p. 282.) When Cambridge again requested a jury trial, the trial

⁴ Our references to Hodge include all class representatives and class members, except where otherwise specifically discussed.

⁵ Cambridge tells us in its respondent's brief that a majority of the jurors sided with the company. The record before us does not include material showing how the jurors' voted at the initial trial, but the history of the litigation, including a prior writ proceeding in our court (*Hodge v. Superior Court* (2006) 145 Cal.App.4th 278) supports an inference that Hodge's case did not fare well in front of the jury.

court granted its request. Hodge initiated a writ proceeding in our court challenging the court's finding that a jury trial was appropriate. We ruled that Cambridge was not entitled to a jury trial. (*Id.* at pp. 282-288.)

In September and October 2008, the parties tried Hodge's remaining UCL claim to the trial court; the parties presented closing arguments on October 15, 2008, and the court took the matter under submission. On December 6, 2008, the trial court issued a tentative decision in favor of Cambridge. Neither party filed objections. On January 26, 2009, the court issued a statement of decision. On February 26, 2009, the court entered judgment in favor of Cambridge.

Hodge filed a timely notice of appeal.

DISCUSSION

Introduction

In a case decided under a former version of the administrative employee exemption, Division One of the First District Court of Appeal examined regulatory language promulgated to enforce the federal Fair Labor Standards Act (FLSA), and applied an "administrative/production worker dichotomy" developed under the federal laws in analyzing whether an employee is exempt under former Wage Order No. 4. (See *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 819-827 (*Bell II*.) Hodge contends the judgment in his current case must be reversed because the facts surrounding his employment, when examined in light of the "administrative/production dichotomy" (see generally *Bell II*, at pp. 826-827), support only one conclusion as a matter of law: he was not an "administrative" employee as defined by Wage Order No. 4. After hearing the evidence, the trial court found "the test announced in *Bell II* [is not] the appropriate standard for determining the exempt/non-exempt status of Plaintiffs." We agree with the trial court that the *Bell II* dichotomy is not workable under these facts and further find no error in the trial court's decision.

As we have previously determined:

“We reject the suggestion that every enterprise can be subjected to a simplistic parsing of its ‘primary’ business function for purposes of labeling administrative versus production-level, rank-and-file workers. Instead, we agree with both state and federal courts that have held the administrative/production dichotomy is ‘but *one analytical tool*, to be used only to the extent it clarifies the analysis.’ (*Bothell* [*v. Phase Metrics, Inc.* (9th Cir. 2002)] 299 F.3d [1120,] 1127, italics added; accord, *Combs* [*v. Skyriver Communication, Inc.* (2008)] 159 Cal.App.4th [1242,] 1259-1260.) Even *Bell II* warns against overreliance on the dichotomy, stating that many employees cannot be properly characterized in terms of the dichotomy and, of particular relevance here, that some ‘employees perform jobs involving wide variations in responsibility that may call for finer distinctions than the administrative/production worker dichotomy provides.’ (*Bell II, supra*, 87 Cal.App.4th at pp. 826-827.)” (*Taylor v. UPS* (2010) 190 Cal.App.4th 1001, 1030-1031 (*Taylor*).)

While we would reach the same conclusion under either analysis, we adhere to our previous decision in *Taylor* and apply the standards set forth in the direct language of Wage Order No. 4.

A. Wage Order No. 4

Operative January 1, 2001, Wage Order No. 4 contains language providing that its mandated overtime requirements “shall not apply to persons employed in administrative, executive, or professional capacities.” (§ 11040, subd. 1(A).) Hodge’s current case involves the exemption for persons employed in an “administrative capacity.” Wage Order No. 4 defines the exemption in section 11040, subdivision 1(A)(2):

“A person employed in an administrative capacity means any employee:

“(a) Whose duties and responsibilities involve . . . :

“(I) The performance of office or non-manual work *directly related to management policies or general business operations* of his/her 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 an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); *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 that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed . . . as such terms are construed in the following regulations under the Fair Labor Standards Act effective as [January 1, 2001]: 29 [Code of Federal Regulations parts] 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include . . . all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer’s realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee [is exempt].” (Italics added.)

B. *Bell II* and *Bell III*

The parties’ briefs spend a great deal of time addressing whether *Bell II*, *supra*, 87 Cal.App.4th 805, and/or *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 (*Bell III*) control the result in Hodge’s current case. We now turn to those cases.

Bell II involved a class action by “claims representatives” who were employed by Farmers Insurance Exchange (FIE) to resolve claims made by or against the exchange’s insureds under their automobile or homeowner’s policies. In the context of a motion for summary adjudication of issues, the trial court ruled that the claims representatives were not “administrative” employees as defined by Wage Order No. 4. The Court of Appeal affirmed, ruling that the claims representatives were properly classified as production employees because adjusting insurance claims was the mission of the FIE offices where

the employees worked, and because they did work constituting the predominant part of FIE's day-to-day business operations at those offices.

In reaching its conclusion, the Court of Appeal examined the language and history of Wage Order No. 4, and, in particular, the definition of "administrative capacities," the relevance of federal law, and the development of the "administrative/production worker dichotomy." (*Bell II, supra*, 87 Cal.App.4th at pp. 819-823.) The court then turned to the facts established by the undisputed evidence presented in the context of the claims representatives' motion for summary adjudication.

As factual underpinnings to its ruling, the Court of Appeal found that FIE did not sell insurance, a service commonly involved in the insurance business, as that function was performed by another branch of the Farmers Insurance Group. Instead, it determined that FIE operated a specialized claims handling function for Farmers Group, Inc. It determined that FIE is managed by Farmers Group, Inc.; that Farmers Group, Inc. is responsible for the executive and administrative functions of the corporation; and that claims representatives "have no formal advisory role in setting FIE's overall claims handling policy and procedures or in managing FIE's business infrastructure, including purchasing, budgeting, and staffing." (*Bell II, supra*, 87 Cal.App.4th at pp. 823-824.)

The Court of Appeal noted that the parties' moving papers set forth differing notions about what constituted the business of FIE and the claims representatives' main tasks. The plaintiffs asserted they merely handled insurance policy claims. (*Bell II, supra*, 87 Cal.App.4th at p. 824.) On the other hand, the defendants sought a much more broad description of FIE's functions and the claims representatives duties, alleging they were "in the business of designing, selling and reinsuring insurance policies." (*Ibid.*) Despite FIE's attempt to spin the evidence, the Court of Appeal found it undisputed that in the California branch offices where the plaintiffs worked their job was to handle claims. (*Bell II*, at p. 825.)

With that factual predicate in place, the Court of Appeal turned to analyzing whether that work fell on the production or administrative aspect of the worker dichotomy. It held that "the undisputed evidence places the work of the claims

representatives squarely on the production side of the administrative/production worker dichotomy. The undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where plaintiffs worked. The claims representatives are fully engaged in performing the day-to-day activities of that important component of the business.” (*Bell II, supra*, 87 Cal.App.4th at p. 826.)

In deciding whether the trial court properly granted summary adjudication in favor of the workers, it looked to a series of federal cases cited by the Plaintiff. The court noted that “the administrative/production worker dichotomy is a somewhat gross distinction that may not be dispositive in many cases.” (*Bell II, supra*, 87 Cal.App.4th at p. 826.) Further, that federal case law was guided by interpretive federal regulations that prevented its courts from applying the distinction too broadly for resolution by summary adjudication. While the Court of Appeal determined the trial court properly granted summary adjudication under the particularized facts of its case, it exhorted California courts to be cautious in doing so “[i]n the absence of detailed interpretative regulations comparable to those in federal cases” (*Id.* at p. 827.)

Of significance in making its determination that summary judgment was properly granted in favor of the workers, the Court of Appeal pointed to a number of facts that confirmed its resolution. It noted “[t]he regional claims manual of the Farmers Insurance Group states, ‘We have made a deliberate decision to vest the responsibility for our operations upon the branch and regional claims managers, and it is necessary that these officials accept this in its full sense. Again, *the actual handling of the routine and unimportant may be delegated, but questions of importance must be decided by the branch claims manager, and at a higher level by the regional claims manager.*’ (Italics added.)” (*Bell II, supra*, 87 Cal.App.4th at p. 827.)

The *Bell II* court pointed to specific evidence bearing on the issue of whether a claims representative was an administrative worker:

“Other evidence confirms that the claims representatives in the personal lines division are ordinarily occupied in the routine of processing a large number of small claims. In the case of automobile physical damage claims, the average cost of repair is

\$3,000 and the average cost of a total loss is \$6,000. Only underinsured motorist claims, which account for only about 1 percent of the workload, may average above \$20,000. The average costs of other categories of property damage and liability claims range between \$2,000 and \$8,000. For example, the average cost of residential building damage claims is slightly over \$3,000. The claim representatives' authority to settle claims is set at a low level that reflects the small size of most claims. With few exceptions, the representatives' file authority is set at \$15,000 or lower and often is \$5,000 or lower.

“On matters of relatively greater importance, the claims representatives acted as investigators or as conduits of information to supervisors. For example, they were instructed to fill out appropriate forms detailing information that might indicate an unusual risk; the forms were then referred to the underwriting department which would review the decision to renew the insured's policy. Again, they were expected to gather information on subrogation potential, which their supervisors could use in deciding to present a claim to a third party. In the event of litigation, they operated as ‘go-betweens’ in conveying information to the attorney. Similarly, on coverage questions involving interpretation of the policy, they were expected to bring information to the attention of supervisors, who would instruct them what to do.

“In short, the record as a whole confirms the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to ‘the routine and unimportant.’ On matters of relatively greater importance, they are engaged only in conveying information to their supervisors—again primarily a ‘routine and unimportant’ role. This characterization of their role in the company places plaintiffs in the sphere of rank and file production workers. More precisely stated, plaintiffs render a service within an important component of the FIE business organization, i.e., the branch claims offices, which this component of the organization exists to produce. Following federal precedents, we hold that this characterization of the plaintiffs' role in the business organization places them clearly outside the category of administrative workers. We therefore conclude that the trial court properly ruled, as a matter of law, that plaintiffs

were not employed in ‘administrative capacities’ within the meaning of the language of [Wage Order No. 4].” (*Bell II, supra*, 87 Cal.App.4th at pp. 827-828.)

The court then noted that its determination that the claims adjusters fell within the purview of being production workers in the dichotomy, which meant they were not required to go further into determining the applicability of parallel federal regulations: “Since the term ‘administrative capacity’ imposes an independent requirement of the exemption, our conclusion that claims representatives do not work in an ‘administrative role’ within the FIE business organization is dispositive and establishes their nonexempt status.” (*Bell II, supra*, 87 Cal.App.4th at pp. 827-829.)

In *Bell III, supra*, 115 Cal.App.4th 715, the same case returned to the Court of Appeal after a jury awarded the claims representatives more than \$90 million for unpaid overtime compensation. Although the Court of Appeal made some modifications to the judgment, it applied the law-of-the-case doctrine and reaffirmed its ruling in *Bell II* that the claims representatives were production workers. (*Bell III, supra*, at pp. 727-739.)

C. The Trial Evidence Concerning Cambridge’s Business and the Adjusters’ Work

Cambridge manages and resolves claims in accord with the terms and conditions of client service agreements (CSA’s) entered with its business and government clients. Cambridge is hired under these contracts to handle a wide variety of claims for its clients, including workers’ compensation, general liability and auto claims. In 2004, Cambridge employed about 200 claims adjusters in California. At the time of the October 2008 trial, Cambridge had about 100 claims adjusters working in four offices in California.

Roughly 40 to 50 percent of Cambridge’s business involves work on claims from CIGA. (CIGA is a state entity that takes over responsibility for the claims of insolvent property and casualty insurance companies.) Claims made against governmental clients, such as the City of San Francisco, account for another 10 percent of Cambridge’s business in California. The remainder of Cambridge’s business is derived from adjusting claims against self-insured companies (e.g., Kmart) and claims from various insurance companies. The majority of Cambridge’s business — between 75 and 80 percent — is

derived from adjusting workers' compensation claims. The remaining 20 to 25 percent of claims adjusted by Cambridge are general liability and automotive claims that arise out of clients' business activities. These claims include vehicle accidents, environmental spills, and all types of personal injuries.

Broadly summarizing their work activities, Cambridge's claims adjusters investigate claims, review evidence, determine coverage questions, set reserves, and authorize settlement or litigation of claims. In the words of the adjusters' trial testimony, they are involved in "complex" litigated claims and are responsible for "millions" of dollars of their clients' money. The adjusters regularly interact with clients and lawyers (representing both claimants and Cambridge's clients), doctors, and other professionals, and make independent conclusions about elements such as causation and appropriate compensation using their personal judgment and discretion and their specialized training, experience and skills. As class member Terri Kaney-Petersen phrased it during her trial testimony, the "essence of the job" of an adjuster is "investigation, analysis, evaluation and negotiation." The testimony of class representative Denise Hughes included a similar summation of an adjuster's job. A wide swath of the adjusters' testimony at trial described the work that they performed for their clients with terms such as "critical" and "vital" and "important" to their clients' business operations.

Some Cambridge claims adjusters work or worked for multiple Cambridge clients, others work or worked exclusively for one client. For example, class representative Kenneth Hodge adjusted claims only for Kmart, class representative Rene Cristobal adjusted claims only for Hewlett-Packard, and class member Jordan Cooper Davis adjusted claims only for Cibus, all self-insured companies. Other claims adjusters had several clients, both insured and self-insured. Class member Terri Kaney-Petersen adjusted claims for several clients, including, among others, Cintas, Corporate Express, and Lincoln Properties. Class representative Denise Hughes testified that she had at least 20 different clients.

A significant part of the trial evidence addressed the details of the adjusters' work. The evidence regarding workers' compensation claims typifies the factual context of the

adjusters' day-to-day responsibilities: Cambridge's business and governmental clients are required by law to offer workers' compensation benefits to their employees (either by purchasing workers' compensation insurance or self-insuring), claims for such benefits must be administered in accord with the workers' compensation law, and Cambridge's claims adjusters handled this "mandatory component" of their clients' operations from beginning to end. It was the adjusters' job to make sure that an injured worker got compensated appropriately under the workers' compensation law and to close the case.

Benefits available through the workers' compensation system include medical benefits, temporary disability, permanent disability, rehabilitation, job displacement and death benefits. Other types of benefits available to a worker, such as union benefits, state disability and potential subrogation rights, must be coordinated with the workers' compensation benefits. In adjusting a workers' compensation claim, the adjusters must determine the nature of the worker's injury, whether the injury is "cumulative," the amount of time the injured worker has worked for the employer, and whether previous employers should share responsibility as part of an ongoing injury. The adjusters must also decide whether temporary or permanent disability benefits are proper. The adjusters' decisions are based on facts disclosed by investigation, including a review of any medical records to assure benefits and any appropriate treatments match an injury report. The adjusters handle all aspects of claims, including working on-site with injured workers and attending settlement conferences. And they apply facts to the law, including the Labor Code.

A "reserve" is an adjuster's estimation of what the total cost of the claim will be over its lifespan. Cambridge's claims adjusters set a reserve for every claim they handle. Cambridge's clients accounted reserves as liabilities and expenses, and, accordingly, they set aside funds to cover these liabilities and expenses. As Cambridge's expert on accounting, financial reporting and compliance with Securities and Exchange Commission requirements explained at trial, Cambridge's adjusters, when setting reserves, are "tying up the cash to ultimately pay the reserves, and by tying up the cash they're removing it from availability for other purposes." For these reasons, the

adjusters' decisions in setting reserves affect the finances of a client "dollar for dollar," and affect a client's business operations insofar as "committing of cash to one function takes it away from another." In short, the adjusters' authority to set reserves is essentially equivalent to the authority to allocate and spend a company's funds. Setting reserves is important to the clients because it is "their money" that must be set aside once the reserve is established. Apart from the general importance to business operations, the state's workers' compensation regulations require self-insured companies to post 135 percent of total incurred reserves in the form of a negotiable instrument or a bond to assure payment of workers' compensation claims in the event of a bankruptcy.

The adjusters' authority to set the amount of a reserve on a claim against a client (and to settle the claim) generally depends on the terms of the CSA between Cambridge and that client; the adjusters' reserve authority commonly varies from between \$20,000 and \$100,000, and is sometimes greater. In January 2002, all 19 of the senior claims adjusters in Cambridge's San Diego office had \$100,000 in reserve authority. At the time of trial in the fall of 2008, the adjusters in the San Diego office had \$50,000 reserve authority from CIGA, which at that time made up about 80 percent of the business in the office. Reserves on claims involving amounts above the authority specifically given to the adjusters are evaluated and set in consultation with the clients. And other CSA's do not specifically limit reserve authority (or settlement authority), but require an adjuster to notify the client about reserves above a certain level, for example, \$25,000.

Given the per-claim reserve authority assigned to Cambridge's adjusters, and the number of claims the adjusters handle, the aggregate reserves set aside by an individual adjuster may tie up millions of dollars of a client's money. Class member Jordan Davis testified that, after he became a supervisor at Cambridge, the aggregate liability of his unit of five adjusters was about \$60 million to \$70 million in any given year.

In addition to their authority to set reserves, Cambridge's adjusters also negotiate settlements which their clients (whether a self-covered company or an insurer), in turn, pay. As with their authority to set reserves, the adjusters' authority to settle claims is generally governed by the particular CSA between Cambridge and the client; adjusters

commonly have authority to settle claims in amounts from \$25,000 to \$75,000 without approval from the client. In accord with applicable governing guidelines, adjusters settle larger claims with a supervisor's approval and/or with approval from the client. The adjusters' recommendations for settlements above their authority level are typically upheld.

Cambridge's adjusters also manage outside litigation counsel and related litigation expenses as part of their jobs. When claims are not settled, adjusters make recommendations for litigation, work with outside counsel in developing litigation plans, evaluating the merits of claims, and projecting the client's exposure. Adjusters may attend court hearings and instruct outside counsel when to settle a claim or continue negotiating with a claimant. In the words of class representative Rene Cristobal, an adjuster does not simply "hand [a] claim over to an attorney and let them [*sic*] run off with it." Although most claims do not involve disputes over the existence of coverage (particularly the workers' compensation claims), adjusters do review and analyze coverage issues when they arise.

D. Analysis

Whether an employee falls within the meaning of a category delineated in a statute or regulation presents a mixed question of fact and law. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794.) On an appeal in a case presenting such a mixed question of fact and law, a reviewing court applies the substantial evidence test to the historical facts established by the trial record, and independently determines the legal issue involved in selecting the proper statutory or regulatory category into which the employee fits. (*Ibid.*, citing *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) In the appeal before us today, the historical facts are not materially disputed — the trial record establishes the duties and responsibilities of Cambridge's claims adjusters as we outlined them above. The appeal, therefore, predominantly presents an issue of law. (*Ramirez v. Yosemite Water Co.*, *supra*, at p. 794.) This is the issue presented: Given the adjusters' duties and responsibilities, are the adjusters "persons employed in an administrative capacity"? We answer this question yes.

We begin with the statutory language. The parties agree that the critical language in Wage Order No. 4 for purposes of their current case is included within this definition of a person employed in an administrative capacity: “any employee whose duties and responsibilities involve the performance of office or non-manual work *directly related to management policies or general business operations*” of his or her employer. In an abstract sense, this regulatory definition applies to all work performed in a business setting because all work is directly related to the “general business operations” of an employer. This, of course, cannot constitute the true meaning of Wage Order No. 4 because it would exempt all employees from earning overtime pay, in which case the exemption would amount to a self-defining nullity.

The most recent version of Wage Order No. 4 (effective January 2001) expressly states that exempt and non-exempt work shall be construed in the same manner as such terms are construed in federal regulations — promulgated under the FLSA — “effective as of the date of [Wage Order No. 4].” Those (2001) federal regulations include former 29 Code of Federal Regulations part 541.205(a), which provided — as it was effective in 2001 — that the phrase “directly related to management policies or general business operations” of an employer “limits” the administrative exemption to those persons “who perform work of *substantial importance* to the management or operation of the business” of an employer. (Italics added.) Part 541.205(b) further provides that the “administrative operations of [a] business include the work performed by so-called white-collar employees engaged in ‘servicing’ a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.” And part 541.205(c) provides that work of “substantial importance” to the management or operations of a business means that the work “affects policy” or “affects business operations to a substantial degree”

Former 29 Code of Federal Regulations part 541.205(c) also provides illustrations of the types of work satisfying the “substantial importance” requirement. For example, the “cashier” of a bank is exempt, but a “teller” of the bank is not. Bookkeepers, secretaries, and “clerks of various kinds hold[ing] the run-of-the-mine [*sic*] positions in

any ordinary business” are not exempt. A “tax consultant” for a company or for a “firm of consultants” is exempt. A “messenger boy,” even when he or she is “entrusted with carrying large sums of money,” is not exempt. A person “operating very expensive equipment” is not exempt. An “inspector,” including an “inspector for an insurance company,” is not exempt. A “statistician” who merely “tabulate[s] data” is not exempt, but a person who tabulates and “makes analyses of data and draws conclusions” that are “important” to a business is exempt. A “buyer” of equipment for an industrial plant or a retail establishment is exempt. (Former 29 C.F.R. § 541.205(c)(1), (2), (3), effective as of January 2001.)

In the end, “[t]he test of [the phrase] ‘directly related to management policies or general business operations’ is also met by many persons employed [in positions] as advisory specialists and consultants of various kinds, [including] credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers’ brokers in stock exchange firms, promotion men, and many others.” (Former 29 C.F.R. § 541.205(c)(5), effective as of January 2001.)

The exemption applies when a person is employed in an administrative capacity, and defines a “person employed in an administrative capacity” to mean “any employee whose duties and responsibilities involve the performance of . . . work directly related to management policies or general business operations of his [or] her employer or his[her] employer’s customers.” Under this language, a person is employed in an “administrative capacity,” and thus exempt from the reach of Wage Order No. 4’s overtime requirements, in one of two situations: (1) when his or her duties and responsibilities involve the performance of office or non-manual work directly related to general business operations of his or her employer; “*or*,” (2) when his or her duties and responsibilities involve the performance of office or non-manual work directly related to general business operations *of his or her employer’s customers*.

Turning to an easy part of the current case: adjusters who work or have worked for a single, self-insured Cambridge client (i.e., the “customer”) whose business was not the business of insurance cannot escape the conclusion that they were “persons whose duties

and responsibilities involve the performance of . . . work directly related to management policies or general business operations” of the client, regardless whether the test applied is the administrative/production worker dichotomy or the test articulated in the federal regulations incorporated into Wage Order No. 4. For example, Kmart is a retailer; its “production” workers perform work related to selling consumer goods. Assuming Kmart hired its own employees to adjust its workers’ compensation claims, it simply cannot be denied that those employees would be involved in the performance of work that is administrative in nature. The fact that Kmart chose to outsource its administrative work does not make the work any less administrative. The same may be said of Hewlett-Packard, whose workers make computers and computer-related equipment, and the City of San Francisco, whose workers provide municipal services. It cannot be disputed that the work performed by the adjusters is “directly related to management policies or general business operations” to Kmart and the other self-insured, noninsurance-related entities. The adjusters working on claims on behalf of Kmart and the other self-insured entities are not equivalent to “messenger boys,” or “clerks in . . . run-of-the-mine [*sic*] positions,” or mere “tabulators” of data. The adjusters reserve “millions” of dollars of the clients’ money to handle claims, removing that money from availability for other business purposes. So, this carves off and ends the prayer for overtime by all of the class member adjusters who are not involved in the adjusting of claims for an insurance-related entity. Those adjusters are persons employed in an administrative capacity.

The other elements in Wage Order No. 4 do not require an exegetic discussion. The trial court found, and it cannot be disputed under the substantial evidence test, that the adjusters “exercise[] discretion and independent judgment” in performing their tasks. (§ 11040, subd. 1(A)(2)(b).) The same may be said of the trial court’s findings that the adjusters perform with minimal direct supervision, and that their work requires special training, experience or knowledge.” (See *id.*, subd. 1(A)(2)(d).) In summary, the record establishes that Cambridge’s claims adjusters are not mere “paper pushers;” they are highly skilled, specialized employees doing work that is, in their own words, “critical” or “important” to the operations of their clients, and which, if not done well, can lead to the

failure or bankruptcy of a client, or, at a minimum, a substantial interference with the general business operations of the client.

We are left, then, with the adjusters who handled claims for insurance-related entities. Applying the language of Wage Order No. 4, we find the claims adjusters were performing “office or non-manual work directly related to management policies or general business operations of his/her employer or his employer’s customers.” The evidence developed at trial belies a conclusion that the adjusters’ duties and responsibilities are “restricted to the routine and unimportant” as in *Bell II*. We agree with the trial court’s conclusion that the adjusters’ duties and responsibilities in setting reserves is of substantial importance to the general business operations of the insurance-related entities. As the trial court noted, the actual reserves established by the adjusters may total “millions of dollars.” In January 2002, the reserve authority of the adjusters in the San Diego office for any given claim averaged about \$75,000. The adjusters’ coordinated medical care, and developed and helped implement litigation strategies when necessary. We simply decline the adjusters’ implicit invitation to label themselves as working in unimportant roles for their clients’ insurance company businesses.

Even applying *Bell II, supra*, 87 Cal.App.4th 805, we reach the same result. There, the Court of Appeal ruled in the context of a motion for summary adjudication of issues that the undisputed evidence established that claims representatives who worked at FIE claims-handling branches were not exempt administrative employees. (*Id.* at pp. 823-827.) The court reached this result based on evidence establishing the following facts: the claims representatives were “ordinarily occupied in the routine of processing a large number of small claims. In the case of automobile physical damage claims, the average cost of repair is \$3,000 and the average cost of a total loss is \$6,000. Only underinsured motorist claims, which account for only about 1 percent of the workload, may average above \$20,000. The average costs of other categories of property damage and liability claims range between \$2,000 and \$8,000. For example, the average cost of residential building damage claims is slightly over \$3,000. The claim representatives’ authority to settle claims is set at a low level that reflects the small size of most claims.

With few exceptions, the representatives' file authority is set at \$15,000 or lower and often is \$5,000 or lower." (*Id.* at p. 827.)

"On matters of relatively greater importance, the claims representatives acted as investigators or as conduits of information to supervisors. For example, they were instructed to fill out appropriate forms detailing information that might indicate an unusual risk; the forms were then referred to the underwriting department which would review the decision to renew the insured's policy. Again, they were expected to gather information on subrogation potential, which their supervisors could use in deciding to present a claim to a third party. In the event of litigation, they operated as 'go-betweens' in conveying information to the attorney. Similarly, on coverage questions involving interpretation of the policy, they were expected to bring information to the attention of supervisors, who would instruct them what to do." (*Bell II, supra*, 87 Cal.App.4th at p. 828.)

In the Court of Appeal's words, the record "confirm[ed] the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to 'the routine and unimportant.' On matters of relatively greater importance, they are engaged only in conveying information to their supervisors — again primarily a 'routine and unimportant' role." (*Bell II, supra*, 87 Cal.App.4th at p. 828.) In short, the evidence "place[d] the plaintiffs in the sphere of rank and file production workers" because it showed they "render[ed] a service within an important component of the FIE business organization, i.e., the branch claims offices, which this component of the organization exist[ed] to produce." (*Ibid.*)

In our view, the evidence in the current case involving Cambridge's adjusters is materially different from the evidence in *Bell II*, and places the adjusters in the sphere of administrative workers. They were not, as were the claims representatives in *Bell II*, "ordinarily occupied in the routine of processing a large number of small claims," such as automobile physical damage claims averaging repair costs of \$3,000, and average total costs of \$6,000. Although it is correct that setting a reserve for a modest sum would not support a finding that the work was performed in an administrative capacity within the

meaning of Wage Order No. 4 (*Bell II, supra*, 87 Cal.App.4th 805), we agree with the trial court that it is significant in the current case that the evidence established that the adjusters who serviced Cambridge’s clients fulfilled a more critical role for those clients than merely setting reserves for a modest sum. Certainly, a significant portion of the adjusters’ work involves “run-of-the-mine [*sic*]” claims, but the fact that a person doing work of “substantial importance” to an insurer may also be required in the course of doing important work to handle mundane tasks does not remove the person from working in a position whose duties involve the performance of work directly related to the general business operations of the business. The test is whether a person is performing work related to managerial policies or the general business operations of his or her employer or customers, not whether the person’s job has its nits. We acknowledge that there is evidence in the record to show that some portion of the adjusters’ activities does not have a direct impact on the financial condition of their clients, but the trial court found that, as historic fact, the adjusters are involved in work of substantial importance to their clients, and we will not supplant a different factual finding where, as here, the finding is supported by substantial evidence. *Bell II* does not compel a different result on the “administrative” versus “production” worker finding as a matter of law.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

KENNETH HODGE et al.,

Plaintiffs and Appellants,

v.

AON INSURANCE SERVICES et al.,

Defendants and Respondents.

B217156

(Los Angeles County
Super. Ct. No. BC265725)

**ORDER CERTIFYING OPINION
FOR PUBLICATION**

(No Change in Judgment)

THE COURT*:

The opinion in the above entitled matter filed on February 2, 2011, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

* BIGELOW, P.J.

FLIER, J.

GRIMES, J.