Filed 7/23/12 (opn. on remand from Supreme Court)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FRANCES HARRIS et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LIBERTY MUTUAL INSURANCE COMPANY et al., Real Parties in Interest.	No. B195121 consolidated with No. B195370 (Super. Ct. Nos. BC246139, BC246140) (JCCP No. 4234 – Liberty Mutual Overtime Cases)
LIBERTY MUTUAL INSURANCE COMPANY et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FRANCES HARRIS et al., Real Parties in Interest.	No. B195370 consolidated with No. B195121 (Super. Ct. Nos. BC246139, BC246140) (JCCP No. 4234 – Liberty Mutual Overtime Cases)

ORIGINAL PROCEEDINGS in mandate. Carolyn B. Kuhl, Judge. Petition in No. B195121 granted; petition in No. B195370 denied.

Robbins Geller Rudman & Dowd, Patrick J. Coughlin, Theodore J. Pintar, Steven W. Pepich, Kevin K. Green, Steven M. Jodlowski; Cohelan Khoury & Singer, Timothy D. Cohelan, Isam C. Khoury; Spiro Moss, Ira Spiro, Dennis F. Moss; Law Office of Michael L. Carver and Michael L. Carver for Petitioners and for Real Parties in Interest Frances Harris, Dwayne Garner, Marion Brenish-Smith, Steven Brickman, Kelly Gray, Adell Butler-Mitchell and Lisa McCauley.

Hud Collins as Amicus Curiae on behalf of Petitioners and Real Parties in Interest Frances Harris, Dwayne Garner, Marion Brenish-Smith, Steven Brickman, Kelly Gray, Adell Butler-Mitchell and Lisa McCauley.

Sidley Austin, Douglas R. Hart, Geoffrey D. Deboskey; Sheppard Mullin Richter & Hampton, Robert J. Stumpf, Jr., and Karin Dougan Vogel for Petitioners and for Real Parties in Interest Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation.

No appearance for Respondent.

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These writ proceedings are before us on remand from the Supreme Court following the court's decision in *Harris v. Superior Court* (2011) 53 Cal.4th 170 (*Harris*). The court reversed our previous decision in this case, concluding that we had "misapplied the substantive law." (*Id.* at p. 175.) The court remanded for us to reconsider the matter in light of the correct legal standard.

Defendants are insurance companies, the employers of plaintiffs, the companies' claims adjusters, who seek damages based on overtime work for which they allege they were not properly paid (Employers and Adjusters, respectively). Adjusters' claims are governed by two different California regulations promulgated by California's Industrial Welfare Commission (IWC): Wage Order No. 4-98 (Wage Order 4-1998), applying to claims arising before

October 1, 2000, and Wage Order No. 4-2001 (Wage Order 4-2001), applying to claims arising thereafter.

Employers claim that the administrative exemption to the overtime compensation requirements applies to claims adjusters. Adjusters claim that the exemption does not apply. In addition, Adjusters contend that the issue of whether their work duties are of the kind required for application of the administrative exemption is a predominant issue common to the claims of all putative class members, warranting class certification. The trial court initially agreed and certified Adjusters' proposed class. Later, however, the court revisited the issue and decertified the class for all claims arising after October 1, 2000, on the ground that under Wage Order 4-2001, but *not* under Wage Order 4-1998, the work duties issue is neither dispositive nor a predominant issue that would justify class treatment of Adjusters' claims.

Both sides petitioned for writ review. Employers seek decertification of the portion of the class that remains certified. Adjusters seek recertification of the decertified portion of the class and also challenge the trial court's denial of their motion for summary adjudication of Employers' affirmative defense based on the administrative exemption. We grant Adjusters' petition and deny Employers' petition because Adjusters' primary work duties are the day-to-day tasks of adjusting individual claims not directly relating to management policies or general business operations.

BACKGROUND

As stated in *Harris*: "[Adjusters are] claims adjusters employed by Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation (collectively [Employers]). [Adjusters] filed four class action lawsuits alleging [Employers] erroneously classified them as exempt 'administrative' employees and seeking damages based on unpaid overtime work. The four actions were coordinated into one proceeding. [Adjusters] also moved for class certification. The trial court certified a class of 'all non-management California employees classified as exempt

by Liberty Mutual and Golden Eagle who were employed as claims handlers and/or performed claims-handling activities.'" (*Harris*, *supra*, 53 Cal.4th at p. 175.)

Adjusters and Employers subsequently filed cross-motions for summary adjudication of Employers' affirmative defense that Adjusters are exempt administrative employees and thus not entitled to overtime compensation. Employers simultaneously moved, in the alternative, to decertify the class, and they later withdrew their motion for summary adjudication.

"The trial court decertified the class in part, depending on whether [Adjusters'] claims arose before or after October 1, 2000, the date the IWC replaced an earlier version of Wage Order 4. The court afforded the disparate treatment because it felt bound by the authority of *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805 (*Bell II*) and *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 (*Bell III*) (collectively *Bell* cases).

"For claims arising before October 1, 2000, the trial court decided that the *Bell* cases compelled a ruling that [Adjusters] were nonexempt 'production workers' under the version of Wage Order 4 adjudicated in those cases. (See *Bell II*, *supra*, 87 Cal.App.4th at p. 826.) The court decertified the class as to all claims arising after October 1, 2000, the effective date of a new Wage Order 4. The court did not believe the *Bell* cases applied to the revised version of Wage Order 4 because those cases did not consider the new wage order, nor did they apply the federal regulations specifically incorporated into it. Recognizing that the law was unsettled, the court suggested the parties seek interlocutory review by the Court of Appeal.

"Both parties did so. [Adjusters] sought review of the order partially decertifying the class and denying their motion for summary adjudication. [Employers] sought review of the trial court's partial denial of their motion to decertify the class." (*Harris*, *supra*, 53 Cal.4th at pp. 175–176.)

We issued an order to show cause, ordered that the petitions be consolidated, and, in a published opinion, granted Adjusters' petition and denied Employers' petition. We directed the trial court to grant Adjusters' motion for summary adjudication and to deny in its entirety Employers' motion to decertify the class. (See *Harris, supra*, 53 Cal.4th at p. 176.)

The Supreme Court granted review and reversed. The court identified certain errors in our reasoning and clarified certain points concerning the governing law. The court reversed our judgment and remanded to this court to reconsider the matter in light of "the appropriate legal standard set out herein." (*Harris, supra*, 53 Cal.4th at p. 191.) The court directed us on remand to "review the trial court's denial of the summary adjudication motion" but did not expressly direct us to review the class certification issue as well. (*Ibid.*) The court did indicate, however, that the parties remained "free to raise the issue on remand" (*id.* at p. 190, fn. 9), and the parties have done so in their supplemental briefing in this court.

STANDARD OF REVIEW

We review the trial court's order denying a motion for summary adjudication de novo. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) We review the trial court's rulings on class certification for abuse of discretion, but a ruling based upon a legal error constitutes an abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326–327; see also *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393 [legal error constitutes abuse of discretion].) We review the trial court's interpretation of statutes and regulations de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [statutes]; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [regulations].)

DISCUSSION

I. Overview of the California and the Federal Regulations

Labor Code section 1173 grants the IWC a broad mandate to regulate the working conditions of employees in California, including the setting of standards for minimum wages and maximum hours. (See *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701–702; see also *Bell v. Farmers Ins. Exchange*, *supra*, 87 Cal.App.4th at p. 810 (*Bell II*).) To that end, the IWC has promulgated 17 different "wage orders" applying to distinct groups of employees. (See Cal. Code Regs., tit. 8, §§ 11010–11170.) At issue in this case are Wage Order 4-1998 and Wage Order 4-2001, which govern the wages and hours of employees in "Professional, Technical, Clerical, Mechanical, and Similar Occupations." (Cal. Code Regs., tit. 8, § 11040 (Regs. § 11040).) "For our purposes, [Wage Order 4-1998] covers claims arising before October 1, 2000, and [Wage Order 4-2001] applies to claims arising thereafter." (*Harris*, *supra*, 53 Cal.4th at p. 177.) More precisely, the IWC first replaced Wage Order 4-1998 with Wage Order No. 4-2000, which took effect on October 1, 2000, and then replaced Wage Order No. 4-2000 with Wage Order 4-2001, which took effect on January 1, 2001. For purposes of this case, there are no relevant differences between Wage Order No. 4-2000 and Wage Order 4-2001, so "we consider Wage Order 4-2001 as applying after October 1, 2000." (*Harris*, *supra*, 53 Cal.4th at p. 177, fn. 1.)

Both wage orders provide for certain exemptions from the overtime compensation requirements. The exemptions are affirmative defenses, so an employer bears the burden of proving that an employee is exempt. (*Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at pp. 794–795.)

As explained by *Harris*: "Wage Order 4-1998 made 'persons employed in administrative, executive, or professional capacities' exempt from overtime compensation requirements. (Wage Order 4-1998, subd. 1(A).) Wage Order 4-1998 did not articulate the precise scope of the administrative exemption. It did,

however, limit the exemption to employees 'engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month . . . .' (Wage Order 4-1998, subd. 1(A)(1).)

"The practical effect of Wage Order 4-1998, and other orders issued by the IWC during that year, was that about eight million workers lost their right to overtime pay because the orders 'deleted the requirement to pay premium wages after eight hours of work a day.' (Stats. 1999, ch. 134, § 2(f), p. 1820, enacting Assem. Bill No. 60 (1999–2000 Reg. Sess.).) In response, the Legislature passed the 'Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999.' (Stats. 1999, ch. 134, § 1, p. 1820, adding and amending provisions of Lab. Code, § 500 et seq.) The act amended Labor Code section 510, which provides that a California employee is entitled to overtime pay for work in excess of eight hours in one workday or 40 hours in one week. (Lab. Code, § 510, subd. (a).) However, Labor Code section 515, subdivision (a), added by the act, exempts from overtime compensation 'executive, administrative, and professional employees' whose primary duties[1] 'meet the test of the exemption,' who 'regularly exercise[] discretion and independent judgment in performing those duties' and who earn a monthly salary at least twice the state minimum wage for full-time employees. (Lab. Code, § 515, subd. (a).)

"Under the statute then, to qualify as 'administrative,' employees must (1) be paid at a certain level, (2) their work must be administrative, (3) their primary duties must involve that administrative work, and (4) they must discharge those primary duties by regularly exercising independent judgment and discretion.

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1 In a footnote at this point, the Supreme Court stated: "Wage Order 4-1998 and Wage Order 4-2001 define 'primarily' as 'more than one-half the employee's work time.' (Regs., § 11040, subd. 2(N).) Thus, in order to be covered by the administrative exemption under either order, employees must spend over one-half of their work time doing work that fits the test of the exemption."

The narrow question here involves the second point, whether [Adjusters'] work is administrative. That is, whether it meets the test of the exemption. These statutory standards are further understood in light of the applicable wage order.

"Labor Code section 515, subdivision (a) directs the IWC to conduct a review of the duties that meet the test of the exemption and, if necessary, modify the regulations. After review, the Commission issued Wage Order 4-2001.

"A comparison of Wage Order 4-1998 and Wage Order 4-2001 reveals that the latter contains a much more specific and detailed description of work that is properly described as administrative. Whereas Wage Order 4-1998 contains only a single sentence relative to an employee involved in administrative work, Wage Order 4-2001 discusses the scope of the administrative exemption in seven fairly extensive and interrelated subdivisions. (Compare Wage Order 4-1998, subd. 1(A)(1) with Wage Order 4-2001, subd. 1(A)(2)(a)–(g).) Specifically, Wage Order 4-2001, subdivision 1(A)(2)(f) provides that the terms 'exempt' and 'non-exempt' are to be construed under certain incorporated regulations listed in the federal Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) then in effect. So, just as the statute is understood in light of the wage order, the wage order is construed in light of the incorporated federal regulations. [¶] . . . [¶]

"As part of its function, the IWC issues 'Statements As To The Basis' (hereafter, Statement or Commission Statement) explaining 'how and why the commission did what it did.' (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 213.) With respect to Wage Order 4-2001, the Commission Statement notes, 'The IWC intends the regulations in these wage orders to provide clarity regarding the federal regulations that can be used [to] describe the duties that meet the test of the exemption under California law, as well as to promote uniformity of enforcement. The IWC deems *only* those federal regulations *specifically* cited in its wage orders, and in effect at the time of promulgation of these wage orders, to apply in defining exempt duties under California law.' (Italics added.)

"Accordingly, Wage Order 4-2001 specifically directs that whether work is exempt or nonexempt 'shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201–205, 541.207–208, 541.210, and 541.215.'[2] (Wage Order 4-2001, subd. 1(A)(2)(f).)

"Like its predecessor, Wage Order 4-2001 exempts 'persons employed in administrative, executive, or professional capacities.' (Wage Order 4-2001, subd. 1(A).) Unlike its predecessor, subdivision 1(A)(2) of the new wage order describes the administrative exemption in some detail. It provides, in part, that persons are employed in an administrative capacity if their duties and responsibilities involve office or nonmanual work '*directly related to management policies or general business operations of* [*their*] *employer or* [*the*] *employer's customers*.' (Wage Order 4-2001, subd. 1(A)(2)(a)(i), italics added.)

"Federal Regulations former part 541.205 (2000) is one of the regulations incorporated in Wage Order 4-2001, subdivision 1(A)(2)(f). That regulation defined the italicized phrase above. It is this 'directly related' phrase that distinguishes between 'administrative operations' and 'production' or 'sales' work. (Fed. Regs. § 541.205(a) (2000).)

"Parsing the language of the regulation reveals that work qualifies as 'administrative' when it is '*directly related*' to management policies or general business operations. Work qualifies as 'directly related' if it satisfies two components. First, it must be *qualitatively* administrative. Second, *quantitatively*, it must be of substantial importance to the management or operations of the business. Both components must be satisfied before work can be considered

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2 In a footnote at this point, the Supreme Court stated: "Regulations appearing in title 29 of the Code of Federal Regulations are hereafter referred to as 'Federal Regulations.' Citations to the Federal Regulations are as they existed on January 1, 2001, the effective date of Wage Order 4-2001. (Current regulations are found in Fed. Regs. § 541.203 (2011).)"

'directly related' to management policies or general business operations in order to meet the test of the exemption. (Fed. Regs. § 541.205(a) (2000).)

"The regulation goes on to further explicate both components. Federal Regulations former part 541.205(b) (2000) discusses the qualitative requirement that the work must be administrative in nature. It explains that administrative operations include work done by 'white collar' employees engaged in servicing a business. Such servicing may include, as potentially relevant here, advising management, planning, negotiating, and representing the company. Federal Regulations former part 541.205(c) (2000) relates to the quantitative component that tests whether work is of 'substantial importance' to management policy or general business operations." (*Harris*, *supra*, 53 Cal.4th at pp. 177–182 & fns. 3, 5, fns. 2, 4 & 6 omitted.)

Only the qualitative component of the "directly related" requirement is at issue in this case. (*Harris*, *supra*, 53 Cal.4th at p. 182.)

II. Wage Order 4-1998 and the Federal Regulations

As *Harris* noted, "Wage Order 4-1998 did not articulate the precise scope of the administrative exemption," stating only that the exemption is limited "to employees 'engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month . . . .' (Wage Order 4-1998, subd. 1(A)(1).)" (*Harris*, *supra*, 53 Cal.4th at p. 177.) Because Wage Order 4-1998 provides so little useful guidance concerning application of the exemption, we conclude that it is "appropriate to reach out to other sources" to inform our determination of the exemption's scope. (*Harris*, *supra*, 53 Cal.4th at p. 190.)

Such a helpful source is readily at hand, namely, the federal regulations that were expressly incorporated in Wage Order 4-2001, which already existed when Wage Order 4-1998 was in effect and which define the scope of the administrative exemption under the Fair Labor Standards Act of 1938. The parties do not deny

that the federal regulations should guide our interpretation of Wage Order 4-1998 and, on the contrary, base their arguments under both Wage Order 4-1998 and Wage Order 4-2001 on the same federal regulations.

Accordingly, because we conclude that the same federal regulations that are incorporated into Wage Order 4-2001 must be used as a guide to interpreting Wage Order 4-1998, we agree with the parties that the analysis of the administrative exemption should be the same under both wage orders.

III. The Qualitative Component of the "Directly Related" Requirement

To qualify for the administrative exemption under either wage order, an employee must be primarily engaged in work that qualitatively is "directly related to management policies or general business operations." (See Wage Order 4-2001, subd. 1(A)(2)(a)(i).) That requirement obviously stands in need of interpretation. In one sense, *every* type of work directly relates to management policy, because every employee does work that carries out, or is governed by, management policy. California's wage and hour regulations, however, are liberally construed in furtherance of their remedial purpose, and exemptions to the regulations are therefore narrowly construed. (*Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 794.) The same interpretive principles apply to the Fair Labor Standards Act of 1938 and its exemptions. (See, e.g., *Klem v. County of Santa Clara, California* (9th Cir. 2000) 208 F.3d 1085, 1089.) Any interpretation that would mean that *all* types of work meet the qualitative component of the "directly related" requirement is consequently untenable.

Under the federal regulations, the qualitative component of the "directly related" requirement provides that an employee's work duties meet the test of the exemption only if they "relat[e] to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work" (Fed. Regs. § 541.205(a) (2000)), but the import of that statement is not perfectly clear. We take it to mean that only duties performed at the level of *policy* or *general* operations can satisfy the qualitative component of the "directly

related" requirement. In contrast, work duties that merely carry out the particular, day-to-day operations of the business are production, not administrative, work.

We are aware of no other plausible interpretation of the qualitative component of the "directly related" requirement, and our interpretation finds support in the federal case law. An employee doing exempt administrative work is "engage[d] 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." (*Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120, 1125; see also *Martin v. Cooper Elec. Supply Co.* (3d Cir. 1991) 940 F.2d 896, 904–905 (*Martin*) [plaintiffs' work of promoting sales did not satisfy the qualitative component of the "directly related" requirement because it "focused simply on particular sales transactions" rather than on increasing "customer sales *generally*"]; *Reich v. American Intern. Adjustment Co., Inc.* (D.Conn. 1994) 902 F.Supp. 321, 325 [the work of automobile damage appraisers fails to satisfy the qualitative component of the "directly related" requirement because "[r]ather than administratively running the business, they carry out the daily affairs of" their employer].)

We recognize that even so interpreted, the qualitative component of the "directly related" requirement remains a somewhat rough distinction that may be difficult to apply in certain cases. But, as Employers concede, the qualitative component is determinative for any employees whose "work falls 'squarely on the "production" side of the line[.]'" (*Bothell v. Phase Metrics, Inc.*, *supra*, 299 F.3d at p. 1127.) The qualitative component is part of the requirement that an exempt administrative employee be primarily engaged in work that is "directly related to management policies or general business operations." (Fed. Regs. § 541.205(a) (2000).) An employee who is primarily (namely, more than half of his or her work time (Regs. § 11040, subd. (2)(N))) engaged in work that does not satisfy the qualitative component therefore is not primarily engaged in work that is "directly related to management policies or general business operations." Such an employee thus cannot be an exempt administrative employee.

IV. Application of the Qualitative Component of the "Directly Related" Requirement

The undisputed facts show that Adjusters are primarily engaged in work that fails to satisfy the qualitative component of the "directly related" requirement because their primary duties are the day-to-day tasks involved in adjusting individual claims. They investigate and estimate claims, make coverage determinations, set reserves, negotiate settlements, make settlement recommendations for claims beyond their settlement authority, identify potential fraud, and the like.

To take just one example, Liberty Mutual submitted a declaration from an employee who had supervised "seven claims adjusters who handled bodily injury claims" under "Personal Market auto and homeowner policies." The claims adjusters were "responsible for determining coverage, setting and updating reserves, determining liability, evaluating a claim for settlement, and negotiating settlement of claims," as well as "recognizing potential subrogation on claims and forwarding such claims to the Subrogation Unit" and "recognizing indicators of potential fraud on claims and forwarding such claims to the Special Investigations Unit." The settlement authority of the adjusters under the declarant's supervision ranged from $6,000 to $40,000, and their expense authority ranged from $5,000 to $20,000. The declarant estimated that 85 percent of the adjusters' claims were settled within their settlement authority; for claims exceeding their authority, he "generally expect[ed] them to provide [him] with a recommendation of settlement as well as a thorough analysis of their reasoning." Other declarations described other adjusters who had lower or higher settlement authority (some as high as $100,000), but all of them performed similar duties.

None of that work, or the similar work of the other class members, is carried on at the level of management policy or general operations. Rather, it is all part of the day-to-day operation of Employers' business.

We acknowledge, however, that Employers did introduce evidence that *some* Adjusters might do *some* work at the level of policy or general operations. A declaration from a Golden Eagle vice-president states that "Golden Eagle's Underwriters may consult with Golden Eagle's claims examiners regarding whether the Company should issue certain types of policies." A declaration from another Golden Eagle employee states that "[o]ne of our [special investigations unit] Investigators was on a committee to develop an integrated [special investigations unit] Task force that is shaping the policies and procedures of Golden Eagle." Another Golden Eagle employee's declaration states that "[t]he claims examiners also serve on various committees that determine how to better run our business."

The work described in the foregoing quotations might well satisfy the qualitative component of the "directly related" requirement. But it is still insufficient to carry Employers' burden in opposition to Adjusters' motion for summary adjudication because no evidence shows that even a single Adjuster *primarily* engages in such work. (See Regs. § 11040, subd. (2)(N) [defining "primarily" to mean "more than one-half the employee's work time"].) Rather, these few examples of potentially administrative work are dwarfed by the mountain of evidence, introduced by Employers themselves, that Adjusters are primarily engaged in the day-to-day tasks of adjusting individual claims, such as investigating, making coverage determinations, setting reserves, and negotiating settlements.

On the other hand, some of the work described in the foregoing quotations might not satisfy the qualitative component of the "directly related" requirement. For example, if a Golden Eagle underwriter consults with a Golden Eagle claims examiner regarding whether the company should issue certain types of policies *to a particular customer*, the claims examiner is not giving advice about management policies or general operations. But if Golden Eagle's underwriters consult with Golden Eagle's claims examiners regarding whether the company should offer

certain types of policies *in general* (namely, whether such policies should be included in Golden Eagle's line of products), the claims examiners are giving advice about management policies or general operations.

The undisputed facts show that Adjusters are primarily engaged in work that fails to satisfy the qualitative component of the "directly related" requirement. Adjusters therefore are not primarily engaged in work that is "directly related to management policies or general business operations." Accordingly, Adjusters cannot be exempt administrative employees under either Wage Order 4-1998 or Wage Order 4-2001.

V. Application of Federal Regulations Former Part 541.205(b) (2000)

Employers rely heavily upon the following language in Federal Regulations former part 541.205(b) (2000): "The administrative operations of the 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." Employers then argue that Adjusters advise management, plan, negotiate, and represent the company. For example, Adjusters advise management "by making recommendations to their supervisors about the settlement of claims in excess of their authority." They also advise management about "whether an attorney or an outside investigator [is] needed, as well as whether there [are] any potential subrogation or fraud issues." Adjusters are responsible for planning "the processing of a claim from beginning to end[.]" "They negotiate with claimants or their attorneys to settle claims." And they represent the company when they settle claims, thereby binding their employers to the terms of the settlements. Employers conclude that, because Adjusters perform the kinds of work listed in Federal Regulations former part 541.205(b) (2000), they must be doing exempt administrative work, namely, work that satisfies the qualitative component of the "directly related" requirement. The Supreme Court likewise called attention to the potential significance of this regulatory provision.

(See *Harris*, *supra*, 53 Cal.4th at pp. 187–188.) We conclude that Employers' argument fails because not all activities that involve advising management, planning, negotiating, and representing the company satisfy the qualitative component of the "directly related" requirement.

Our analysis begins with the text of the regulatory provision, quoted in full above. The regulation does not unambiguously state that *all* planning, negotiating, representing the company, and the like constitutes work that satisfies the qualitative component of the "directly related" requirement. Nor are we aware of any cases expressly holding that the regulation means that *all* planning, negotiating, representing the company, and the like constitutes work that satisfies the qualitative component of the "directly related" requirement. Employers cite none.

And the Supreme Court did not hold that the regulation means that *all* planning, negotiating, representing the company, and the like constitutes work that satisfies the qualitative component of the "directly related" requirement. On the contrary, the court stated that Federal Regulations former part 541.205(b) (2000) "explains that administrative operations include work done by 'white collar' employees engaged in servicing a business" and that "[s]uch servicing *may* include, as potentially relevant here, advising management, planning, negotiating, and representing the company." (*Harris*, *supra*, 53 Cal.4th at p. 182, italics added.) Thus, under the court's interpretation of the regulation, planning, negotiating, and the like are part of the administrative operations of the business (namely, they satisfy the qualitative component) only insofar as they constitute "servicing" the business within the meaning of the regulation. And the court's use of the word "may" at least allows for the possibility that not all planning, negotiating, and the like constitutes such servicing.

For further guidance, we turn to federal case law interpreting Federal Regulations former part 541.205(b) (2000). *Martin*, *supra*, 940 F.2d 896, held that although wholesale salespersons negotiated prices and terms, represented the

company, and purchased non-inventory products that customers requested, none of those activities satisfied the qualitative component of the "directly related" requirement, *even though negotiating, representing the company, and purchasing are all listed in Federal Regulations former part 541.205(b) (2000)*. (*Martin*, at pp. 904–905.) Rather, those work duties performed by the wholesale salespersons were "only routine aspects of sales *production* within the context of" the employer's wholesaling business and therefore did not constitute "administrative-type 'servicing' of [the employer's] wholesale business within the meaning of [Federal Regulations former part 541.205(b) (2000)]." (*Martin*, *supra*, 940 F.2d at p. 905.) That is, negotiating, representing the company, purchasing, and the like satisfy only the qualitative component of the "directly related" requirement insofar as they constitute "administrative-type 'servicing'" (*ibid.*) of a business within the meaning of the regulation. The case therefore unequivocally holds that *not* all negotiating, representing the company, purchasing, and the like satisfies the qualitative component of the "directly related" requirement.

That holding in itself is sufficient to dispose of Employers' argument. They argue that because Adjusters advise management, plan, negotiate, and represent the company, and because advising management, planning, negotiating, and representing the company are all listed in Federal Regulations former part 541.205(b) (2000), it follows that Adjusters' work of advising management, planning, negotiating, and representing the company must satisfy the qualitative component of the "directly related" requirement. That inference is invalid—*some* advising of management, planning, negotiating, and representing the company satisfies the qualitative component of the "directly related" requirement, but *some* does not. Because Employers make no attempt to specify where the line should be drawn, let alone to show that Adjusters' work falls on the proper side, their argument fails.

The holding of *Martin*, that *not* all negotiating, representing the company, purchasing, and the like satisfies the qualitative component of the "directly

related" requirement, makes sense. An example will illustrate the point. Secretaries at law firms regularly engage in planning—they must plan the preparation and execution of court filings, for example, and also plan the performance of their work, prioritizing certain tasks or assignments over others for a given day, week, or month. Legal secretaries also negotiate with legal messengers concerning the filing and service of legal documents, and the secretaries thereby represent their employers, binding them to pay the messengers for services rendered. Legal secretaries also advise management about various matters—for example, a secretary might advise a partner that a particular filing should not be planned for a particular day because there are already several other major filings scheduled for that day. But, for reasons that are independent of the work's importance (namely, independent of the *quantitative* component of the "directly related" requirement), it is difficult to see how any of that secretarial work could constitute work that is "directly related to management policies or general business operations." The secretaries' work is presumably *governed* by management policies, but *all* work is presumably so governed, and we cannot interpret the qualitative component of the "directly related" requirement in such a way that *all* work of every kind satisfies it—the exemptions to the overtime compensation laws are narrowly construed. (*Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 794; *Klem v. County of Santa Clara, California*, *supra*, 208 F.3d at p. 1089.) Apart from being *governed* by management policies, the secretarial work described above appears to have nothing to do with management *policies* or *general* business operations. And if that is correct, then *Martin*'s holding is sound—not *all* planning, negotiating, and the like satisfies the qualitative component of the "directly related" requirement.

Consequently, some dividing line is necessary: *Some* planning, negotiating, and the like satisfies the qualitative component of the "directly related" requirement, but *some* does not. Our interpretation of the qualitative component (see *ante*, pt. III) provides such a dividing line. But Employers' argument fails

regardless of whether our identification of the dividing line is correct. As long as *some* dividing line is necessary (see *Martin*, *supra*, 940 F.2d at pp. 904–905) and Employers' argument does not provide one, the argument cannot succeed in showing that Adjusters' work satisfies the qualitative component of the "directly related" requirement.

One final point should be noted: The Supreme Court observed that "the one element of the administrative exemption" that is at issue in these proceedings concerns "the character of [Adjusters'] duties" (*Harris*, *supra*, 53 Cal.4th at p. 182), and the court pointed out that the analysis in the *Bell* cases (*Bell II*, *supra*, 87 Cal.App.4th 805; *Bell v. Farmers Ins. Exchange*, *supra*, 115 Cal.App.4th 715) was based on the plaintiffs' *role* in their employer's business and consequently did not address the character of those plaintiffs' *duties* (*Harris*, *supra*, 53 Cal.4th at pp. 183–186). Nowhere in this opinion do we in any way rely upon the *Bell* cases, and our discussion of Employers' argument concerning Federal Regulations former part 541.205(b) (2000) concerns only Adjusters' duties and is entirely independent of Adjusters' role in Employers' business. The phrase "advising management," for example, can refer to any number of different work duties: Advising management about the formulation of policy is not the same duty as advising management that next Tuesday would be a bad day to file a summary judgment motion, regardless of the role that the advisor plays in the employer's business overall. (Either duty might be performed by a partner or by a secretary.) The holding of *Martin*, which we follow, is that some of the duties that can be described as "advising management," "planning," and the like satisfy the qualitative component of the "directly related" requirement, and some do not. The employee's role in the employer's business has no bearing on that holding or on its application to this case.

VI. Producing the Employer's Product

Employers argue that Adjusters do not produce Employers' product because Employers' product is the transference of risk, not claims adjusting. On

that basis, Employers conclude that Adjusters' work must not be production work but rather is administrative and consequently satisfies the qualitative component of the "directly related" requirement.

The argument fails for two reasons. First, as Employers' own evidence shows, adjusting claims is an important and essential part of transferring risk. If Employers never paid any claims, then they would not be transferring any risk; they would just be transferring their customers' premium payments to themselves. But Employers cannot pay any claims without first adjusting those claims, namely, making coverage determinations, assessing the value of the covered portions of claims, and paying the covered amount. Thus, by adjusting claims, Adjusters directly engage in transferring risk. It is unsurprising, then, that the declaration of one of Liberty Mutual's own executives states that (1) "Liberty Mutual's principal function is the acceptance of risks transferred to it by others[,]" and (2) "[t]hat task is accomplished in a number of ways, including but not limited to . . . claims adjustment . . . ." Consequently, assuming the truth of Employers' contention that their product is the transference of risk, we would still have to reject their contention that Adjusters do not produce Employers' product.

Second, Employers' argument is unsound for an independent reason, namely, that workers who do not produce their employer's product can still do work that fails to satisfy the qualitative component of the "directly related" requirement. Were that not so, the work of *every* office worker employed by a manufacturing enterprise would satisfy the qualitative component of the "directly related" requirement. That result, however, would violate the rule that the exemptions must be narrowly construed. (*Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 794; *Klem v. County of Santa Clara, California*, *supra*, 208 F.3d at p. 1089.) The qualitative component of the "directly related" requirement distinguishes between *kinds* of office or nonmanual work; it does not classify *all* office work as administrative.

And this point—that workers who do not produce their employer's product can still do work that fails to satisfy the qualitative component of the "directly related" requirement—applies with equal force to nonmanufacturing enterprises. Again, consider a secretary at a law firm. The firm's product is legal advice and legal representation, not secretarial services. A secretary at the firm therefore does not produce the firm's product; indeed, to do so would be to engage in the unauthorized practice of law, assuming the secretary is not a member of the bar. But, as discussed in part V, *ante*, the work of the secretary would seem to be paradigmatically nonexempt work that fails to satisfy the qualitative component of the "directly related" requirement. For reasons unrelated to the importance of the secretary's work, the work seems to have nothing to do with management *policy* or *general* operations (except in the sense that, like every employee's work, it is *governed* by policy). Rather, the secretary's work relates entirely to the day-to-day carrying on of the firm's affairs.

Thus, because workers who do not produce their employer's product can still do work that fails to satisfy the qualitative component of the "directly related" requirement, Employers' argument would be unsound even if they were right that Adjusters do not produce Employers' product. That is, even if Adjusters did not produce Employers' product, it would not follow that Adjusters' work satisfies the qualitative component of the "directly related" requirement.

We note also that Employers' argument seems to depend entirely on Adjusters' alleged *role* in Employers' business: According to Employers, Adjusters' work satisfies the qualitative component of the "directly related" requirement because Adjusters do not play the role of producing Employers' product. The argument consequently appears to run afoul of the Supreme Court's holding that only "the character of [Adjusters'] duties," not their role, is at issue here. (*Harris, supra*, 53 Cal.4th at p. 182.) For this additional reason, we conclude that Employers' argument must be rejected.

VII. The Effect of Federal Regulations Former Part 541.205(c)(5) (2000)

Employers argue that they should prevail under Federal Regulations former part 541.205(c)(5) (2000), which provides that "[t]he test of 'directly related to management policies or general business operations' is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, *claim agents and adjusters*, . . . and many others." (Italics added.) The argument fails because the Supreme Court has rejected it. The only element of the administrative exemption that is at issue in these proceedings is the qualitative component of the "directly related" requirement. (*Harris*, *supra*, 53 Cal.4th at p. 182.) Federal Regulations former part 541.205(c) (2000) relates only to the quantitative component. (*Harris*, at p. 182.)

VIII. The Agency Opinion Letters and the Federal Case Law

Employers urge us to defer to a 2002 opinion letter issued by the federal Department of Labor, which concludes that claims adjusters are exempt administrative employees. Adjusters urge us instead to rely on opinion letters issued in 1998 and 2003 by the Division of Labor Standards Enforcement, the California agency charged with enforcing IWC wage orders, which support Adjusters' contention that they are not exempt. The Supreme Court instructs, however, that "it is ultimately the judiciary's role to construe the language" of the applicable statutes and regulations. (*Harris*, *supra*, 53 Cal.4th at p. 190.) We therefore do not rely upon any of the agency opinion letters.

In addition, we recognize that a number of federal circuit and district court cases have concluded that claims adjusters do work that is "directly related to management policies or general business operations." We are not, however, bound by decisions of the lower federal courts on issues of federal law. (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 327–328.) We find none of the federal cases involving claims adjusters persuasive.

For example, cases relying on evidence that claims adjusters plan, advise, negotiate, and represent the company (*Roe-Midgett v. CC Services, Inc.* (S.D.Ill.

2006) 2006 WL 839443, p. *14, affd. (7th Cir. 2008) 512 F.3d 865; *Jastremski v. Safeco Ins. Companies* (N.D.Ohio 2003) 243 F.Supp.2d 743, 751; *Palacio v. Progressive Ins. Co.* (C.D.Cal. 2002) 244 F.Supp.2d 1040, 1047; *Blue v. The Chubb Group* (N.D.Ill. July 13, 2005, No. 03 C 6692) 2005 WL 1667794, p. *11) all fail to recognize *Martin*'s holding that not all such work satisfies the qualitative component of the "directly related" requirement. (*Martin, supra*, 940 F.2d at pp. 904–905.) We find *Martin* persuasive on that point, and we see no reason not to apply its analysis to suits by claims adjusters.

Other cases rely on the reference to "claim agents and adjusters" in Federal Regulations former part 541.205(c)(5) (2000). (*Roe-Midgett v. CC Services, Inc.*, *supra*, 2006 WL 839443, at p. *14; *Jastremski v. Safeco Ins. Companies*, *supra*, 243 F.Supp.2d at p. 751; *Blue v. The Chubb Group*, *supra*, 2005 WL 1667794, at p. *10; *McLaughlin v. Nationwide Mut. Ins. Co.* (D.Or. Aug. 18, 2004, No. Civ. 02-6205-TC) 2004 WL 1857112, p. *5; *Munizza v. State Farm Mut. Auto. Ins. Co.* (W.D.Wash. May 12, 1995, No. C94-5345RJB) 1995 WL 17170492, p. *5, affd. (9th Cir., Nov. 7, 1996, No. 95-35794) 1996 WL 711563; *Marting v. Crawford & Co.* (N.D.Ill. 2006) 2006 WL 681060, pp. *5–*6; *Murray v. Ohio Casualty Corp.* (S.D.Ohio Sept. 27, 2005, No. 2:04-CV-539) 2005 WL 2373857, pp. *5–*6.) Those cases are unpersuasive because the Supreme Court concluded that Federal Regulations former part 541.205(c) (2000) concerns only the quantitative component of the "directly related" requirement, not the qualitative component, which is at issue here.

Some cases rely upon the proposition that claims adjusters employed by insurance companies do not produce their employers' product, namely, insurance policies. (*Cheatham v. Allstate Ins. Co.* (5th Cir. 2006) 465 F.3d 578, 585; *Palacio v. Progressive Ins. Co.*, *supra*, 244 F.Supp.2d at p. 1050; *Jastremski v. Safeco Ins. Companies*, *supra*, 243 F.Supp.2d at p. 753; *McLaughlin v. Nationwide Mut. Ins. Co.*, *supra*, 2004 WL 1857112, at p. *5.) That analysis is based on the mistaken assumption that workers who do not produce their employer's product

must automatically satisfy the qualitative component of the "directly related" requirement. As discussed in part VI, *ante*, that assumption cannot be correct because otherwise *every* office worker employed by a manufacturing enterprise would be doing work that satisfies the qualitative component of the "directly related" requirement. Such a reading of the regulation is impermissible—both the California and the federal exemptions *must* be narrowly construed. (*Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 794; *Klem v. County of Santa Clara, California*, *supra*, 208 F.3d at p. 1089.) And the analysis in these cases relies on the adjusters' role in their employers' business, so it contravenes the Supreme Court's determination that the qualitative component of the "directly related" requirement concerns workers' duties, not their role. (*Harris*, *supra*, 53 Cal.4th at p. 182.)

In sum, we do not rely upon the agency opinion letters, and we conclude that the federal cases involving claims adjusters are not persuasive.

IX. The Alleged Heterogeneity of the Class

Employers present one argument we have not yet addressed. According to them, the qualitative component of the "directly related" requirement cannot be dispositive, and class treatment cannot be appropriate because the certified class is so heterogeneous. In support of this argument, Employers point out that the class includes claims adjusters "from multiple companies, three different business lines, and 39 different broad job classifications. . . . [D]ifferent team managers impose different limitations on what the claims adjusters they supervise may do without either obtaining approval or notifying the team manager. Some adjusters work closely with attorneys toward the resolution of claims, while others do not. The settlement authority of Liberty Mutual claims handlers also varies widely." (Citations omitted.) Employers' argument fails because the fact that the class is heterogeneous in certain respects does not undermine our conclusion that no evidence shows that any class members primarily engage in work at the level of management policy or general business operations. Thus, no evidence shows that

any class members primarily engage in work that satisfies the qualitative component of the "directly related" requirement. That conclusion disposes of Employers' affirmative defense based on the administrative exemption, and it is a predominant issue that is common to the claims of all class members.

Finally, we address Employers' assertion that the question presented in these proceedings is whether "every insurance adjuster in California, without exception, from the most senior to the most junior, and *regardless of the adjuster's duties*" is nonexempt. (Italics added.) The assertion is mistaken.

Job titles by themselves determine nothing. (Fed. Regs. § 541.201(b)(1) (2000) ["A title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status . . . ."]; Regs. § 11040, subd. (1)(A)(2)(f) [incorporating Fed. Regs. § 541.201 (2000) into Wage Order 4-2001].) In every case, "the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities, and salary meet all the requirements of" the exemption at issue. (Fed. Regs. § 541.201(b)(2) (2000).) The Supreme Court likewise held 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." (*Harris*, *supra*, 53 Cal.4th at p. 190.) Application of the administrative exemption thus requires case-specific factual analysis of the work duties actually performed by the particular employees involved. We have provided that analysis in part IV, *ante*. Reliance on a job title like "claims adjuster" is no substitute.

X. Conclusion

The parties do not disagree as to Adjusters' work duties. Indeed, the evidence is essentially undisputed as to what those duties are. We hold that, with the few exceptions we have noted, Adjusters' work duties do not satisfy the qualitative component of the "directly related" requirement because they are not carried on at the level of policy or general business operations. Adjusters therefore are not primarily engaged in work that is "directly related to

management policies or general business operations." (Fed. Regs. § 541.205(a) (2000).) It follows that Adjusters are not exempt administrative employees under either Wage Order 4-1998 or Wage Order 4-2001. Accordingly, Adjusters' motion for summary adjudication should have been granted, and, because the qualitative component of the "directly related" requirement is a predominant common issue under both wage orders, Employers' motion for class decertification should have been denied in its entirety.

DISPOSITION

Plaintiffs' petition for writ of mandate (B195121) is granted. We direct the trial court to vacate its October 18, 2006 order (1) denying plaintiffs' motion for summary adjudication and (2) partially granting defendants' motion to decertify the class, and to enter a new and different order (1) granting plaintiffs' motion for summary adjudication of defendants' affirmative defense based on the administrative exemption and (2) denying in its entirety defendants' motion to decertify the class. Defendants' petition for writ of mandate (B195370) is denied. Plaintiffs shall recover their costs on both writ proceedings.

CERTIFIED FOR PUBLICATION.

MALLANO, P.J.

I concur:

JOHNSON, J.

Rothschild, J., concurring and dissenting:

I would deny both petitions, and I would deny defendants' petition on narrower grounds than those expressed in the majority opinion. I therefore concur in the judgment in part and in Part VII of the majority's discussion, but I respectfully dissent from the remainder of the majority opinion.

Both plaintiffs' motion for summary adjudication and plaintiffs' opposition to defendants' motion to decertify the class were based on the proposition that the administrative/production worker dichotomy is a dispositive test under both Wage Order No. 4-98 (Wage Order 4-1998) and Wage Order No. 4-2001 (Wage Order 4-2001). In *Harris v. Superior Court* (2011) 53 Cal.4th 170 (*Harris*), however, the Supreme Court held that under Wage Order 4-2001, the dichotomy is not a dispositive test, but rather is merely "an analytical tool" that might or might not be useful in certain cases. (*Harris*, *supra*, 53 Cal.4th at p. 190.) Because the administrative/production worker dichotomy is not a dispositive test under Wage Order 4-2001, plaintiffs' motion for summary adjudication was properly denied, and plaintiffs have failed to show that the trial court abused its discretion by partially decertifying the class (i.e., by decertifying it for all claims governed by Wage Order 4-2001).

I would likewise reject defendants' challenge to the trial court's refusal to decertify the class as to claims arising before October 1, 2000, because defendants have failed to show that the ruling constituted an abuse of discretion.

The arguments on this point in defendants' petition relied primarily on the contention that *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805 (*Bell II*) and *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 (*Bell III*) improperly made use of the administrative/production worker dichotomy and were wrongly decided. The Supreme Court, however, considered but did not accept defendants' contentions. The Court indicated that "because Wage Order 4-1998 did not provide sufficient guidance," the *Bell II* court did not proceed improperly when it "looked beyond the language of the wage order and employed the administrative/production worker dichotomy as an analytical tool." (*Harris*, *supra*, 53 Cal.4th at p. 187; see also *id.*

at p. 190 [if "the particular facts" and "the language of the statutes and wage orders at issue . . . fail to provide adequate guidance," then it is "appropriate to reach out to other sources"].) Moreover, the Court expressly declined to hold "that the administrative/production worker dichotomy was misapplied to the *Bell II* plaintiffs, based on the record in that case, or that the dichotomy can never be used as an analytical tool." (*Harris, supra*, 53 Cal.4th at p. 190.) Given the Supreme Court's treatment of *Bell II* and *Bell III*, I cannot conclude that defendants' arguments concerning those cases, which failed to persuade the Court, show that the trial court abused its discretion by refusing to decertify the entire class.

Another argument in defendants' petition relied on 29 C.F.R. § 541.205(c)(5) (2000). I agree with the majority that the Supreme Court rejected this argument by holding that 29 C.F.R. § 541.205(c) (2000) relates only to the quantitative component of the "directly related" requirement. (*Harris, supra,* 53 Cal.4th at p. 182.)

Finally, defendants' argument in their briefing on remand from the Supreme Court is similarly unpersuasive. Defendants contend that "the Supreme Court made no distinction in the application of the administrative exemption under Wage Order 4-1998 and [Wage Order] 4-2001." (Underlining omitted.) On that basis, defendants conclude that "the Supreme Court has now held that the dichotomy is not dispositive for any portion of the class period," so the entire class should be decertified. I disagree.

The Supreme Court explained that "because Wage Order 4-1998 did not provide sufficient guidance," the *Bell II* court "looked beyond the language of the wage order and employed the administrative/production worker dichotomy as an analytical tool." (*Harris, supra*, 53 Cal.4th at p. 187.) The Court added, "[b]y comparison, Wage Order 4-2001, *the operative order here*, along with the incorporated federal regulations, set out detailed guidance on the question." (*Ibid.*, italics added.) Moreover, the phrase I have italicized indicates that the Court's subsequent discussion—including its holding that the administrative/production worker dichotomy is not a dispositive test but may, when appropriate, be used as an analytical tool—relates only to Wage Order 4-2001, not to Wage Order 4-1998. (After the quoted passage, the Court's

opinion never again refers to Wage Order 4-1998.) The Court thus made clear that because of the textual differences between Wage Order 4-1998 and Wage Order 4-2001, both the scope of the administrative exemption and the role of the administrative/production worker dichotomy might be different under the two wage orders. Defendants' argument that the Court "made no distinction in the application of the administrative exemption under Wage Order 4-1998 and [Wage Order] 4-2001" is consequently unsound.

For all of the foregoing reasons, I would deny both petitions.

ROTHSCHILD, J.