

STATE OF NEW YORK  
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :  
 :  
 HUDSON VALLEY MALL DENTAL, :  
 :  
 Petitioner, :  
 :  
 To Review Under Section 101 of the Labor Law: :  
 An Order Under Article 6 of the Labor Law, issued :  
 August 10, 2012, :  
 :  
 - against - :  
 :  
 THE COMMISSIONER OF LABOR, :  
 :  
 Respondent. :  
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DOCKET NO. PR 12-034  
RESOLUTION OF DECISION

**APPEARANCES**

Greenberg Traurig, LLP (Carla E. Hogan and Cynthia Evans Neidl of counsel), for petitioner.

Pico Ben-Amotz, Esq., General Counsel, NYS Department of Labor (Matthew Robinson-Loffler of counsel), for respondent.

**WHEREAS:**

On September 5, 2012, petitioner Hudson Valley Mall Dental (petitioner) filed an amended petition to Count 2 of an order that the Commissioner of Labor (Commissioner or respondent) issued against it on August 10, 2012. The respondent filed its answer on December 14, 2012.

The order under review is an order under Article 6 of the New York Labor Law for failing to pay wages weekly to manual workers not later than seven days after the end of the week in which the wages were earned and directs petitioner to pay a \$100.00 civil penalty. The order contained three other counts (Counts 1, 3 and 4) but those counts were not appealed by the petitioner.

The petition alleges that the Commissioner improperly classified dental assistants as "manual workers" under Article 6 of the Labor Law, who must be paid on a weekly basis pursuant to Labor Law § 191(1)(a). The petitioner maintains that the dental assistants should be classified as "clerical and other workers" under Article 6 and are therefore not be required to be paid weekly.

A pre-hearing telephone conference was held with the counsel for the parties and the Hearing Officer for this matter on January 17, 2013. At that time the parties agreed to submit briefs and a Joint Stipulation of Facts prior to oral argument on the issues under appeal. An executed Joint Stipulated Facts was filed with the Board by the parties on May 6, 2013, and briefs from petitioner and respondent were filed with the Board on June 5, 2013.

Upon notice to the parties dated November 5, 2013, an Oral Argument on the issues of law and fact was held on December 6, 2013, in Albany, New York before Wendell P. Russell, Jr., Counsel of the Board and the designated Hearing Officer in this proceeding. Also participating in the Oral Argument were Anne P. Stevason, then Chairperson of the Board and Devin A. Rice, Associate Counsel. Each party was afforded a full opportunity to argue the issues of law and fact that the party wished the Board to consider regarding this case.

### **I. SUMMARY OF EVIDENCE**

Petitioner operates a dental office in Kingston, New York and employs dental assistants to assist dentists and dental hygienists in providing dental care to patients. The following items are the joint stipulated facts:

1. Petitioner Hudson Valley Mall Dental operates a dental office located at 1300 Ulster Ave., Suite 160, Kingston, New York 12401.
2. During the relevant period, Petitioner employed three dental assistants (the "Dental Assistants").
3. The primary duties of the Dental Assistants are to assist dentists and dental hygienists in providing dental care to patients.
4. More than 85% of the Dental Assistants' time is spent with patients in the treatment room and assisting the dentist in providing dental care.
5. The Dental Assistants possess special skills as a result of on the job training. One Dental Assistant is preparing to take the State examination for certification as a dental assistant.
6. Depending on education, experience and term of employment, dental assistants in the area are paid between \$10 and \$25 per hour. The Dental Assistants currently earn between \$11 and \$13.25 per hour.
7. The Dental Assistants perform the following day-to-day tasks (and spend approximately the following amount of time on each task each day):
  - a) Receiving patients from the waiting room and seating patients in treatment chair (3%);
  - b) Providing dental education and reassurance to patients (3%);
  - c) Relaying patient mood, questions, comments and fears to dentist and dental hygienist (2%);

- d) Preparing the patient for treatment, gathering dental records, and applying protective garb to the patient (2%);
  - e) Selecting and preparing appropriate dental instruments, materials and medicines for use by the dentist during each specific procedure (30%);
  - f) Preparing restorative materials, dental cements, and impression materials for placement by the dentist (5%);
  - g) Keeping the patient's oral operative area clear during dental procedures by use of suction devices, water/air sprays, cotton rolls, and retraction of tongue and cheek (30%);
  - h) When requested by the dentist, taking, developing and mounting x-rays necessary for diagnostic evaluation (5%);
  - i) When requested by the dentist, holding materials and devices, such as matrix strips and curing lamps, during dental procedures (2%);
  - j) Obtaining consents and waivers from patients when necessary (1%);
  - k) Making notations in patients' charts (3%);
  - l) Ensuring adequate stock of solution and supplies (2%);
  - m) Sterilizing instruments and maintaining the sterilization area (5%);
  - n) Performing periodic cleaning and maintenance of dental equipment, instruments and treatment areas on an as needed basis (a cleaning service comes in each night) (2%); and
  - o) Handling communications and mail to and from and otherwise coordinating with dental laboratories (5%).
8. The Dental Assistants spend approximately more than 85% of their time performing tasks (a) through (k) above.
9. The remainder of the Dental Assistants' time is spent performing tasks (l) through (o) above.

The petitioner argued that the primary duties of the dental assistants are to assist dentists and dental hygienists in providing dental care to patients. In this role, more than 85% of their time is spent with patients in the treatment room and assisting the dentist in providing care to patients. The petitioner argued that very little of the dental assistants' time is spent doing any routine, manual or physical labor such as stocking supplies or cleaning treatment areas.

The dental assistants require significant and very specialized training. The training can come in the form of on-the-job training and/or education. A dental assistant can be licensed by the State (*see* N.Y. Education Law § 6608) and one of the petitioner's dental assistants is in the

process of becoming licensed. A certified dental assistant is defined as providing “supportive services to a dentist in his/her performance of dental services.” The support shall include: “providing patient education, taking preliminary medical histories and vital signs to be reviewed by the dentist, placing and removing rubber dams, selecting and prefitting provisional crowns, selecting and prefitting orthodontic bands, removing orthodontic arch wires and ligature ties, placing and removing matrix bands, taking impressions for study casts or diagnostic casts, removing periodontal dressings, and such other dental supportive services authorized by the dentist...” This definition demonstrates that all dental assistants operate under the supervision and in support of the professional services provided by a dentist and the certified dental assistant is authorized to engage in more specific types of dental diagnostic and treatment procedures.

The petitioner’s dental assistants earn well in excess of the minimum wage earning between eleven to slightly more than thirteen dollars an hour and petitioner claims that dental assistants in the Hudson Valley area can earn up to \$50,000 a year, depending on experience and education. The petitioner argues that dental assistants possess both the financial stability and the skill-set to distinguish themselves from the typical manual worker. Section 190 (4) of the Labor Law defines a “manual worker” as a “mechanic, workingman or laborer.” The respondent Commissioner in his brief notes that it has been the Department of Labor’s “long-standing interpretation” that individuals who spend more than twenty-five percent of working time engaged in physical or manual labor fit within the term “manual worker.”

The Department of Labor’s Division of Labor Standards, Manual of Investigations, states that the term “workingman” has been interpreted to include any person employed in manual labor, whether skilled or unskilled and the term “manual labor” is “understood to mean labor which is performed by the exercise of physical force, whether aided or unaided by tools.”

For payment purposes the Department of Labor has construed Labor Law § 191.1.a to include any employee who spends at least 25% of his or her total weekly work time engaged in physical labor. On the basis of the stipulated facts the respondent takes the position that since the dental assistants are engaged in manual or physical labor for more than twenty-five percent of their working time they must be considered manual workers as defined by Labor Law Section 190 (4). The respondent notes in his brief, however, that he is “not asserting that all dental assistants are, by virtue of their title, a manual worker. Rather, and according to the method of making such a determination as outlined above, these specific dental assistants, under the conditions observed by the Respondent and stipulated to by the parties, are manual workers for purposes of frequency of pay under the Labor Law.”

The respondent also argued that to determine whether an employee is a “manual worker” the Department of Labor looks at the actual duties performed by the worker, not the job title or written description assigned to such work. The Department “then takes the data and applies it to the ordinary and usual meaning of the statutory terms and comes to a conclusion as to whether the employee fits within the definition of ‘manual worker’.” The respondent noted that the petitioner does not so much object to respondent’s method of evaluating whether an employee is a manual worker but instead only objects to the respondent’s determination that these dental assistants are in fact manual workers.

## GOVERNING LAW

### Standard of Review and Burden of Proof

The Labor Law provides that “any person . . . may petition the board for a review of the validity or reasonableness of any . . . order made by the [C]ommissioner under the provisions of this chapter” (Labor Law § 101 [1]). It also provides that a Commissioner’s order shall be presumed “valid” (Labor Law § 103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an order issued by the Commissioner must state “in what respects [the order on review] is claimed to be invalid or unreasonable” (Labor Law § 101[2]). It is a petitioner’s burden at the hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 [“The burden of proof of every allegation in a proceeding shall be upon the person asserting it.”]; State Administrative Procedure Act § 306; *Angelo v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rule 65.39 (12 NYCRR § 65.39).

The issue before the Board is whether the Commissioner’s determination that petitioner’s dental assistants are manual workers and as such are required to be paid on a weekly basis is valid and reasonable. It is the petitioner’s burden to prove that the Commissioner’s determination is invalid or unreasonable and we believe that petitioner met its burden in showing that the Commissioner’s determination is unreasonable.

The definition of a “manual worker” references a “mechanic, workingman or laborer” and common sense and experience do not lead one to find that the work of a dental assistant falls within general notions of manual labor. The respondent basically relies on the notion that more than twenty-five percent of the duties of the dental assistants “requires the exercise of physical force as their primary activity” and respondent’s brief references items 7. d, f, g, h, l, m, n, and o from the stipulated facts. It is interesting to note, however, that respondent omits other listed activities that involve “physical force” like items 7. e (Selecting and preparing appropriate dental instruments, materials and medicines for use by the dentist during each specific procedure.) and this activity alone amounts to 30% of the dental assistants activities, and 7.i (When requested by the dentist, holding materials and devices, such as matrix strips and curing lamps, during dental procedures [2%] ). These activities are directly associated with assisting the dentist in providing treatment and go against any general sense of persons engaged in manual labor.

The traditional notion of a manual worker, the “mechanic, workingman or laborer” generally includes a sense of interchangeable physical labor that can be done by multiple individuals with the capacity to move material or things from one place to another. A common laborer may dig a ditch, he or she may not have dug a ditch before but they can be shown how to do so in a matter of minutes and then be left to dig in the designated area. A warehouse

worker may be moving boxes of material from a truck to a rack and from a rack to a work station for repacking and shipment out to a customer. A construction worker may be moving material from one area to another, where another worker may be incorporating the material into a building. These types of jobs are typically low-skilled, can be easily trained, and the workers can be easily replaced by other able-bodied workers. This general skill level and easy replacement led to labor laws aimed to protect workers by insuring that workers who were dependent upon wages earned for a week's work received them on a weekly basis.

A dental assistant, in contrast, is not a low-skilled job that anyone walking into a dentist's office can do. It is a skilled position working closely with a highly trained professional providing dental care to patients. The position requires sensitive interaction with patients who may be anxious about the procedure they are about to undergo. It is a job that involves providing assistance in the provision of highly personal services to patients. It requires specialized training and attention to detail given the health risks associated with the patient care. There are a variety of procedures and each patient is a distinct individual with special needs and concerns. There is a licensed type of dental assistant, and one has reason to suspect that the respondent would not consider licensed dental assistants as manual workers since respondent's brief noted that he was "not asserting that all dental assistants are, by virtue of their title, a manual worker." It is in the nature of the dental assistant being an essential assistant to the dentist that lays the distinction between this job being more properly considered a "clerical or other worker" instead of a manual worker under the Labor Law.

An early New York case that dealt with a somewhat comparable situation was *Mitchell v Interborough Rapid Transit Company*:

"It scarcely needs argument to show that the following are not within the defined classes: Stenographer, accountant, typist, chainman, levelman, civil engineers...bookkeeper, draftsman, structural designer, clerk. The case of the rodman is not so clear. His work is apparently largely of a manual nature, but as his duty is to 'assist civil engineers' in their work, I think that we may infer that he belongs to the engineering staff, although in a humble capacity, rather than among the workingmen or laborers, and is accordingly not within the statutory definition." 169 AD 32, 35 (1<sup>st</sup> Dept. 1915).

The petitioner argues that as in *Interborough*, where the rodman was determined to be part of the engineering staff because of the nature of his work in assisting engineers, so too should dental assistants be considered part of the dental staff. In the case of dental assistants, their work is much less traditional manual labor than was the case of the rodman described in *Interborough*. The dental assistants' fundamental role is to support the dentist in providing patient care and that close role with highly educated and licensed dental health care professionals undercuts the respondent's rationale for the manual worker classification as opposed to the clerical or other worker classification.

This Board has in a number of cases reversed the Commissioner's classification of certain workers as manual workers and these cases are relevant to the instant case. In *Creative Transportation, Inc.*, PR-49-88 (August 9, 1991) the Board found that school bus drivers of buses transporting handicapped children were "specially trained and have a clear and defined

employment responsibility for the health and welfare of their passengers. We do not agree that the traditional concept and classification of a bus driver is applicable in this case.” The Board noted “...the affected workers involved in this proceeding do not properly come within the definition of ‘manual worker.’ They clearly perform no manual labor and they are not within the unskilled and menial wage work force which the statute was intended to project [sic] (protect).” The special training and health and welfare responsibilities of the bus drivers were important factors and in the case of dental assistants, these factors are of even greater significance in distinguishing this type of work from manual labor.

In *Regis Corporation*, PR 48-86 (October 27, 1987) the Board found that cosmetologists were not “manual workers” because they were “...trained and licensed individuals who during working hours perform sales and service functions relating to the treatment, styling and care of hair, scalp and skin...” While the cosmetologists were individually all licensed, the training and health related responsibilities of hair and skin care are relevant to the case of dental assistants who are directly involved in assisting licensed professionals in the treatment of teeth and gums with attendant requirements of special procedures to avoid infection and the spread of disease from patient to patient. In *Diebold, Incorporated*, PR-66-93 (January 25, 1994), the Board held that the petitioner’s employees who maintained and serviced automatic teller machines, bank vaults and security systems were not manual workers given that the specialized education and training required and primary customer contact made these workers members of the petitioner’s technical and administrative support staff. “While the employment duties may include hands-on equipment type work from time to time, we do not find any proper or reasonable basis in this record to include such employees under the statutory definition of ‘manual worker’.”

In the present case, while the physical tasks may exceed the Commissioner’s twenty-five percent threshold, the overall nature of the work in providing assistance to the provision of dental treatment to patients outweighs any sense of the role being one of a manual worker as a reasonable person would view it. Finally, in *NDI Video, Inc. d/b/a Blockbuster Video*, PR-19-94 (August 5, 1994), the subject employees were known as “customer service representatives” whose main duties were to assist customers in the selection and rental of video cassettes, which included checking customers out, checking the membership of customers, checking tapes in and returning the tapes to the display shelves upon their return. While the Board did not find sufficient evidence in the record to establish that the subject employees did perform more than twenty-five percent of their time stocking shelves, it was held that the principal duties were to assist in conducting and concluding sale and rental transactions and as such “...we do not find any proper or reasonable basis in this record to include such employees under the statutory definition of ‘manual worker’.”

We find that the petitioner met its burden of proof by reference to case precedents and by reference to a realistic common sense consideration of the nature of the work that dental assistants should not be classified as manual workers but should properly be considered within the category of clerical or other workers. The respondent in its brief or during oral argument offered no compelling reason to support the classification of dental assistants as manual workers. By conceding that he was not asserting that all dental assistants are by virtue of their title manual workers, the respondent was setting up potential distinctions between licensed and unlicensed dental assistants that could create unnecessary complexity in the payroll administration of dental offices. We find that dental assistants do not fall within traditional

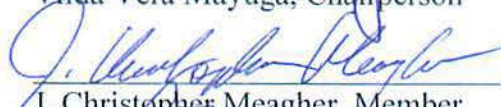
conceptions of manual workers under the Labor Law and find that Count 2 of the Order is unreasonable and must be reversed.

**NOW THEREFORE, IT IS HEREBY RESOLVED THAT:**

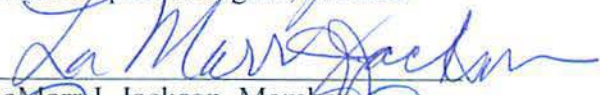
1. The Board determines that petitioner's dental assistants are not "manual workers" under Labor Law Article 6; and
2. Count 2 of the Order is reversed; and
3. The Petition for review be, and the same hereby is, granted.



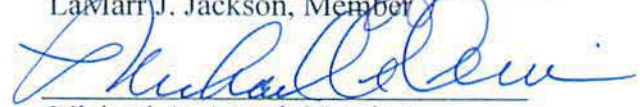
Vilda Vera Mayuga, Chairperson



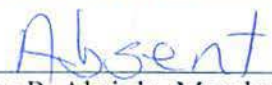
J. Christopher Meagher, Member



LaMarr J. Jackson, Member



Michael A. Arcuri, Member



Frances P. Abriola, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at Albany, New York, on  
August 7, 2014.