

STATE OF CALIFORNIA  
Division of Workers' Compensation  
Workers' Compensation Appeals Board

Case No. ADJ9580623

SERGIO SILVA,

*Applicant,*

vs.

PLAZA GARIBALDI;  
ILLINOIS MIDWEST SPRINGFIELD;

*Defendants.*

**FINDINGS AND ORDER  
And OPINION ON DECISION**

The above entitled matter having been heard and regularly submitted, the Honorable Adoralida Padilla, Workers' Compensation Judge, now decides as follows:

**FINDINGS OF FACT**

1. Applicant, SERGIO SILVA, born 03/30/1970, while employed on 11/10/2013, as a cook, in San Jose, California, by Plaza Garibaldi Restaurant, sustained an injury arising out of and arising in the course of employment to the right foot, bilateral hips, back, right shoulder, right elbow, and right upper extremity;
2. The employer's workers' compensation insurance carrier on the date of injury was ProCentury Insurance Company, adjusted by Illinois Midwest Insurance Agency;
3. Defendant's Petition for Replacement Panel filed 07/27/2015 is granted;
4. The parties are to proceed to an evaluation from Panel #1740714;
5. All other issues remain specifically deferred.

**ORDER**

ORDER IS MADE in favor of Defendant and against Applicant as follows:

- 1) Liability for injury as set forth in Findings Nos. 1 and 2;
- 2) Discovery as set forth in Findings Nos. 3 and 4;
- 3) All other issues as set forth in Findings No. 5.

**DATE: 10/02/2015**



**ADORALIDA PADILLA**  
WORKERS' COMPENSATION JUDGE

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## OPINION ON DECISION

### PANEL DISPUTE

The facts are not in dispute. The parties selected Dr. Patrick McCreesh from Panel # 1679583. Dr. McCreesh examined Applicant on 12/11/2014. A report was due from Dr. McCreesh on 01/10/2015.

By 02/10/2015 a report from Dr. McCreesh had not yet been received by Defendant, and therefore Defendant objected to the lateness of the report pursuant to Regulation 31.5(a)(12) via a fax to Applicant's attorney of the same date.

Thereafter, Dr. McCreesh did issue a report, which was dated 02/07/2015, but the proof of service and the billing both show dates of 02/11/2015. I cannot accept the 02/07/2015 date on the report as the actual date of the report, when the proof of service shows 02/11/2015. Regulation 31.5(a)(12) references the date the report is *served*. As such, Defendant has timely objected to the late reporting of Dr. McCreesh, and the objection issued before the service of the report. Defendant has properly complied with the Labor Code and the Regulations in objecting to an untimely report, before service of the report, and has properly requested a replacement panel.

Defendant has the right to waive the lateness of the report, and accept the findings of the panel doctor, but Defendant is not obligated to do so and this Judge cannot force Defendant to waive their right to object. Defendant has received the late report, and has opted to not waive their rights, and that is within their discretion.

There are a line of cases in which a late report has been "accepted" by the Board. However, in those cases, it is generally an Agreed Medical Examiner (AME) rather than a panel evaluator, and also the AME has had long involvement and issued many reports, or has already been deposed. Those are not the facts of this case.

Allow me to say that the reason for Regulation 31.5(a)(12) is to insure that the workers' compensation discovery process is handled expeditiously. So, the question here is: would it have been more expeditious to accept the report from Dr. McCreesh served on 02/11/2015, or is the delay of 8 months while the parties litigated this issue actually more expeditious? Clearly, it would have been more expeditious to accept the report of Dr. McCreesh; if we were only concerned with an expeditious process then this litigation has been ill-advised. However, we are not only concerned with an expeditious process; we are also concerned with due process and compliance with the rule of law. Weighing one against the other makes this a close case. However, the decision to pursue litigation and incur the additional time delay was made by Applicant, who could have accepted the fact of a late report and moved forward with an evaluation off the replacement panel from April, 2015.

There is no evidence of any substantial prejudice to Applicant in his decision to litigate this issue, and therefore the issue of time delay will not be sufficient to overcome the rule of law and due process.

Defendant's objection was timely and proper. Defendant's Petition for Replacement Panel is granted. The parties are to proceed with a new evaluation from Panel #1740714.

**OTHER ISSUES**

All other issues remain specifically deferred.

**DATE: 10/02/2015**



**ADORALIDA PADILLA**  
WORKERS' COMPENSATION JUDGE

Served:

Date: 10/2/2015

Copy served by mail on all parties as are listed  
on the current Official Address Record Attached.

By: *Helen M. Garza*

10-02-2015

**OFFICIAL ADDRESS RECORD**

**Case Number:** ADJ9580623

BRADFORD BARTHEL SAN JOSE	Law Firm, 2841 JUNCTION AVE STE 114 SAN JOSE CA 95134, E- DOCS@BRADFORDBARTHEL.COM
ILLINOIS MIDWEST SPRINGFIELD	Insurance Company, PO BOX 13369 SPRINGFIELD IL 62791
MAYEN HERRERA SAN JOSE	Law Firm, 300 S 1ST ST STE 319 SAN JOSE CA 95113
PLAZA GARIBALDI	Employer, 1170 E SANTA CLARA ST SAN JOSE CA 95116
SERGIO SILVA	Injured Worker, 243 S 33RD ST APT B SAN JOSE CA 95116