

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 David Ortiz,

10 Plaintiff,

11 v.

12 Zurich American Insurance Company;
13 Sedgwick Claims Management Services,
14 Inc.; Kelly Thompson; XYZ Corporations;
15 John Does 1-26,

16 Defendants.

No. CV-13-02097-PHX-JAT

ORDER

17 Pending before the Court are Zurich American Insurance Company
18 (“Defendant”)'s¹ Motion for Summary Judgment RE: Punitive Damages (Doc. 94) and
19 Motion to Strike Portions of the Declaration of Everette Lee Herndon, Jr. (Doc. 106). The
20 Court has considered the pleadings and now rules on the motions.

21 **I. Motion to Strike**

22 The Court first considers Defendant’s motion to strike because, if granted, it
23 would narrow the evidence before the Court in considering Defendant’s motion for
24 partial summary judgment. In Plaintiff’s response to Defendant’s partial summary
25 judgment motion, he submitted a declaration by expert witness Everette Lee Herndon, Jr.
26 *See* (Doc. 100-2). Defendant moves to strike six paragraphs of Mr. Herndon’s
27 declaration. *See* (Doc. 106).

28

¹ All other Defendants have been dismissed from this action. *See* (Docs. 9, 31, 57).

1 **A. Legal Standard**

2 Local Rule of Civil Procedure for the District of Arizona (“Local Rule”) 7.2
3 governs the filing of motions to strike and provides that “a motion to strike may be filed
4 only if it is authorized by statute or rule . . . or if it seeks to strike any part of a filing or
5 submission on the ground that it is prohibited (or not authorized) by a statute, rule, or
6 court order.” LRCiv 7.2(m)(1). Further, “[a]n objection to (and any argument regarding)
7 the admissibility of evidence offered in support of or opposition to a motion must be
8 presented in the objecting party’s responsive or reply memorandum and not in a separate
9 motion to strike or other separate filing.” *Id.* 7.2(m)(2).

10 **B. Analysis**

11 Before reviewing the merits of Defendant’s motion to strike, the Court must first
12 determine if the motion is procedurally proper under Local Rule 7.2(m). Defendant
13 asserts in its motion that the Court should strike certain portions of Mr. Herndon’s
14 declaration because it “violates the Court-ordered expert and discovery deadlines.”
15 (Doc. 106 at 2). Thus, Defendant argues that portions of the declaration are prohibited by
16 a court order, satisfying Local Rule 7.2(m)(1).

17 On the other hand, Defendant is unable to explain how its motion satisfies Local
18 Rule 7.2(m)(2). In essence, Local Rule 7.2(m)(2) bars motions to strike if the objection
19 could have been made in a responsive pleading. Here, Plaintiff submitted Mr. Herndon’s
20 declaration with his response to Defendant’s motion for partial summary judgment.
21 Defendant, therefore, was required to object to Mr. Herndon’s declaration in its “reply
22 memorandum and not in a separate motion to strike.” LRCiv 7.2(m)(2).

23 For the foregoing reason, the Court will deny Defendant’s motion to strike.

24 **II. Factual Background**

25 This lawsuit arises from an injury Plaintiff David Ortiz sustained on August 7,
26 2012 while he worked as a cook at Starwood Hotels & Resorts (“Starwood”) in Phoenix,
27 Arizona. At the time, Starwood was covered by a workers’ compensation insurance
28 policy issued by Defendant and adjusted by Sedgwick Claims Management Services, Inc.

1 (“Sedgwick”). Although Plaintiff eventually received the benefits to which he was
2 entitled, he encountered several obstacles along the way. As an initial matter, the Court
3 must determine the undisputed material facts in this case.

4 **A. Parties’ Statements of Facts**

5 To supplement its summary judgment motion, Defendant filed a Separate
6 Statement of Facts in Support of Motion for Summary Judgment (“DSOF”). (Doc. 95).
7 Plaintiff then filed a Response to Defendant’s Motion for Partial Summary Judgment RE:
8 Punitive Damages (Doc. 98), a Response to Defendant’s Separate Statement of Facts
9 (Doc. 99), and his own Separate Statement of Facts (Doc. 100). Finally, Defendant filed a
10 Reply in Support of Its Motion for Summary Judgment RE: Punitive Damages (Doc. 103)
11 and a Controverting Statement of Facts (Doc. 104).

12 Local Rule 56.1(a) requires that a party moving for summary judgment file a
13 separate statement of facts, in addition to the motion, setting forth each material fact on
14 which the party relies in support of its motion. LRCiv 56.1(a). In addition, the rule
15 requires that each material fact be numbered in a separate paragraph and refer to
16 admissible portions of the record for that fact. *Id.* Similarly, Local Rule 56.1(b) requires a
17 party opposing a motion for summary judgment, the non-movant, to file a controverting
18 statement of facts in addition to its response to the motion. *Id.* 56.1(b). In the
19 controverting statement of facts, the non-movant must address each of the material facts
20 that the moving party put forth and, if disputed, include “a reference to the specific
21 admissible portion of the record supporting the party’s position.” *Id.* Moreover, if the
22 non-movant wishes the court to consider “any additional facts that establish a genuine
23 issue of material fact,” it must set forth each additional fact in a separately numbered
24 paragraph with a reference “to a specific admissible portion of the record where the fact
25 finds support.” *Id.*

26 **1. Plaintiff’s “Response to Defendant’s Separate Statement of**
27 **Facts” (Doc. 99)**

28 In addition to its motion for partial summary judgment, Defendant filed its DSOF

1 in compliance with Local Rule 56.1(a), which includes sixty-nine separately numbered
2 material facts spanning nine pages. *See* (Doc. 95). Accompanying his response to
3 Defendant’s motion, Plaintiff filed two independent statements of facts, *see* (Docs. 99,
4 100), the first of which attempts to address each of the material facts as set forth in
5 DSOF. *See* (Doc. 99). Plaintiff labelled this filing “Plaintiff’s Response to Defendant’s
6 Separate Statement of Facts.” (*Id.*) Plaintiff, however, did not support any of his
7 “disputes” with a citation to the record. *See (id.)* Local Rule 56.1(b) clearly requires any
8 facts that the non-movant disputes to be accompanied with “a reference to the specific
9 admissible portion of the record supporting the party’s position.” LRCiv 56.1(b). A
10 party’s failure to provide such references permits the Court to: 1) give the party an
11 opportunity to properly support or address the fact; 2) consider the fact undisputed for
12 purposes of the motion; 3) grant summary judgment if the movant is entitled to it; or 4)
13 issue any other appropriate order. Fed. R. Civ. P. 56(e); *see Szaley v. Pima Cty.*, 371 F.
14 App’x 734, 735 (9th Cir. 2010) (“The district court permissibly deemed Defendant’s
15 statement of facts to be true because Plaintiff failed to comply with Local Rule 56.1(b).”).

16 The Court is not expected or required to scour the record on Plaintiff’s behalf to
17 find support for his disputes. *See Schneider v. TRW, Inc.*, 938 F.2d 986, 990 n.2 (9th Cir.
18 1991) (“[T]he law of this circuit . . . recognizes that a district court is under no obligation
19 to mine the full record for issues of triable fact.”); *Nilsson, Robbins, Dalgarn, Berliner,*
20 *Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988) (“We hold that
21 when a local rule . . . has been promulgated, it serves as adequate notice to nonmoving
22 parties that if a genuine issue exists for trial, they must identify that issue and support it
23 with evidentiary materials, without the assistance of the district court judge.”). Even after
24 examining Plaintiff’s disputes, the Court finds that each alleged dispute either relates to
25 an immaterial fact or is flatly unsupported by the record. Accordingly, for purposes of
26 this Order, the Court will construe all facts as set forth in DSOF (Doc. 95) as true. *See*
27 Fed. R. Civ. P. 56(e)(2); *Szaley*, 371 F. App’x at 735.

28

1 **2. Plaintiff’s “Separate Statement of Facts” (Doc. 100)**

2 In addition to his “Response to Defendant’s Separate Statement of Facts,” Plaintiff
3 also filed a “Separate Statement of Facts.” *See* (Doc. 100). This statement of facts does
4 not respond to DSOF, but sets forth Plaintiff’s account of the material facts along with
5 citations to the record. *See (Id.)* The Court finds that Plaintiff’s Statement of Facts
6 adequately complies with Local Rule 56.1(b) as an attempt to propose “any additional
7 facts that establish a genuine issue of material fact.”

8 In order to “assist the Court in tracking the facts at issue and each party’s position
9 in response thereto,” Defendant then filed a “Controverting Statement of Facts” in
10 response to Plaintiff’s Separate Statement of Facts. (Doc. 104 at 2). Though well-
11 intended, Local Rule 56.1 does not provide for a reply statement of facts or a response to
12 the non-moving party’s separate statement of facts. Rather, Local Rule 7.2(m)(2)
13 provides that any objection to the non-moving party’s statement of facts must be made in
14 a “reply memorandum and may not be presented in a separate responsive memorandum.”
15 LRCiv 7.2(m)(2); *see EEOC v. Autozone, Inc.*, 2008 WL 2509302, at *1 (D. Ariz. June
16 19, 2008) (“Should a moving party have any objections or replies to arguments or facts
17 made in the Response or its supporting statement of facts, these ‘must be included in the
18 responding party’s reply memorandum for the underlying motion and may not be
19 presented in a separate responsive memorandum.’” (quoting LRCiv 7.2(m)(2))). The
20 Local Rules do not contemplate attaching additional exhibits to replies in support of
21 summary judgments or filing a separate response to the non-moving party’s statement of
22 facts. The Court, therefore, will only consider the objections Defendant made in its Reply
23 (Doc. 103) and not those contained in its Controverting Statement of Facts (Doc. 104).

24 Accordingly, for purposes of this Order, the Court will view all facts as described
25 in DSOF (Doc. 95) and any properly supported additional facts found in Plaintiff’s
26 Separate Statement of Facts (Doc. 100) in the light most favorable to Plaintiff. *See*
27 *Ellison v. Robertson*, 357 F.3d 1072, 1075–76 (9th Cir. 2004).

1 **B. The Undisputed Material Facts**

2 The undisputed facts show that Plaintiff suffered an on-the-job injury during an
3 incident with his supervisor on August 7, 2012. (Doc. 99 at 1). Although Plaintiff claimed
4 that he fell when his supervisor pushed him, two witnesses stated the supervisor merely
5 pulled away from a hug, causing Plaintiff to lose his balance. (*Id.* at 2). The difference is
6 of no matter to the outcome of this case. At the time of the incident, Starwood was
7 covered by a workers' compensation insurance policy issued by Defendant and adjusted
8 by Sedgwick. (Doc. 100 at 2).

9 For one week following the incident, Plaintiff continued to work without official
10 complaint. (*Id.*) On August 15, 2012, Plaintiff first reported his injury to Starwood and
11 started to receive medical treatment from U.S. Healthworks. (Doc. 99 at 1–2). About one
12 month after Plaintiff began his medical treatment with U.S. Healthworks, he was referred
13 to an orthopedic surgeon. (*Id.* at 2). On September 19, 2012, Defendant first received
14 notice of Plaintiff's workers' compensation claim. (*Id.*) Because Plaintiff had been
15 released to "light duty" and continued to work, Sedgwick initially designated Plaintiff's
16 claim as "medical-only" and assigned the claim to an adjuster named Lisa Miller. (*Id.*).

17 On September 24, 2012, Dr. Brian L. Shafer of Arizona Bone and Joint Specialists
18 examined Plaintiff. (*Id.*) Based on this evaluation, Dr. Shafer advised Plaintiff to undergo
19 an MRI to determine whether he injured his right rotator cuff. (*Id.*) The ensuing MRI
20 indicated a full-thickness tear of Plaintiff's rotator cuff, leading Dr. Shafer to recommend
21 reparatory surgery. (*Id.* at 2–3). Upon receiving an authorization request for surgery,
22 Sedgwick re-titled the claim as an "indemnity" claim and transferred it to Kelly
23 Thompson ("Thompson"). (*Id.* at 3).

24 After Thompson took Plaintiff's statement, obtained witness statements and
25 reviewed Plaintiff's medical records, she requested authority from her supervisor to deny
26 the claim. (*Id.* at 3–4). In her claim note, Thompson provided a myriad of reasons for her
27 denial recommendation, including: conflicting accounts of the incident; Plaintiff's
28 existing limp and unsteady intrinsic balance; Plaintiff's delay in seeking treatment;

1 Plaintiff's indications of feeling "fine" for one week after the incident; Plaintiff's prior
2 motor vehicle accident that resulted in a shoulder injury; and Plaintiff's engagement in
3 soccer as an extracurricular activity. (*Id.*) On October 29, 2012, Thompson issued a
4 Notice of Claim Status with the Industrial Commission of Arizona ("ICA") denying
5 Plaintiff's claim. (*Id.* at 4). Soon thereafter, Thompson told Plaintiff in a telephone
6 conversation that his claim was being denied because the circumstances of the incident
7 did not fall within the course and scope of his employment. (*Id.* at 4–5).

8 On November 28, 2012, Plaintiff filed a Request for Hearing before the ICA to
9 challenge Sedgwick's denial of benefits. (*Id.* at 5). Plaintiff's principal argument was
10 that, contrary to Thompson's belief, his injury occurred in the course and scope of his
11 employment. (*Id.*) Sedgwick hired Julie Doherty ("Doherty") of Klein, Doherty,
12 Lundmark, Barberich & La Mont, P.C. to defend against Plaintiff's claim. (*Id.*) In her
13 initial case report, Doherty promised to depose Plaintiff, explore his medical history,
14 obtain relevant medical records and schedule an independent medical examination
15 ("IME"). (*Id.*) After Doherty deposed Plaintiff, she advised Thompson that "In my
16 opinion, the possibilities are extremely great that the Judge will find for [Plaintiff]." (*Id.*
17 at 6). Doherty also told Thompson that she believed Plaintiff's injury occurred in the
18 course and scope of his employment. (*Id.*) Thompson disagreed with Doherty, expressly
19 rejecting her conclusion that Plaintiff's injury occurred in the course and scope of his
20 employment. (*Id.*; Doc. 100-14).

21 On January 24, 2013, Thompson retained Scott Houston ("Houston") of Jardine,
22 Baker, Hickman, and Houston to replace Doherty as Sedgwick's counsel. (Doc. 99 at 6–
23 7). In Houston's preliminary case analysis, he questioned whether the "nature of the
24 physical injury involved" could cause Plaintiff's torn rotator cuff and whether the injury
25 occurred in the course and scope of Plaintiff's employment. (*Id.* at 7; Doc. 95-3 at 119).
26 To obtain a second medical opinion, Houston scheduled Plaintiff to undergo an IME by
27 Dr. Neil Rockowitz. (Doc. 99 at 7). On February 21, 2013, Dr. Rockowitz issued his IME
28 report concluding that, based on the information available for his review, Plaintiff's

1 injury and need for surgery were related to the August 7, 2012 incident. (*Id.* at 8).

2 On February 28, 2013, Houston advised Thompson that, based on deposition
3 testimony from two witnesses, Plaintiff's injury likely occurred within the course and
4 scope of his employment. (Doc. 100 at 4). Houston also remarked, however, that he
5 remained skeptical about "medical causation." (Doc. 95-3 at 131). Specifically, Houston
6 questioned how Plaintiff could have worked for one week without complaint while
7 suffering from a torn rotator cuff. (Doc. 99 at 7–8).

8 The first hearing before the ICA occurred on March 6, 2013. (*Id.* at 8). Plaintiff
9 testified that he struck the back of his right shoulder on the lower hinge of the freezer
10 door when he fell and denied falling on an "outstretched" arm or elbow. (*Id.*) After the
11 hearing, Houston had a telephonic conference with Dr. Rockowitz to discuss the
12 mechanism of injury in light of Plaintiff's testimony. (*Id.*) During this conference, Dr.
13 Rockowitz—contrary to his earlier IME report—expressed that, based on Plaintiff's
14 testimony, the rotator cuff injury could not have resulted from the incident. (*Id.* at 8–9).

15 A second ICA hearing took place on June 6, 2013. (*Id.* at 9). Dr. Shafer testified at
16 this hearing and concluded that, although he did not have all of the information relating to
17 Plaintiff's injury available to him at the time of his initial evaluation, the incident as
18 described in Plaintiff's testimony could have caused the rotator cuff injury. (*Id.*)

19 On June 26, 2013, Dr. Rockowitz testified at the final ICA hearing. (*Id.*) During
20 his testimony, Dr. Rockowitz attested that the mechanism of Plaintiff's injury could not
21 have supplied the necessary force to cause a full thickness tear of his rotator cuff. (*Id.* at
22 10). Instead, he testified that some tension or stress on the extremity would have been
23 necessary to cause the injury. (*Id.*) The case was then submitted for decision. (*Id.*)

24 On August 29, 2013, Judge Mosesso rendered his decision finding that Plaintiff's
25 claim was compensable. (*Id.*) Defendant did not appeal the award and accepted Plaintiff's
26 claim. (*Id.*) Plaintiff then brought this lawsuit alleging the following four claims for
27 relief: 1) breach of the duty of good faith and fair dealing as to Defendant; 2) aiding and
28 abetting Defendant's breach of the duty of good faith and fair dealing as to Sedgwick; 3)

1 aiding and abetting Defendant’s breach of the duty of good faith and fair dealing as to
2 Thompson; and 4) punitive damages as to Sedgwick, Thompson and Defendant. (Doc. 9).
3 In a previous Order, the Court dismissed all of Plaintiff’s claims against Sedgwick and
4 Thompson. *See* (Doc. 57). Plaintiff’s remaining punitive damages claim—against
5 Defendant—is the only claim on which Defendant seeks summary judgment.

6 **III. Summary Judgment Standard**

7 Summary judgment is appropriate when “the movant shows that there is no
8 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
9 of law.” Fed. R. Civ. P. 56(a). “A party asserting that a fact cannot be or is genuinely
10 disputed must support that assertion by . . . citing to particular parts of materials in the
11 record, including depositions, documents, electronically stored information, affidavits, or
12 declarations, stipulations . . . admissions, interrogatory answers, or other materials,” or by
13 “showing that materials cited do not establish the absence or presence of a genuine
14 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”
15 *Id.* 56(c)(1)(A) & (B). Thus, summary judgment is mandated “against a party who fails to
16 make a showing sufficient to establish the existence of an element essential to that party’s
17 case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v.*
18 *Catrett*, 477 U.S. 317, 322 (1986).

19 Initially, the movant bears the burden of pointing out to the Court the basis for the
20 motion and the elements of the causes of action upon which the non-movant will be
21 unable to establish a genuine issue of material fact. *Id.* at 323. To be entitled to summary
22 judgment, the movant must support its motion with evidence that would entitle it to a
23 directed verdict at trial, *id.* (citing Fed. R. Civ. P. 50(a)); i.e., the party must show that “a
24 reasonable jury would not have sufficient evidentiary basis to find for the party on that
25 issue.” Fed. R. Civ. P. 50(a). The burden then shifts to the non-movant to establish the
26 existence of material fact. *Celotex Corp.*, 477 U.S. at 323. The non-movant “must do
27 more than simply show that there is some metaphysical doubt as to the material facts” by
28 “com[ing] forward with ‘specific facts showing that there is a genuine issue for trial.’”

1 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting
2 Fed. R. Civ. P. 56(e) (1963) (amended 2010)). A dispute about a fact is “genuine” if the
3 evidence is such that a reasonable jury could return a verdict for the non-moving party.
4 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant’s bare
5 assertions, standing alone, are insufficient to create a material issue of fact and defeat a
6 motion for summary judgment. *Id.* at 247–48. However, in the summary judgment
7 context, the Court construes all disputed facts in the light most favorable to the non-
8 moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

9 **IV. Punitive Damages Claim**

10 **1. Legal Standard**

11 “Punitive damages primarily further the same objectives underlying criminal law:
12 punishing the defendant and deterring the defendant and others from future misconduct.”
13 *Gurule v. Ill. Mut. Life & Cas. Co.*, 152 Ariz. 600, 601, 734 P.2d 85, 86 (1987) (en banc)
14 (citing *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679
15 (1986)). In the context of an insurance bad faith claim, punitive damages are available
16 only when the evidence reflects, by clear and convincing evidence, “something more”
17 than the conduct necessary to establish the tort. *Rawlings v. Apodaca*, 151 Ariz. 149, 160,
18 726 P.2d 565, 576 (1986); see *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681. More
19 specifically, punitive damages are appropriate “when, *and only when*, the facts establish
20 that defendant’s conduct was aggravated, outrageous, malicious or fraudulent.” *Id.* at 162,
21 726 P.2d at 578 (citing *Anderson v. Cont’l Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368
22 (1978)). In other words, an “evil mind” must guide an “evil hand.” *Id.*

23 Notably, while “[i]ndifference to facts or failure to investigate [may be] sufficient
24 to establish the tort of bad faith[, such conduct] may not rise to the level required by the
25 punitive damage rule.” *Id.* Rather, in addition to such indifference or failure to
26 investigate, the plaintiff must also show that the insurer was “guided by an evil mind
27 which either consciously sought to damage the insured or acted intentionally, knowing
28 that its conduct was likely to cause unjustified, significant damage to the insured.” *Id.* Put

1 another way, a court should consider “the nature of the defendant’s conduct, including
2 the reprehensibility of the conduct and the severity of the harm likely to result, as well as
3 the harm that has occurred[,] . . . [t]he duration of the misconduct, the degree of
4 defendant’s awareness of the harm or risk of harm, and any concealment of it.” *Hawkins*
5 *v. Allstate Ins. Co.*, 152 Ariz. 490, 497, 733 P.2d 1073, 1080 (1987).

6 Because an insurer is rarely “willing to take the stand and admit its ‘evil mind,’”
7 however, circumstantial evidence is often the only way a plaintiff can prove he is entitled
8 to punitive damages. *Id.* at 498, 733 P.2d at 1081. “Thus, whether the [insurer] intended
9 to injure the plaintiff or consciously disregarded the plaintiff’s rights may be suggested
10 by a pattern of similar unfair practices.” *Id.* In any event, the primary question when
11 punitive damages are requested is motive, because gross negligence and reckless
12 disregard are not enough. *See Volz v. Coleman Co., Inc.*, 155 Ariz. 567, 570–71, 748 P.2d
13 1191, 1194–95 (1987).

14 **2. Analysis**

15 Defendant argues that it is entitled to summary judgment as to Plaintiff’s punitive
16 damages claim because Plaintiff is unable to establish that Defendant acted with the
17 requisite “evil mind” to support punitive damages. (Doc. 94). Defendant asserts that even
18 if its conduct supports Plaintiff’s insurance bad faith allegations, which it does not
19 concede, this alone is insufficient for an award of punitive damages. (*Id.*)

20 To establish a claim for punitive damages, the evidence must show that Defendant
21 either: (1) intended to cause injury; (2) engaged in wrongful conduct motivated by spite
22 or ill will; or (3) acted to serve its own interests, having reason to know and consciously
23 disregarding a substantial risk that its conduct might significantly injure the rights of
24 others, even though Defendant had neither desire nor motive to injure. *See Bradshaw v.*
25 *State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 422, 758 P.2d 1313, 1324 (1988).

26 Plaintiff does not appear to contend that either of the first two avenues applies in
27 this case. To the extent Plaintiff did so, the Court finds that no evidence has been
28 presented to show that Defendant “intended to cause injury” or “engaged in wrongful

1 conduct motivated by spite or ill will.” Accordingly, the Court will focus its analysis on
2 the third avenue. In this regard, Plaintiff alleges that Defendant consciously disregarded a
3 substantial risk of significant harm to Plaintiff’s rights because it placed its financial
4 interests above Plaintiff’s interests by crafting an incentive for claims adjusters to close
5 claims without regard to a claim’s merits, “attorney-shopped,” and improperly persuaded
6 Dr. Rockowitz to “flip” his opinion regarding medical causation. (Doc. 98).

7 Plaintiff first alleges that a monetary bonus program implemented by Starwood
8 and paid to Sedgwick claims adjusters imposed “arbitrary and unreasonable pressure” on
9 the adjusters to deny an injured worker’s claim without regard to the claim’s merits.
10 (Doc. 98 at 1). Plaintiff contends that the program “improperly” incentivized Thompson
11 to deny Plaintiff’s workers’ compensation claim. (*Id.*)² Even if the allegedly tainted
12 program created a slight incentive for claims adjusters to *close* claims, however, Plaintiff
13 presents no evidence that the program encouraged adjusters to *deny* claims. Further,
14 satisfying the minimum “year-end closing ratio” was only one of several conditions to be
15 eligible for a bonus. The program included multiple other requirements—such as internal
16 audit scores and a maximum 5% reopen rate—that undoubtedly would have been
17 compromised if an adjuster closed a claim incorrectly. Finally, there is no evidence that
18 Defendant placed “arbitrary or unreasonable pressure” on Thompson or any other claims
19

20
21 ² As outlined in Plaintiff’s papers (Doc. 98 at 12) and the bonus program itself
22 (Doc. 100-8 at 1), the program would seemingly encourage adjusters to *not* close claims.
23 Specifically, the program requires that an adjuster’s “year-end closing ratio must be at
24 least 105%” to be eligible for a bonus. (Doc. 100-8 at 1). According to Plaintiff and the
25 program description, the “Year-end closing ratio = total # of intake / total # of closures
26 during the year.” (*Id.*) If this equation were applied, however, an adjuster would gain
27 nothing by closing a claim, as any *increase* in “closures” would automatically *decrease*
28 the corresponding “year-end closing ratio.” For example, if an adjuster had five “intake”
claims and “closed” one, her “closing ratio” would be 500% pursuant to this equation. On
the other hand, if the adjuster closed all five claims, her closing ratio would be 100%.
Plaintiff presents no evidence explaining this anomaly or illustrating how the program
was enforced or administered.

1 adjuster to meet the program’s requirements.³ In fact, Thompson testified the program
2 was “never presented” to her. (Doc. 100-6 at 5–6). In any event, even if the program was
3 unreasonable, Defendant’s actions do not amount to “aggravated, outrageous, oppressive
4 or fraudulent” conduct necessary to create a triable issue for the jury. *See Rawlings*, 151
5 Ariz. at 162, 726 P.2d at 578.⁴

6 Second, Plaintiff claims that Defendant actively pursued an attorney who would
7 “support any reason, no matter how illegitimate, to deny [Plaintiff’s] claim.” (Doc. 98 at
8 7). Initially, there is no evidence that Defendant did not have a continuous, subjective
9 belief in the merits of its denial of Plaintiff’s claim. At the outset, Thompson denied
10 Plaintiff’s claim because she doubted medical causation and believed that the injury did
11 not occur in the course and scope of his employment. (Doc. 95-3 at 46–47). The issue of
12 medical causation remained a concern for both of Defendant’s retained attorneys,
13 Doherty (*id.* at 99–100) and Houston (*id.* at 119, 145). Finally, when Dr. Rockowitz was
14 apprised of Plaintiff’s sworn testimony regarding the incident, he too questioned medical
15 causation. (Doc. 99 at 10). Plaintiff presents no evidence that Defendant’s continuous
16 subjective belief in the merits of its denial was motivated by an “evil mind” or that
17 Defendant consciously disregarded a substantial risk that its conduct might significantly

18
19 ³ To support his argument that Defendant placed arbitrary and unreasonable
20 pressure on claims adjusters to deny claims, Plaintiff presents the Court with e-mails sent
21 by Starwood to Thompson and other claim adjusters. The e-mails intimated that the
22 adjusters should “focus on closing” certain claims, including Plaintiff’s, “before the end
23 of the year.” (Doc. 100-17). The e-mails do not, however, equate “closing” a claim with
24 “denying” a claim, much less prove that Defendant consciously disregarded a substantial
25 risk of significant harm to Plaintiff’s rights. While these e-mails may be evidence of bad
26 faith, they do not create a dispute of material fact on the issue of punitive damages.

27 ⁴ The Court finds that *Nardelli v. Metro Grp. Prop. & Cas. Ins. Co.*, 230 Ariz.
28 592, 277 P.3d 789 (Ct. App. 2012) is inapplicable to Plaintiff’s claim. In *Nardelli*, the
Arizona Court of Appeals was presented with evidence that an insurance company
implemented an “aggressive company-wide profit goal” and “aggressively communicated
this goal to the claims department (including the office and employees handling [the
plaintiff’s] claim).” *Id.* at 605, 277 P.3d at 802. The evidence also showed that the
monetary benefits given to the claims office were tied to the “average amount paid on
claims.” *Id.* Plaintiff presents no similar evidence here.

1 injure Plaintiff's rights. While reasons for "dilatatory" resolution of a claim may ultimately
2 be found "groundless or inadequately investigated" resulting in bad faith liability, this
3 does not mean that such reasons are sufficient to create an issue of fact for the jury on
4 punitive damages. *Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 599, 734 P.2d
5 76, 84 (1987). "Something more" is required; Plaintiff failed to produce such evidence
6 here.

7 Plaintiff's final argument is that Defendant engaged in misconduct when Houston
8 had a second conversation with Dr. Rockowitz to "persuade[] him to change his position
9 to support Zurich's denial of the claim." (Doc. 98 at 7).⁵ Plaintiff presents no evidence to
10 support this allegation. On the other hand, Houston testified that the purpose of the
11 conversation was to inform Dr. Rockowitz of Plaintiff's ICA testimony regarding the
12 mechanism of injury. (Doc 104-1 at 22).⁶ Without evidence of "something more,"
13 Houston's ancillary conversation with Dr. Rockowitz to determine the credibility of a

14
15 ⁵ Plaintiff also appears to argue that Houston's initial scheduling of the IME with
16 Dr. Rockowitz constituted illicit conduct. (Doc. 98 at 2, 7). Plaintiff, however, fails to
17 recognize that no IME had been performed at this time. Without evidence of bad faith or
18 unreasonableness, an insurer acts within its rights by scheduling a preliminary IME. *See*
19 *Ariz. Rev. Stat. § 23-1026* (2015); *Ariz. Admin. Code § R20-5-114* (2013); *Mendoza v.*
20 *McDonald's Corp.*, 222 Ariz. 139, 159, 213 P.3d 288, 308 (Ct. App. 2009) (implying that
21 seeking an IME is not automatically bad faith). Moreover, Plaintiff's attempt to create a
22 material fact dispute by citing a letter expressing Houston's "hope[that] Dr. Rockowitz
23 will support our argument" is not enough. (Doc. 99 at 7). No reasonable juror could
24 conclude that a party's mere "hope" for a certain outcome is sufficient to support a
25 finding of "aggravated, outrageous, malicious or fraudulent" conduct by clear and
26 convincing evidence.

27 ⁶ The evidence Plaintiff cites for his argument that this conversation was nefarious
28 actually bolsters Houston's testimony. *See* (Doc. 100-22 at 3). Namely, the evidence
shows that after Houston learned for the first time that Plaintiff's arm was not extended
when he fell, he wrote to Thompson that "this piece of evidence will be critical to Dr.
Rockowitz. . . . I will arrange for a telephonic conference with Dr. Rockowitz to see if
this changes his opinion regarding the rotator cuff tear noted." (*Id.*) Plaintiff presents no
evidence that Dr. Rockowitz already knew of the mechanism of the injury, nor does the
IME report suggest as much. *See* (Doc. 115). Rather, the evidence aligns with Houston's
testimony that he merely wanted to know whether Plaintiff's testimony would have a
bearing on Dr. Rockowitz's prior opinion.

1 viable defense was not “aggravated, outrageous, malicious or fraudulent” conduct as
2 required for punitive damages. *See Rawlings*, 151 Ariz. at 162, 726 P.2d at 578.⁷

3 **V. Conclusion**

4 The Court concludes that the evidence presented does not warrant a reasonable
5 inference that Defendant acted with an “evil mind” mandated by Arizona law to establish
6 punitive damages. While Plaintiff’s evidence may rise to the level of bad faith liability,
7 no evidence exists from which a reasonable juror could conclude that Defendant knew of
8 the evil of its actions, or that it acted from spite, or that Defendant’s conduct was so
9 outrageous that it presented an unacceptable risk of tremendous harm to Plaintiff.⁸ The

10
11 ⁷ Plaintiff argues that *Demetrulias v. Wal-Mart Stores, Inc.*, 917 F. Supp. 2d 993
12 (D. Ariz. 2013) directly resembles Plaintiff’s claim and should be followed. In
13 *Demetrulias*, however, the plaintiff offered significantly more evidence to support her
14 punitive damages claim than Plaintiff does here. In particular, the plaintiff in *Demetrulias*
15 offered evidence that her supervisor falsely told the IME physician that there was
16 surveillance footage demonstrating her ability to work. *Id.* at 1011. Plaintiff offers no
17 similar evidence here.

18 ⁸ The Court does not find *Newman v. Select Specialty Hosp.-Ariz., Inc.*, No. 1 CA-
19 CV 13-0665, 720 Ariz. Adv. Rep. 12, 2015 Ariz. App. LEXIS 174 (Ct. App. Sept. 1,
20 2015) to be applicable to this case. In *Newman*, the Arizona Court of Appeals reversed
21 the trial court’s decision to grant a hospital defendant’s motion for a directed verdict on
22 the issue of punitive damages. *Id.* at ¶ 15. The plaintiff, a hospital patient, had presented
23 evidence at trial that the hospital was aware of the plaintiff’s injuries and required
24 treatment, had internal policies imposing a detailed course of conduct on hospital
25 personnel, failed to follow direct treatment orders from the plaintiff’s doctor, and was
26 consciously aware that failing to uphold the treatment standards risked severely
27 exacerbating the plaintiff’s condition. *Id.* at ¶ 13. Despite this knowledge, the hospital
28 “continued to pursue a course of conduct that could severely exacerbate [the plaintiff’s]
wounds.” *Id.* at ¶ 14.

23 In this case, the evidence Plaintiff presents simply does not show by clear and
24 convincing evidence that Defendant consciously disregarded a substantial risk of
25 significant harm to Plaintiff when it denied Plaintiff’s claim. Specifically, in contrast with
26 *Newman* where the hospital knew that a substantial risk of significant harm to the
27 plaintiff was the patent consequence of disregarding the doctor’s treatment orders and the
28 hospital’s mandatory protocols, the evidence of a substantial risk of significant harm was
absent in this case. Dr. Shafer’s initial surgery authorization request noted that surgery
would provide Plaintiff “the best chance to improve his pain and maximize his function
both short-term and long-term.” (Doc. 95-3 at 73). Simply suggesting that a treatment


1 Court, therefore, will grant Defendant's motion for summary judgment as to the punitive
2 damages claim.

3 For the foregoing reasons,

4 **IT IS ORDERED** that Defendant's Motion to Strike Portions of the Declaration
5 of Everette Lee Herndon, Jr. (Doc. 106) is denied.

6 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment
7 Re: Punitive Damages (Doc. 94) is granted.

8 Dated this 25th day of September, 2015.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

James A. Teilborg
Senior United States District Judge

27
28

option is a patient's "best chance," however, is not equivalent to pronouncing that a
"significant risk of substantial harm" will result by foregoing the treatment. The Court is
not willing to make this stretch to uncover a material fact dispute for the jury.