

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

<b>Ted Lewis, Jr.,</b>	)	<b>CASE NO. S CIV 07-0090 DOC</b>
	)	
<b>Plaintiff(s),</b>	)	
	)	<b><u>ORDER GRANTING MOTION FOR</u></b>
<b>v.</b>	)	<b><u>SUMMARY JUDGMENT</u></b>
	)	
<b>B. Naku, et al.,</b>	)	
	)	
<b>Defendant(s).</b>	)	
	)	
	)	

Before the Court is Defendant Binoye Naku’s (“Defendant”) Motion for Summary Judgement (the “Motion”). After considering the moving, opposing, and replying papers, the Court hereby GRANTS the Motion.

**I. BACKGROUND**

Petitioner Ted Lewis (“Petitioner”) filed the instant lawsuit under 42 U.S.C. §1983 alleging that Defendant Binoye Naku (“Defendant”) was deliberately indifferent to his medical needs in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. Petitioner has had numerous complaints of back pain while housed at Salinas Valley State Prison due to an injury sustained on May 6, 1999. After being transferred to CSP-Solano on August 16, 2005, Petitioner continued to complain of back pain due to both the May 6, 1999 injury and degenerative disc dysplasia. On December 29, 2005, Petitioner allegedly tripped over a stool while working as a metal fabricator at CSP-Solano, thereby allegedly injuring his lower back and right knee.

1 On April 18, 2006, Defendant saw Petitioner for the first time for a complaint of dizziness and a  
2 general problem with his right ear. Defendant avers that Petitioner did not mention any claim of back  
3 pain at that time. Defendant diagnosed Petitioner with a perforated right ear drum and wrote him an  
4 order for batteries for his hearing aid. On April 21, 2006 Petitioner scheduled an appointment with  
5 Defendant, for which he allegedly did not appear. On May 15, 2006, Petitioner was seen by Defendant  
6 for his back pain. Defendant states:

7 During the physical examination, [Defendant] directly placed his hands on  
8 [Petitioner] and found that [Petitioner] was not in distress and that  
9 [Petitioner's] lumbar spine was remarkable only for point tenderness at the  
10 mid back. [Defendant] diagnosed [Petitioner] with osteoarthritis based on  
11 [Petitioner's] history of chronic back pain, [] subjective complaints, [] age  
12 [Petitioner's date of birth is 4/24/58) and his physical examination fo  
13 [Petitioner]. [Defendant] wrote [Petitioner] a prescription for Motrin, a  
14 non-steroidal anti-inflammatory drug, to be taken three times per day as  
15 needed for pain for 60 days, and Robaxin, a muscle relaxant, 750 mg  
16 twice a day for 30 days. On May 15, 2006, [Defendant] also wrote an  
17 order for [Petitioner] to be seen again in 30 days, wrote an order for bi-  
18 weekly complete blood counts for 30 days, and wrote [Petitioner] an order  
19 to have a complete blood count taken that day.

20 Def.'s Mo. p. 3.

## 21 II. LEGAL STANDARD

22 Summary judgment is proper if “the pleadings, the discovery and disclosure materials on file,  
23 and any affidavits show that there is no genuine issue as to any material fact and that the movant is  
24 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

25 The Court must view the facts and draw inferences in the manner most favorable to the non-  
26 moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993 (1962); *Chevron Corp. v.*  
27 *Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of  
28 demonstrating the absence of a genuine issue of material fact for trial, but it need not disprove the other

1 party's case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505 (1986); *Celotex Corp.*  
2 *v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548 (1986). When the non-moving party bears the burden  
3 of proving the claim or defense, the moving party can meet its burden by pointing out that the non-  
4 moving party has failed to present any genuine issue of material fact. *Musick v. Burke*, 913 F.2d 1390,  
5 1394 (9th Cir. 1990).

6 Once the moving party meets its burden, "an opposing party may not rely merely on allegations  
7 on denials or its own pleading; rather, its response must—by affidavits or as otherwise provided in this  
8 rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond,  
9 summary judgment should, if appropriate, be entered against that party. Fed. R. Civ. P. 56(e)(2); *see*  
10 *also Anderson*, 477 U.S. at 248-49. Furthermore, a party cannot create a genuine issue of material fact  
11 simply by making assertions in its legal papers. There must be specific, admissible evidence identifying  
12 the basis for the dispute. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*,  
13 690 F.2d 1235, 1238 (9th Cir. 1980). The Supreme Court has held that "[t]he mere existence of a  
14 scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably  
15 find for [the opposing party]." *Anderson*, 477 U.S. at 252.

### 16 III. DISCUSSION

17 When prison officials are deliberately indifferent to the serious medical needs of those under  
18 their control, the Eighth Amendment proscription against cruel and unusual punishment is violated.  
19 *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285 (1976). A determination of deliberate indifference  
20 requires an examination of two elements: (1) the seriousness of the prisoner's medical needs; and (2) the  
21 nature of the defendant's response to that need. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.  
22 1992).

23 "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition  
24 does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice  
25 does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*,  
26 429 U.S. 97, 106 (1976). Isolated occurrences of neglect do not constitute deliberate indifference to  
27 serious medical needs. *See Jett v. Penner*, 439 F.3d. 1091, 1096 (9th Cir. 2006). To establish deliberate  
28 indifference, the prison official must know of, and disregard, an excessive risk to the patient's health

1 and safety. *Toguchi v. Chung*, 391 F.3d 1057-1058. The prison official must not only be aware of facts  
2 from which the inference could be drawn that a substantial risk of serious harm exists, but actually draw  
3 the inference. *Id.*

4 Petitioner claims that the Defendant was deliberately indifferent when Defendant failed to  
5 properly diagnose Petitioner's back injury. Petitioner saw the Defendant on three medical visits where  
6 Defendant diagnosed Petitioner with osteoarthritis. Petitioner was later diagnosed by a different doctor  
7 with a cervical spine disk protrusion in C4-5 and C5-6 ("degenerative disc dysplasia"). Petitioner  
8 requires an anterior cervical discectomy and fusion of the cervical disk protrusion at the L 7-8, L45, and  
9 L55 lumbar level. Petitioner does not suffer from osteoarthritis.

10 During the April 18, 2006 medical visit, Petitioner alleges that he was not permitted to ask the  
11 Defendant to address his back pain. He claims he was told that he would have to resubmit another  
12 medical request form in order for the Defendant to discuss his back pain. At that time, Defendant  
13 diagnosed a perforated right ear drum and wrote Petitioner an order for batteries for his hearing aid. As  
14 Petitioner did not inform Defendant that he had back pain at his medical visit, Defendant properly  
15 responded to Petitioner's needs and did not violate his Eighth Amendment rights. Petitioner's back  
16 pain was not at issue during the April 18, 2006 medical visit and Defendant was not deliberately  
17 indifferent to Petitioner's medical condition. Indeed, this was an isolated incident of alleged  
18 indifference and did not rise to the level of a constitutional violation.

19 On the May 15, 2006 visit, where Petitioner's back pain was at issue, Petitioner claimed that he  
20 was not complaining of lower back pain, but rather neck pain. Although Petitioner claims he was  
21 suffering neck pain and not back pain, this does not show up in any of the Petitioner's exhibits. Each of  
22 Petitioner's exhibits shows that he was suffering "back pain," including the exhibits where Petitioner  
23 claims he catches Defendant in a lie. Defendant examined Petitioner and determined that Petitioner was  
24 not in distress and that Petitioner's lumbar spine was remarkable only for point tenderness at the mid  
25 back. Defendant then diagnosed Petitioner with osteoarthritis.

26 The Court finds that Defendant's diagnosis was not deliberately indifferent to Petitioner's  
27 medical needs and did not violate the Eighth Amendment. At most, Defendant was negligent in his  
28 diagnosis. However, as stated above, a negligent diagnosis does not rise to the level of a constitutional

1 violation. *See Estelle*, 429 U.S. 97. Petitioner had a history of chronic back pain. This history includes  
2 back pain dating back to May 6, 1999, Petitioner's age of 48-years-old, and Defendant's physical  
3 examination. Defendant was not indifferent to the pain Petitioner was experiencing and wrote Petitioner  
4 a prescription for Motrin, a pain killer, and Robaxin, a muscle relaxant, for 30 days. Prescribing Motrin,  
5 a non-steroidal anti-inflammatory drug, and Robaxin, was the conservative course of treatment and  
6 shows that Defendant did not purposefully ignore the Petitioner's osteoarthritis diagnosis. Whether  
7 Defendant made the correct diagnosis is an issue of negligence and not deliberate indifference.  
8 Therefore, the Defendant did not violate Petitioner's Eighth Amendment.

9 Finally, on June 9, 2006, Defendant examined Petitioner because he was complaining about an  
10 earache. Defendant's physical examination only determined that Petitioner had an inflamed right ear  
11 drum. Defendant responded by writing Petitioner a prescription for Augmentin, an antibiotic, and  
12 Motrin to help with the pain. Petitioner again argues that he had back pain at the time of the medical  
13 visit and that the Defendant refused to address the issue. This visit was shortly after Petitioner's  
14 previous visit, where he was prescribed Motrin and Robaxin. At the time of the visit, Petitioner was still  
15 under treatment for Defendant's previous diagnosis. Defendant was not deliberately indifferent to  
16 Petitioner's medical needs when he prescribed an antibiotic for Petitioner's earache and Motrin for his  
17 pain and when Petitioner was already under treatment for the prior diagnosis of osteoarthritis.

18 The Court finds that, although Defendant's diagnosis was incorrect, his actions were not  
19 deliberately indifferent. The findings of the x-ray and the MRI and the hands-on physical examination  
20 could have supported the diagnosis of osteoarthritis. Prescribing a non-steroidal anti-inflammatory drug  
21 such as Motrin, was the correct first step in treating chronic back pain. The Court finds that the  
22 Defendant's failure to initially diagnose Petitioner with degenerative disc dysplasia during this medical  
23 visit was not deliberately indifferent and did not violate Plaintiff's constitutional rights.

24 The Defendant was not deliberately indifferent to Petitioner's medical needs. On each of the  
25 three clinical examinations, Defendant responded to Petitioner's complaints and promptly examined and  
26 treated him. Although Defendant's diagnosis of osteoarthritis was incorrect, his diagnosis does not rise  
27 to the level of deliberate indifference. At most, Defendant's diagnosis was negligent, however, medical  
28 negligence is not considered a constitutional violation under the Eighth Amendment simply because the

1 patient is a prisoner. *Estelle*, 429 U.S. 97, 106. It does not appear that the Defendant knew of, and  
2 disregard, an excessive risk to the Petitioner's health and safety when he diagnosed the Petitioner with  
3 osteoarthritis. Therefore, Defendant was not deliberately indifferent in treating the Petitioner and did  
4 not violate the Petitioner's constitutional right to be free from cruel and unusual punishment.

5 Consequently, because Plaintiff did not allege deliberate indifference on the part of the  
6 Defendant, the Defendant is entitled to summary judgment on Petitioner's complaint against him.

7 **IV. OUTCOME**

8 For the foregoing reasons, Defendant's Motion for Summary Judgment is hereby GRANTED.

9 IT IS SO ORDERED.

10 DATED: July 1, 2009



11 DAVID O. CARTER  
12 UNITED STATES DISTRICT COURT JUDGE  
13 Sitting by Designation  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28