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

J. GARY KERNS,	)	
	)	
Plaintiff,	)	2:08-cv-02016-GEB-KJM
	)	
v.	)	<u>ORDER GRANTING IN PART AND</u>
	)	<u>DENYING IN PART DEFENDANT'S</u>
THE NORTHWESTERN MUTUAL LIFE	)	<u>MOTION FOR SUMMARY JUDGMENT*</u>
INSURANCE COMPANY,	)	
	)	
Defendant.	)	
_____	)	

Defendant The Northwestern Mutual Life Insurance Company's ("Northwestern") moves for summary judgment on Plaintiff's breach of contract and breach of the implied covenant of faith and fair dealing claims, and on Plaintiff's request for punitive damages. Plaintiff alleges in his Complaint that Northwestern breached the parties' contract when it declined to award Plaintiff lifetime disability benefits under Plaintiff's insurance policy. Specifically, Plaintiff challenges Northwestern's determination that Plaintiff's degenerative disc disorder was caused by a "sickness" rather than by a combination of a sickness and two "accidents." Plaintiff alleges Northwestern made this determination in bad faith and therefore breached the implied covenant of good faith and fair dealing. Plaintiff alleges these breaches were "malicious[]" and entitle Plaintiff to receive punitive damages. For the following reasons, Northwestern's motion is granted in part and denied in part.

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\* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 **I. Background**

2 Plaintiff has two disability income policies with  
3 Northwestern: Policy D023812 ("Policy 1") and Policy D013647 ("Policy  
4 2") (collectively, the "Policies"). (Statement of Undisputed Facts  
5 ("SUF") ¶¶ 1-3.) Under both Policies, the "maximum benefit period"  
6 available to an insured depends on whether the disability resulted  
7 from "accidental bodily injuries" or "sickness." (Id. ¶ 4.) If the  
8 disability resulted from accidental bodily injury, the insured may  
9 collect benefits for life. (Id.) If the disability resulted from  
10 sickness, the insured may collect benefits for twenty-four months for  
11 a disability beginning after age sixty-three; otherwise, the insured  
12 may collect benefits until the "first policy anniversary" after the  
13 insured's sixty-fifth birthday. (Id.) Each Policy states:

14 Concurrent Disabilities. If disability results  
15 from more than one cause, the monthly disability  
16 benefit shall be the maximum payable for any one of  
the causes.

17 (Suhr Decl. Ex. A, NW-00021, Ex. B, NY-00010; SUF ¶ 8.)

18 On October 3, 2006, Plaintiff requested disability benefits  
19 from Northwestern, claiming that as of February 2006, he was disabled  
20 from his occupation as an insurance agent due to neck and back pain.  
21 (SUF ¶¶ 9-10.) Plaintiff alleges this pain was caused by two  
22 sporting-event related incidents in 1987 and 2001. (Id. ¶ 11.) In  
23 the first incident, Plaintiff sustained a sprained neck and concussion  
24 when he was knocked down while refereeing a college football game in  
25 1987. (Id. ¶ 12.) In the second incident, Plaintiff was hit on the  
26 side of his head by a foul ball while a spectator at a minor league  
27 baseball game in 2001. (Id. ¶ 13.)

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1 After receiving Plaintiff's claim, "Northwestern [] began  
2 administering the claim under the total disability benefit provisions  
3 of both policies." (Id. ¶ 14.) Northwestern paid Plaintiff  
4 disability benefits under Policy 1 until August 20, 2008, and under  
5 Policy 2 until August 1, 2009. (Id. ¶¶ 16, 20.) It is undisputed  
6 that Northwestern has paid all benefits owed under the Policies if  
7 Plaintiff's disability was caused by "sickness" only. (Id. ¶¶ 17,  
8 21.)

9 On November 14, 2006, Northwestern acknowledged receipt of  
10 Plaintiff's request for continuance of disability benefits and  
11 requested further information to evaluate whether the disability was  
12 the result of an accident or sickness, which Plaintiff provided. (SUF  
13 ¶¶ 27-28, 43.) The information Plaintiff submitted was reviewed by  
14 Dr. Henry Alba, a medical consultant for Northwestern; he "opined that  
15 the symptoms in February 2006 appeared to be the result of a chronic  
16 and progressive cervical disc disease and not the result of the 1987  
17 and 2001 incidents." (Id. ¶¶ 43, 50.) On May 16, 2007, Northwestern  
18 "wrote to [P]laintiff and explained in detail its claim determination  
19 that the disability was the result of sickness, rather than an  
20 accident." (Id. ¶ 51.)

## 21 **II. Legal Standard**

22 The movant for summary judgment bears the initial burden of  
23 demonstrating the absence of a genuine issue of material fact for  
24 trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). If the  
25 movant satisfies its burden, "the non-moving party must set forth, by  
26 affidavit or as otherwise provided in Rule 56 [of the Federal Rules of  
27 Civil Procedure], specific facts showing that there is a genuine issue  
28 for trial." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors

1 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotations and citation  
2 omitted) (emphasis omitted). "All reasonable inferences must be drawn  
3 in favor of the non-moving party." Bryan v. McPherson, 590 F.3d 767,  
4 772 (9th Cir. 2009).

### 5 **III. Discussion**

#### 6 **A. Breach of Contract**

7 Northwestern argues it is entitled to summary judgment on  
8 Plaintiff's breach of contract claim "since Plaintiff cannot establish  
9 entitlement to benefits . . ." (Mot. 10:13-14.) Specifically,  
10 Northwestern argues Plaintiff's breach of contract claim fails because  
11 "there was no sudden precipitating 'accident' that caused his  
12 disability." (Id. 11:3-7.) Plaintiff responds he "suffered  
13 accidental bodily injuries to his neck and head in both 1987 and  
14 2001." (Opp'n 8:20-22.)

15 The Policies provide benefits for a disability "resulting  
16 from accidental bodily injuries incurred . . . while this policy is in  
17 force." (Suhr Decl. Ex. A, B.) "The rules governing policy  
18 interpretation require [the Court] to look first to the language of  
19 the contract in order to ascertain its plain meaning or the meaning a  
20 layperson would ordinarily attach to it." Waller v. Truck Ins.  
21 Exchange, Inc., 11 Cal. 4th 1, 18 (1995). Neither Policy contains a  
22 definition of "accidental bodily injuries"; nor does either Policy  
23 require that the onset of the disability occur within a stated time  
24 period after the accident.

25 No all inclusive definition of the word 'accident'  
26 can be given. It has been defined as a casualty-  
27 something out of the usual course of events and  
28 which happens suddenly and unexpectedly and without  
design of the person injured. It includes any  
event which takes place without the foresight or

1 expectation of the person acted upon or affected by  
the event.

2 Geddes v. Smith, Inc. v. St. Paul Mercury Indemnity Co., 51 Cal. 2d

3 558, 563 (1959); see also Bilezikjian v. Unum Life Ins. Co. of Am., --

4 F. Supp. 2d ---, 2010 WL 444729, at \*18 (C.D. Cal. 2010) (A common

5 sense appraisal of the phrase 'accidental bodily injury,' . . .

6 connotes an injury produced by a sudden event."). Here, it is

7 undisputed that Plaintiff sustained a sprained neck and concussion

8 when he was knocked down while refereeing a college football game and

9 that Plaintiff was hit on the side of his head by a foul ball while a

10 spectator at a minor league baseball game. (Id. ¶ 12-13.) It is not

11 disputed that these incidents are "accidents." Whether these

12 accidents are contributing "causes" of Plaintiff's disability is

13 disputed.

14 Plaintiff argues he is entitled to "lifetime benefits  
15 payable for permanent disability caused by a combination of sickness

16 and accidental bodily injury" because "his disability was caused by

17 both a sickness (degenerative disc disease) and accidental bodily

18 injuries (1987 football incident and 2001 baseball incident)." (Opp'n

19 7:13-14, 19-21 (emphasis in original).) Northwestern counters this

20 argument contradicts Plaintiff's pleadings, arguing since Plaintiff

21 only alleged in his Complaint that his disability "was the result of

22 an accident," he cannot now allege that his disability was the result

23 of more than one cause. (Reply 2:14-22.)

24 Northwestern relies on California Evidence Code Section 623

25 as its support for this pleading argument, which states: "Whenever a

26 party has, by his own statement or conduct, intentionally or

27 deliberately led another to believe a particular thing to be true and

28 to act upon such belief, he is not in any litigation arising out of

1 such statement or conduct, permitted to contradict it." However,  
2 Northwestern has not shown that this California Evidence Code section  
3 applies to Plaintiff's federal complaint.

4 Plaintiff relies on the following language in each policy as  
5 support for his position that his disability determination can be  
6 based on concurrent causes:

7 Concurrent Disabilities. If disability results  
8 from more than one cause, the monthly disability  
9 benefit shall be the maximum payable for any one of  
10 the causes.

11 (Id.) Northwestern counters this language addresses situations in  
12 which the insured has "concurrent disabilities (i.e., disabilities  
13 occurring at the same time)," and not situations in which the  
14 insured's sole injury has two causes. (Reply 2:23-17.) However, this  
15 provision concerns a "disability result[ing] from more than one  
16 cause."

17 Plaintiff argues his disability was a "result" of both  
18 sickness and the 1987 and 2001 accidents. Plaintiff cites the  
19 declaration of Doctor LeRoi Gardner, Jr. as support for his position.  
20 Dr. Gardner declares:

21 Specifically, it is my opinion, based on my review  
22 of the Northwestern Mutual Life Insurance Company  
23 claims file, including all of the medical records  
24 contained therein, and other records I have reviewed  
25 that plaintiff J. Gary Kerns is permanently disabled  
26 due to his condition of chronic headache and neck  
27 pain. Further, it is my opinion that the traumatic  
28 bodily injuries that J. Gary Kerns sustained on  
September 19, 1987 and July 28, 2001 were and are  
substantial factors causing the permanent disability  
that Mr. Kerns suffers.

26 (Gardner Decl. ¶ 4.) Further, Plaintiff attached to Dr. Gardner's  
27 declaration a written report containing Dr. Gardner's opinions  
28 concerning Plaintiff's injuries and the information Dr. Gardner

1 considered in forming these opinions. (Gardner Decl. Ex. A.) Dr.  
2 Gardner discusses in his report Plaintiff's claim file and concludes,  
3 "it is my expert medical opinion Mr. Kerns is permanently disabled and  
4 that the accidents substantially contributed to his disability."  
5 (Id.) Plaintiff's evidence is sufficient to create a genuine issue of  
6 material fact as to whether Plaintiff's two accidents were a "cause"  
7 of his disability.<sup>2</sup> Therefore, Northwestern's motion for summary  
8 judgment on Plaintiff's breach of contract claim is denied.

9 **B. Breach of the Implied Covenant of Good Faith and Fair Dealing**

10 Northwestern also seeks summary judgment on Plaintiff's  
11 breach of the implied covenant of good faith and fair dealing claim,  
12 arguing "even if there were an underlying breach of contract, the  
13 existence of a genuine issue regarding coverage precludes finding  
14 breach of the implied covenant." (Mot. 13:3-4.)

15 "[A] court can conclude as a matter of law that an insurer's  
16 denial of a claim is not unreasonable, even if the court concludes the  
17 claim is payable under the policy terms, so long as there existed a  
18 genuine issue as [to] the insurer's liability." Franceschi, 852 F.2d  
19 at 1220 (holding that the "district court properly granted summary  
20 judgment in favor of [insurer] on [insured's] claims that [the  
21 insurer] . . . breached the implied covenant of good faith and fair  
22 dealing"); see also Bilezikjian, -- F. Supp. 2d ---, 2010 WL 444729,  
23 at \*21 (stating because of "a good faith dispute over coverage, [the]  
24 claim for breach of the implied covenant of good faith and fair  
25 dealing fails as a matter of law").

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27 <sup>2</sup> Plaintiff has also presented four letters attached to his  
28 attorney's declaration, each from a treating physician, to which  
Northwestern makes a hearsay objection. The objection is sustained.

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2 Plaintiff argues in support of this claim:

3 Northwestern consciously ignored the language in  
4 the policies regarding concurrent causes of  
5 disability. Instead, Northwestern always took the  
6 position that the disability had to be due to  
7 either an accidental bodily injury or sickness, and  
8 not a combination thereof. This was true even  
9 after the undersigned presented the written  
10 opinions of four treating physicians that the 1987  
11 and 2001 accidental bodily injury incidents  
12 substantially contributed to Kerns' disability.

13 (Opp'n 9:16-21.) Plaintiff further argues:

14 [T]here is nothing in the claims file to suggest  
15 that Dr. Alba, apparently the only physician who  
16 has reviewed this claim for Northwestern, was ever  
17 asked to give an opinion on the key issue in this  
18 case, that is, whether a combination of sickness  
19 and accidental bodily injury combined to cause  
20 Kerns' disability condition.

21 (Id. 9:26-10:2.) However, Plaintiff has not presented evidence  
22 showing that Northwestern's "interpretation of the [policy] was  
23 arbitrary or unreasonable." Franceschi v. Am. Motorists Ins. Co., 852  
24 F.2d 1217, 1220 (9th Cir. 1988). Nor has Plaintiff presented evidence  
25 showing that Northwestern ignored Plaintiff's medical records or his  
26 treating doctors' correspondence, that Northwestern deliberately  
27 sought only information to support its determination that sickness  
28 caused Plaintiff's disability. It is undisputed that Northwestern  
29 reviewed all of Plaintiff's healthcare providers' opinions and  
30 records. It is also undisputed that Northwestern requested and  
31 obtained medical information from health care providers it believed  
32 would have medical records regarding Plaintiff's medical care  
33 following the 1987 and 2001 incidents. (SUF ¶ 29.) It is further  
34 undisputed that Northwestern determined Plaintiff's disability was  
35 caused by sickness and that it paid all benefits owed pursuant to that

1 determination. (Id. ¶¶ 17, 21.) Therefore, since there existed a  
2 “genuinely arguable issue” as to Northwestern’s liability,  
3 Northwestern’s motion for summary judgment on Plaintiff’s breach of  
4 the implied covenant of good faith and fair dealing claim is granted.  
5 Franceschi, 852 F.3d at 1220.

6 **C. Punitive Damages**

7 Finally, Northwestern seeks summary judgment on Plaintiff’s  
8 request for punitive damages, arguing “there was nothing malicious,  
9 oppressive or fraudulent in the handling of [P]laintiff’s claim.”  
10 (Mot. 17:14-15.) Plaintiff counters that he is entitled to punitive  
11 damages since “Northwestern has deliberately chosen to ignore the  
12 language in its own policy and framed the causation issue as being  
13 either due to accident or due to sickness to favor its own position  
14 over that of its insured.” (Opp’n 10:24-16.)

15 Punitive damages are available if “the insured proves by  
16 clear and convincing evidence that the insurance company itself  
17 engaged in conduct that is oppressive, fraudulent, or malicious.”  
18 Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1164 (9th Cir.  
19 2002); see also Silberg v. California Life Ins. Co., 11 Cal. 3d 452,  
20 462 (1974) (“In order to justify an award of exemplary damages, the  
21 defendant must be guilty of oppression, fraud or malice.”)

22 Plaintiff has not countered Northwestern’s evidence with  
23 evidence showing that Northwestern acted with oppression, fraud, or  
24 malice in its claim determination; nor has Plaintiff presented  
25 evidence sufficient to permit a reasonable inference that Northwestern  
26 deliberately misinterpreted the Policies to “favor its own position.”  
27 Therefore, Northwestern’s motion for summary judgment on the punitive  
28 damages portion of Plaintiff’s complaint is granted. See Franceschi,

1 852 F.2d at 1220 ("For the same reasons that [Plaintiff's breach of  
2 the implied covenant of good faith and fair dealing] claims were  
3 properly dismissed, punitive damages are not recoverable.").

4 **IV. Conclusion**

5 For the stated reasons, Northwestern's motion for summary  
6 judgment on Plaintiff's breach of contract claim is DENIED and its  
7 motion for summary judgment on Plaintiff's breach of the implied  
8 covenant of good faith and fair dealing claim and on Plaintiff's  
9 request for punitive damages is GRANTED.

10 Dated: May 26, 2010

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14 GARLAND E. BURRELL, JR.  
15 United States District Judge  
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