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

TROY COOPER,)	
)	2:10-cv-01057-GEB-DAD
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
PHARMACIST S. NAKU, NURSE KAUR,)	
and DR. YUEN CHEN,)	
)	
Defendants.)	
_____)	

Plaintiff Troy Cooper ("Plaintiff"), a state prisoner proceeding pro se, brings this civil rights action under 42 U.S.C. § 1983, alleging Defendants acted with deliberate indifference to his serious medical needs in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Defendants Kaur and Chen move for summary judgment on each of Plaintiff's claims, arguing Plaintiff's Fourteenth Amendment due process claim is duplicative of his Eighth Amendment claim, Defendants did not act with deliberate indifference to Plaintiff's serious medical needs, Plaintiff cannot establish that Defendants' actions or omissions caused Plaintiff harm, and alternatively, that Defendants are entitled to qualified immunity. (Defs.' Mot. for Summ. J. 8:13-14, 9:20-21, 10:1, 11:27-12:5, ECF No. 36.)

The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. On February 1, 2012, the Magistrate Judge filed findings and recommendations, which

1 were served on all parties, and which contained notice to all parties
2 that any objections to the findings and recommendations were to be filed
3 within fourteen days. (ECF No. 63.) Defendants filed objections to the
4 findings and recommendations. (ECF No. 68.)

5 In accordance with 28 U.S.C. § 636(b)(1) and Local Rule 304,
6 this Court has conducted a de novo review of this case. Having carefully
7 reviewed the entire file, the court finds the findings and
8 recommendations to be supported by the record and by proper analysis
9 except on the issue whether Defendant Kaur acted with deliberate
10 indifference concerning Plaintiff's serious medical needs.

11 I. LEGAL STANDARD

12 A party seeking summary judgment bears the initial burden of
13 demonstrating the absence of a genuine issue of material fact for trial.
14 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "A fact is
15 'material' when, under the governing substantive law, it could affect
16 the outcome of the case." Thrifty Oil Co. v. Bank of Am. Nat. Trust &
17 Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003) (quoting Anderson v.
18 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue of material
19 fact is "genuine" when "'the evidence is such that a reasonable jury
20 could return a verdict for the nonmoving party.'" Id. (quoting Anderson,
21 477 U.S. at 248).

22 When the defendant is the moving party and is seeking summary
23 judgment on one or more of a plaintiff's claims, the defendant

24 has both the initial burden of production and the
25 ultimate burden of persuasion on [the motion]. In
26 order to carry its burden of production, the
27 [defendant] must either produce evidence negating
28 an essential element of the [plaintiff's claim] or
show that the [plaintiff] does not have enough
evidence of an essential element to carry its
ultimate burden of persuasion at trial. In order to
carry its ultimate burden of persuasion on the

1 motion, the [defendant] must persuade the court
2 that there is no genuine issue of material fact.

3 Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099,
4 1102 (9th Cir. 2000) (citations omitted). If the moving party satisfies
5 its initial burden, "the non-moving party must set forth, by affidavit
6 or as otherwise provided in [Federal] Rule [of Civil Procedure ('Rule')]
7 56, '*specific facts* showing that there is a genuine issue for trial.'" T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626,
8 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e)). The "non-moving
9 plaintiff cannot 'rest upon the mere allegations or denials of the
10 adverse party's pleading' but must instead produce evidence that 'set[s]
11 forth specific facts showing that there is a genuine issue for trial.'" Estate of Tucker ex rel. Tucker v. Interscope Records, Inc., 515 F.3d
12 1019, 1030 (9th Cir. 2008) (quoting Fed. R. Civ. P. 56(e)).

13
14 Evidence must be viewed "in the light most favorable to the
15 non-moving party," and "all reasonable inferences" that can be drawn
16 from the evidence must be drawn "in favor of [the non-moving] party."
17 Nunez v. Duncan, 591 F.3d 1217, 1222-23 (9th Cir. 2010) (internal
18 quotation marks omitted). However, "[t]he district court must . . .
19 undertake some initial scrutiny of the inferences that could be
20 reasonably drawn from the evidence" to determine "whether there remains
21 sufficient probative evidence which would permit a finding in favor of
22 the [non-moving party] based on more than mere speculation, conjecture,
23 or fantasy." Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 680-81 (9th
24 Cir. 1985).

1 **II. UNCONTROVERTED FACTS¹**

2 At all relevant times, Plaintiff was incarcerated at
3 California State Prison-Solano ("SOL"). (Defs.' Statement of Undisputed
4 Facts ("SUF") ¶ 1.) In essence, this action concerns Plaintiff's
5 allegations that certain SOL medical staff acted with deliberate
6 indifference concerning his serious medical need; specifically, his
7 peripheral vascular disease ("PVD"). (Pl.'s First Am. Compl. ¶¶ 6-131.)
8 Plaintiff's allegations concern medical treatment he received at SOL
9 preceding the January 7, 2009, below-the-knee amputation of his right
10 leg. Id.

11 Plaintiff was diagnosed with PVD in 2005. (SUF ¶ 2.) PVD is a
12 progressive narrowing or blocking of the arteries which results in
13 restricted blood flow to the leg. Id. ¶ 3. PVD can cause coldness,
14 bluish discoloration, pain when walking, which is called "claudication,"
15 or gangrene in the extremities. Id. Between August 2005 and April 2008,
16 Plaintiff underwent three surgical procedures on his right leg to treat
17 his PVD. Id. ¶ 4. In April of 2008, he was prescribed Coumadin, a blood
18 thinner, to treat his PVD. Id. ¶ 5.

19 At all relevant times, Defendant Kaur ("Kaur") was employed by
20 SOL as a nurse. (Decl. of K. Kaur ("Kaur Decl.") ¶ 1.) She has been
21 licensed in California as a registered nurse since 2004. Id. As a
22 registered nurse, Kaur provides primary medical care to inmates. Id. ¶
23 2. She triages patients' complaints, conducts physical examinations,
24 refers inmates to doctors, and schedules appointments. Id.

25
26
27 ¹ The uncontroverted facts discussed herein concern only the
28 issue of whether Defendant Kaur acted with deliberate indifference
concerning Plaintiff's serious medical needs since all other portions of
the findings and recommendations are adopted in full.

1 Plaintiff's claims against Kaur involve his interactions with
2 her on October 6, 2008, and October 22, 2008, concerning Plaintiff's
3 complaint of right leg pain. (Pl.'s Dep. 28:3-29:7, 36:8-11, 39:4-8;
4 Kaur Decl. ¶ 3.)² The parties dispute the extent of their interactions
5 on these dates.

6 On November 5, 2008, Plaintiff had a follow up appointment
7 with his vascular surgeon, who noted that the prior surgeries to correct
8 or improve Plaintiff's circulation to his right leg failed. (SUF ¶ 25.)
9 Therefore, Plaintiff underwent another right-leg surgery that same day.
10 Id. Plaintiff underwent a fifth right-leg surgery on December 31, 2008,
11 and had his right leg amputated below the knee on January 7, 2009, after
12 attempts to restore circulation to his foot failed. Id. ¶¶ 32-33.
13 Plaintiff contends Kaur's actions and/or omissions were a direct cause
14 of his right leg amputation. (Pl.'s First Am. Compl. ¶ 125.)

15 III. DISCUSSION

16 Kaur seeks summary judgment on Plaintiff's Eighth Amendment
17 deliberate indifference to serious medical needs claim, arguing, *inter*
18 *alia*, "[n]othing in [her] conduct or treatment of [Plaintiff]
19 demonstrates that she was indifferent to his medical needs." (Defs.'
20 Mot. for Summ. J. 8:17-19.) Specifically, Kaur argues: "[i]n October
21 2008, [she] . . . treated and triaged [Plaintiff's] ailments, referred
22 him to a doctor as needed, scheduled follow-up appointments, placed
23 orders for prescriptions, and checked on the status of his
24 prescriptions. Nothing in Kaur's conduct or treatment of [Plaintiff]

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26 ² Although Kaur states in her declaration, and Plaintiff's
27 medical records reflect, that Kaur interacted with Plaintiff on two
28 additional dates, October 8, 2008, and October 10, 2008, these events
are not discussed herein since they are not a basis for Plaintiff's
claims against Kaur. (Kaur Decl. ¶¶ 7-10, Ex. B at 3-4.)

1 demonstrates that she was indifferent to his medical needs." Id. at
2 8:14-18 (citation omitted). Plaintiff counters that Kaur's "motion for
3 summary judgment [should be] denied." (Pl.'s Opp'n 2:10-12.)

4 "An inmate's complaint of inadequate medical care amounts to
5 a constitutional violation if the inmate alleges 'acts or omissions
6 sufficiently harmful to evidence deliberate indifference to serious
7 medical needs.'" Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.
8 1990) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

9 In the Ninth Circuit, the test for deliberate
10 indifference consists of two parts[:] First, the
11 plaintiff must show a "serious medical need" by
12 demonstrating that "failure to treat a prisoner's
13 condition could result in further significant
injury or the unnecessary and wanton infliction of
pain." Second, the plaintiff must show the
defendant's response to the need was deliberately
indifferent.

14 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting McGukin v.
15 Smith, 974 F.2d 1050, 1059 (9th Cir. 1991), overruled on other grounds
16 by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en
17 banc)) (internal quotation marks and citations omitted). "For purposes of
18 this motion," Kaur does not dispute that Plaintiff had a serious medical
19 need. (Defs.' Mot. for Summ. J. 8 n.1.) Therefore, resolution of her
20 summary judgment motion on Plaintiff's Eighth Amendment claim depends
21 solely upon whether a genuine issue of material fact exists that she
22 acted with deliberate indifference to his serious medical need.

23 Deliberate indifference is "satisfied by showing (a) a
24 purposeful act or failure to respond to a prisoner's pain or possible
25 medical need and (b) harm caused by the indifference." Jett v. Penner,
26 439 F.3d 1091, 1096 (9th Cir. 2006). "[Deliberate i]ndifference 'may
27 appear when prison officials deny, delay or intentionally interfere with
28 medical treatment, or it may be shown by the way in which prison

1 physicians provide medical care.'" Jett, 439 F.3d at 1096 (quoting
2 McGuckin, 974 F.2d at 1059).

3 "[A]n 'inadvertent or negligent failure to provide adequate
4 medical care alone does not state [a Constitutional violation].'" Id.
5 (internal brackets omitted) (quoting McGuckin, 974 F.2d at 1059). "While
6 poor medical treatment will at a certain point rise to the level of
7 constitutional violation, mere malpractice, or even gross negligence,
8 does not suffice." Wood, 900 F.2d at 1334. Further, "a mere difference
9 of medical opinion is insufficient, as a matter of law, to establish
10 deliberate indifference.'" Toguchi v. Chung, 391 F.3d 1051, 1058 (9th
11 Cir. 2004) (internal brackets omitted) (quoting Jackson v. McIntosh, 90
12 F.3d 330, 332 (9th Cir. 1996)). "Rather, to prevail on a claim involving
13 choices between alternative courses of treatment, a prisoner must show
14 that the chosen course of treatment 'was medically unacceptable under
15 the circumstances,' and was chosen 'in conscious disregard of an
16 excessive risk to the prisoner's health.'" Id. (internal brackets
17 omitted) (quoting Jackson, 90 F.3d at 332).

18 Concerning the parties' October 6, 2008, interaction, Kaur
19 declares that she "treated [Plaintiff]" when "[h]e submitted a request
20 for medical treatment for pain in his right-lower leg that he claimed
21 began earlier that day." (Kaur Decl. ¶ 2.) Kaur further declares:

22 During [her] examination, [she] took
23 [Plaintiff's] blood pressure, respiration, pulse,
24 temperature, and checked his orientation and pain
25 level. [She] examined his legs and ability to walk.
26 He had no swelling, discoloration, or acute
27 distress, and his left and right calves were the
28 same size. [She] checked for Homans' signs—a test
to check for possible blood clots by flexing the
ankle while the knee is bent at a ninety-degree
angle—which were negative. [She] found that
[Plaintiff's] pedal pulse was weaker in his right
foot than his left.

1 Based on [her] findings, [Kaur] scheduled
2 [Plaintiff] for an immediate appointment with a
3 doctor. [Defendant] Chen saw him that afternoon.

4 After [Plaintiff's] appointment with the
5 doctor, [Kaur] scheduled him for his next
6 appointment, instructed him to take his Coumadin .
7 . . as prescribed, and to return to the clinic if
8 he developed any swelling or redness or if his leg
9 pain continued. [Kaur] also called the prison
10 pharmacy to ensure that [Plaintiff's] Coumadin
11 prescription was delivered to him.

12 (Kaur Decl. ¶¶ 4-6.)

13 Plaintiff testified during his deposition that Kaur examined
14 him on October 6, 2008, and that he was subsequently seen by Dr. Chen on
15 the same day. (Pl.'s Dep. 28:3-23, 32:10-21.) However, he disputes the
16 extent to which Kaur examined his right foot. Plaintiff testified in
17 relevant part as follows:

18 Q. When you arrived at the medical clinic,
19 did Nurse Kaur see you right away?

20 A. Yes.

21 Q. Okay. And to the best of your
22 recollection, what is it that you told her was your
23 primary complaint?

24 A. Well, I told her I walk a certain
25 distance and I would have to stop.

26 Q. Did you specify what that distance was?

27 A. Yes, I did.

28 Q. What did you tell her?

 A. About 150 yards.

 Q. Okay.

 A. She then asked me to take off my boot and
sock, and that's when she felt my Achilles tendon.
She said at that time you have tendinitis, and she
called another nurse to verify her diagnosis saying
that that nurse had experience with that type of
condition.

. . . .

1 Q. When Nurse Kaur was examining your foot,
2 did you feel she had any kind of animosity or ill
3 will against you?

4 A. She didn't examine my foot. She examined
5 my tendon --

6 Q. Okay.

7 A. -- my Achilles tendon.

8 No, I didn't feel that she had any
9 animosity.

10 Q. Okay.

11 A. But she didn't in my presence consult my
12 medical record.

13 Q. Did you ask her if she had reviewed your
14 medical records before your arrival?

15 A. No, I didn't.

16 Q. Did she tell you that she had not
17 reviewed your medical file before your arrival?

18 A. No, she didn't.

19 Q. Now, you mentioned that she asked you to
20 take off your shoe and your sock; is that correct?

21 A. Yes.

22 Q. Okay. Did she or did you roll up your
23 pants, if you were wearing pants?

24 A. I didn't have to roll them up. It was
25 already pulled up.

26 Q. Okay. And what part was it from, just
27 below the knee, mid calf, that your leg was exposed
28 to view?

A. It was my whole -- well, from my knee to
my foot.

Q. Okay. Did Nurse Kaur put her hand on your
feet? Did she touch you on your foot, your calf,
your knee or anywhere on that lower part of your
leg?

A. She touched me on the Achilles tendon.

Q. Okay. So she put her hands on you?

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A. Yes.

Q. Okay. And how long was she actually touching you?

A. No more than six, seven seconds.

Q. Okay. And while she was touching you, did she say anything to you?

A. After she finished touching me she said something.

Q. Okay. What did she say after she was done touching your leg?

A. She said you have tendinitis.

Q. Did she say anything else?

A. Not that I can recall, no.

. . . .

Q. And you mentioned that after she examined you she went and got another nurse?

A. No, the nurse was present at that time in the same room.

Q. Okay. So while she was touching your leg there was another nurse present?

A. Yes.

. . . .

Q. Did that other nurse say anything in response to any of the comments you had made about the symptoms you were having?

A. No, she didn't. She simply, I think, felt my Achilles tendon and said yes, it's tendinitis.

Q. So both nurses, Nurse Kaur and this other nurse, touched your leg during the process of them treating you?

A. Yes.

Q. After the second nurse concurred with Nurse Kaur, what happened after that?

A. Well, after that I was seen by Dr. Chen.

. . . .

1 Q. Okay. But you saw Dr. Chen the same day?

2 A. Yes.

3 Q. Okay. Would you say you waited more or
4 less than an hour?

5 A. I would say less.

6

7 Q. Okay. At any time when Nurse Kaur was
8 seeing you on October 6th, did she refuse to
address any of the concerns you had?

9 A. She just didn't make any comment on them.

10 Q. Okay. At any time did she tell you that
11 she was not going to treat you for your complaints?

12 A. No.

13

14 Q. Did you tell Nurse Kaur that you had PVD?

15 A. Well, I -- no, I didn't express that on
that day, no.

16

17 Q. Okay. Did you tell Nurse Kaur that you
18 had suffered from blood clots before October 6,
2008?

19 A. I simply stated on the appeal -- I mean
20 health care form that I had suspected a blood clot.

21 Q. During any time she saw you and was
22 looking at your leg, did you mention blood clots at
all to her?

23 A. No.

24 Id. at 28:21-34:6.

25 Regarding the parties' October 22, 2008, interaction, Kaur
26 declares that she "did not treat or triage [Plaintiff] on this day[,]"
27 but she "placed an order for an arch support and scheduled [him] for the
28 blood work that Dr. Chen prescribed." (Kaur Decl. ¶ 11.)

1 Plaintiff testified in his deposition that his medical records
2 do reference an order for a "gel insole" on October 22, 2008. (Pl.'s
3 Dep. 35:9-36:7.) However, Plaintiff testified that Kaur personally
4 examined him on that date as well. Plaintiff testified concerning his
5 October 22, 2008, interaction with Kaur as follows:

6 [Q.] You mentioned that [Kaur] also saw you on
7 October 22, 2008; is that correct?

8 A. Yes.

9 Q. Do you remember if that was a ducated
10 appointment or if it was a walk-in?

11 A. It was a scheduled appointment.

12 Q. Did you fill out another health request
13 form for that appointment?

14 A. No, I didn't.

15 Q. Okay. Was that like a follow-up
16 appointment?

17 A. I believe so, yes.

18

19 [D]o you have an independent recollection of seeing
20 [Kaur] on October 22nd?

21 A. Yes, I remember seeing her on October
22 22nd.

23

24 Q. Okay. When you saw Nurse Kaur on October
25 22nd, what were your complaints at that time?

26 A. I believe I told her I was still having
27 the same type of pain that I had previously.

28 Q. Did you tell her what distance you were
able to walk before the pain became intolerable?

A. No, I don't believe I mentioned that.

Q. Do you recall if you mentioned your PVD
on October 22nd?

A. No.

1 Q. Did you mention your PVD on October 22nd?

2 A. I don't think I did.

3 Q. Did you mention to Nurse Kaur that you
4 had previously suffered from blood clots on October
22nd?

5 A. Not on that date, no.

6 Q. Okay. Did she put her hands on you to
7 examine you on October 22nd?

8 A. No.

9 Q. What was the extent of your interaction
with her on October 22nd?

10 A. I believe she took my blood pressure. I'm
11 not sure.

12 Q. Were you there to see her specifically or
were you there to see another -- a doctor?

13 A. Well, the process here is you see the
14 nurse first and then you see a doctor.

15 Q. Okay. So your interaction with her was
16 more in just doing the initial blood pressure,
temperature, maybe pulse before you saw the doctor?

17 A. Yes.

18 Q. Okay. It wasn't a specific appointment
with her?

19 A. No.

20 Q. Okay. On October 22nd, did she make any
21 kind of diagnosis as far as your condition?

22 A. I believe she said again that I had
tendinitis.

23 Q. Did she look at your leg --

24 A. No.

25 Q. -- before she said that?

26 A. No.

27 Q. Okay. At any time when she was processing
28 you and taking your vital signs, did you feel that
she had any animosity or ill feelings towards you?

1 A. No, I didn't.

2

3 Q. Any any time during your interaction with
4 Nurse Kaur on October 22nd, did she tell you that
she was not going to treat you?

5 A. No, she didn't.

6 Q. Did she tell you she was not going to
7 allow you to see the physician?

8 A. No, she didn't.

9 Q. Did she refuse you entry into the medical
10 clinic?

11 A. No, she didn't.

12 Q. Were you able to get in to see Dr. Chen
on the 22nd of October?

13 A. Yes.

14 (Pl.'s Dep. 34:9-38:17.)

15 Although the parties dispute the scope of their interactions
16 on October 8, 2008, and October 22, 2008, it is undisputed that Kaur
17 never refused Plaintiff treatment. Further, it is undisputed that Kaur
18 did not delay Plaintiff in obtaining further medical care; Plaintiff was
19 seen by a doctor, Defendant Chen, on both of the dates at issue. Even
20 accepting all of Plaintiff's deposition testimony as true, and drawing
21 all reasonable inferences therefrom in his favor, "[t]here is nothing in
22 [Kaur's] actions to suggest that she knew that [Plaintiff] faced a
23 substantial risk of serious harm and disregarded that risk by failing to
24 take reasonable steps to abate it." Newman v. McLean, No. C 05-01724 JW
25 (PR), 2009 WL 688859, at *3 (N.D. Cal. Mar. 13, 2009) (stating
26 allegations that "[Defendant Nurse] saw plaintiff within a day or two of
27 his initial injury, promptly ordered an x-ray upon a follow-up
28 examination after plaintiff complained of continual pain, and referred

1 plaintiff to a physician for further treatment . . . [a]t most . . . may
2 give rise to a claim of medical malpractice or negligence which are
3 insufficient to make out a violation of the Eighth Amendment"). "Even if
4 [Kaur] misdiagnosed his condition, and even if that misdiagnosis
5 amounted to negligence, that is insufficient to establish deliberate
6 indifference." Schilling v. Ferriter, No. CV 11-28-H-DWM-RKS, 2012 WL
7 78423, at *3 (D. Mont. Jan. 10, 2012) (dismissing Eighth Amendment
8 deliberate indifference to serious medical needs claim against nurses
9 who allegedly misdiagnosed an inmate's dislocated shoulder as a muscle
10 cramp).

11 Accordingly, IT IS HEREBY ORDERED that:

12 1. The findings and recommendations filed February 1, 2012,
13 are adopted in full except on the issue that a genuine material factual
14 issue exists concerning whether Kaur acted with deliberate indifference
15 concerning Plaintiff's serious medical needs;

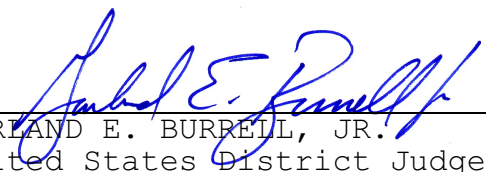
16 2. Defendants' May 5, 2011 motion for summary judgment (ECF
17 No. 36) is granted in part and denied in part as follows:

18 A. Each Defendant's motion for summary judgment on
19 Plaintiff's Fourteenth Amendment due process claim is granted;

20 B. Defendant Chen's motion for summary judgment on
21 Plaintiff's Eighth Amendment claim is denied;

22 C. Defendant Kaur's motion for summary judgment on
23 Plaintiff's Eight Amendment claim is granted.

24 Dated: March 16, 2012

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26 
27 GARLAND E. BURRELL, JR.
28 United States District Judge

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