NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDREW E. ARMSTRONG, Plaintiff, vs. TIMOTHY FRIEDERICHS, et al., Defendants.	No. C 07-00680 JF (PR) ORDER GRANTING MOTION FOR SUMMARY JUDGMENT (Docket No. 33)

Plaintiff, a California prisoner proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983 against Correctional Training Facility personnel. The Court found cognizable Plaintiff's claims that Defendants violated his Eighth Amendment rights by: (1) acting with deliberate indifference to his safety based upon the existing prison conditions; and (2) acting with deliberate indifference to his serious medical needs, and ordered service on Defendants B. Curry, Dr .T. Friederichs and Dr. H. Aung. On September 22, 2009, the Court granted Defendant Curry's motion to dismiss claim 1, and set a briefing schedule for the remaining medical claims against Defendants Friederichs and Aung. Defendants filed a motion for summary judgment on the grounds that there is no genuine issue as to any material fact, and in the alternative, that they are

entitled to qualified immunity. (Docket No. 33.) Plaintiff filed opposition to Defendants' summary judgment motion, and Defendants filed a reply. After reviewing the complaint and all submitted papers, the Court concludes that Defendants are entitled to summary judgment and will GRANT Defendants' motion.

DISCUSSION

I. Standard of Review

Summary judgment is proper where the pleadings, discovery and affidavits show that there is 'no genuine issue as to any material fact and [that] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A court will grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of the lawsuit under governing law, and a dispute about such a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Generally, the moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id. at 325. If the evidence in opposition to the motion is merely colorable, or is not significantly probative, summary judgment may be granted. See Liberty Lobby, 477 U.S. at 249-50.

The burden then shifts to the nonmoving party to "go beyond the pleadings and by

her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324 (citations omitted). If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." Id. at 323.

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The evidence must be viewed in the light most favorable to the nonmoving party, and the inferences to be drawn from the facts must be viewed in a light most favorable to the nonmoving party. See id. at 631. It is not the task of the district court to scour the record in search of a genuine issue of triable fact. Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying with reasonable particularity the evidence that precludes summary judgment. Id. If the nonmoving party fails to do so, the district court may grant summary judgment in favor of the moving party. See id.; see, e.g., Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1028-29 (9th Cir. 2001).

II. Legal Claims and Analysis

Plaintiff alleges that he suffered a slip and fall in the shower on October 14, 2005, which rendered him unconscious for a few minutes and resulted in injuries to his head, neck and back. (Compl. 3.) Plaintiff claims that he was not seen by a doctor until several months later. (Id. at 4.) When he did finally see a doctor, Plaintiff alleges that Defendant Friederichs merely examined his back, touched his chest twice, and then concluded that Plaintiff was "alright." (Id.) Plaintiff claims that because he was still experiencing pain and dizziness due to the fall, he therefore requested an MRI and to be seen by an outside specialist. However, Defendant Friederichs denied the request for an MRI, diagnosing that the symptoms were possibly due to scoliosis, and instead ordered X-rays. (Id.) Plaintiff alleges that he was later interviewed by Defendant Dr. Aung on January 23, 2006, who after a "look and a touch" stated that Plaintiff was "fine." (Id.) Plaintiff

alleges that when he told Defendant Aung that he was experiencing a "shock" feeling throughout his entire body, Defendant Aung "acknowledged that this was due to the severity of the fall but, [] did not want to hear, nor was he concern[ed] with any of [Plaintiff's] ailments." (Id.) Plaintiff alleges that Defendant Aung stated that he would only address the X-ray requests. (Id.) Plaintiff claims that his medical condition has deteriorated to the point where he is in constant pain and that he still experiences "shocks" throughout his body while nothing has been done to remedy the problem. (Id. at 5.) The Court found that Plaintiff's allegations, liberally construed, stated cognizable claims that Defendants violated his Eighth Amendment rights by acting with deliberate indifference to his serious medical needs.

Deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate indifference" involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need. See McGuckin, 974 F.2d at 1059.

A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." McGuckin, 974 F.2d at 1059 (citing Estelle, 429 U.S. at 104). The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a "serious" need for medical treatment. Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990)).

A prison official is deliberately indifferent if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps

to abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but he "must also draw the inference." Id. If a prison official should have been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the risk. Gibson v. County of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002).

In order for deliberate indifference to be established, therefore, there must be a purposeful act or failure to act on the part of the defendant and resulting harm. See McGuckin, 974 F.2d at 1060; Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). A finding that the defendant's activities resulted in "substantial" harm to the prisoner is not necessary, however. Neither a finding that a defendant's actions are egregious nor that they resulted in significant injury to a prisoner is required to establish a violation of the prisoner's federal constitutional rights, McGuckin, 974 F.2d at 1060, 1061 (citing Hudson v. McMillian, 503 U.S. 1, 7-10 (1992) (rejecting "significant injury" requirement and noting that Constitution is violated "whether or not significant injury is evident")), but the existence of serious harm tends to support an inmate's deliberate indifference claims, Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing McGuckin, 974 at 1060).

A claim of medical malpractice or negligence is insufficient to make out a violation of the Eighth Amendment. See Toguchi v. Chung, 391 F.3d 1051, 1060-61 (9th Cir. 2004); Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981); see, e.g., Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998) (finding no merit in claims stemming from alleged delays in administering pain medication, treating broken nose and providing replacement crutch, because claims did not amount to more than negligence); McGuckin, 974 F.2d at 1059 (mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's 8th Amendment rights); O'Loughlin v. Doe, 920 F.2d 614, 617 (9th Cir. 1990) (repeatedly failing to satisfy requests for aspirins and antacids to alleviate headaches, nausea and

pains is not constitutional violation; isolated occurrences of neglect may constitute grounds for medical malpractice but do not rise to level of unnecessary and wanton infliction of pain); Anthony v. Dowdle, 853 F.2d 741, 743 (9th Cir. 1988) (no more than negligence stated where prison warden and work supervisor failed to provide prompt and sufficient medical care).

1. Claim against Defendant Dr. T. Friederichs

The following facts are not in dispute unless otherwise indicated. Plaintiff's claim against Defendant Friederichs is based solely on the medical examination that took place on December 1, 2005. (Compl. 4; Pl.'s Depo. 53:24-25, 54:1-4) (Docket No. 36). According to Plaintiff's medical records, he fell and hit his head in the prison showers on October 14, 2005. (Friederichs Decl. at 2; Attach. MR 071.) Plaintiff submitted a written request three days later to the CTF medical clinic, stating that since his fall in the shower, he was experiencing "bad headaches," that his neck and back were very sore, and that his chest was "sensitive to the touch." (Id.) The medical staff responded to what they assessed to be a non-emergency situation by scheduling a doctor's appointment for Plaintiff on the next available date, which was December 1, 2005. (Id. at 3.)

On December 1, 2005, the medical staff weighed Plaintiff and recorded the following four vital signs: 1) body temperature, 2) pulse rate, 3) respiration rate, and 4) blood pressure. (Id.; Attach. MR 071.) The results were found to be normal for someone of Plaintiff's size and age. (Id.) Then Plaintiff was examined by Defendant Dr. Friederichs, who was a staff physician and surgeon at CTF since 1998. (Friederichs Decl. at 2.) Defendant Friederichs has been board certified in family medicine by the American Board of Family Medicine since 1979, and has examined and treated thousands of patients with head-related injuries, back and neck problems, neurological deficiencies, muscle strain, headaches, pains and soreness, among other things. (Id.) When he saw Plaintiff on December 1, 2005, Defendant Friederichs applied and recorded the examination under the "SOAP" format used by medical professionals to record the following: subjective observations, objective observations, an assessment (diagnosis), and

a treatment plan. (Id. at 3.) Defendant Friederichs' subjective observation notes indicated that Plaintiff informed him that he had lost consciousness for one or two minutes in October 2005, when he fell and hit his head in the showers, and that he had headaches and back pain. (Id.; Attach. MR 072.) Plaintiff's subjective statements were clinically significant because the first twenty-four hours after a head injury or loss of consciousness are the most critical time period. (Id. at 4.) A patient who was unconscious for more than two minutes would typically be admitted to a hospital for a 24-hour observation period, and if necessary, a CT scan. (Id.) In Plaintiff's case, it does not appear that he was unconscious long enough to warrant hospitalization.

Although Plaintiff claims that he complained of dizziness as well as pain from the incident, (Compl. 4), no other subjective observations were noted during the examination, such as interference with memory, judgment, reflexes, speech, balance and coordination, to indicate to Defendant Friederichs that Plaintiff was suffering from a serious head injury. Rather, Defendant Friederichs noted that Plaintiff's neurological system was "intact," which means generally that Plaintiff's cognitive and motor skills were functioning fine. (Friederichs Decl. at 4.) Defendant Friederichs states that since he examined Plaintiff almost seven weeks after the purported head injury, any head concussion would have "undoubtedly resolved itself." (Id.) Furthermore, Plaintiff displayed none of the symptoms during the examination to indicate that he was still suffering a concussion, such as interference with memory, judgment, reflexes, speech, balance and coordination. (Id.)

Defendant Friederichs states that in light of Plaintiff's statements and the passage of time since the purported head injury, he would have looked for objective symptoms consistent with a delayed subdural hematoma, a blood cot that forms between the skull and the brain, such as bruises around eyes and ears. (Id.) Depending on the severity of the injury, patients may also experience the following symptoms: confusion, loss of consciousness, blurred vision, severe headaches, vomiting, memory loss, slurred speech, difficulty walking, weakness or loss of sensation on one half of the body, seizures, change

in skin color, behavioral changes, and blood or clear fluid draining from the ears o nose, among others. (Id.) In Plaintiff's case, Defendant Friederichs found that there were not enough symptoms to diagnose subdural hematoma or any other serious head injury, which would have warranted a referral to a specialist or the local hospital for further evaluation and testing. (Id. at 5.)

In response to Plaintiff's complaints of soreness and based on his description, Defendant Friederichs examined Plaintiff's back and chest and diagnosed him with having "neck (right trapezius) and back (right latissimus dorsi) muscle strain." (Id.; Attach. MR 066.) Defendant Friederichs also observed a prominent right rib hump on Plaintiff's back, which indicated scoliosis (curvature of the spine). (Id.; Attach. MR 072.) Defendant Friederichs noted "possible scoliosis" in his notes for the medical staff to monitor the condition at future medical appointments, and ordered X-rays of Plaintiff's chest and spine to confirm his preliminary diagnosis and to uncover any hidden problems. (Id.; Attach. MR 066.) The X-ray results for Plaintiff's upper (thoracic) and lower (lumbar) back regions and neck (cervical) came back normal. The only abnormality was in certain areas of Plaintiff's neck spine, *i.e.*, the C3-4, C4-5 area, which showed "spondylosis with diminished disc height and spurring."[1] (Id. at 6; Attach. MR 222.)

[1] Defendant Friederichs describes the nature of spondylosis and treatment in his declaration, which Plaintiff does not dispute: "Cervical spondylosis is a common degenerative condition that is generally referred to as age-related wear and tear affecting the joints in a person's neck. Aging causes the bones and cartilage in the backbone and neck region to gradually deteriorate and sometimes form bone spurs (irregular bony outgrowths). These changes occur in everyone's spine. Patients with cervical spondylosis may sometimes experience, among other things, stiffness, pain, unsteady gait, abnormal reflexes, and tingly or pinprick sensations (sometimes described as "shocks") in their hands and legs, which are caused by nerve compression and lack of blood flow. Still, many people with signs of cervical spondylosis on X-rays manage to escape the associated symptoms. Treatment for spondylosis is usually conservative in nature and commonly treated by nonsteroidal anti-inflammatory drugs (e.g., ibuprofen), physical modalities (e.g., therapeutic interventions that use physical methods like heat, cold, massage, or exercise to relieve pain), and lifestyle modifications (e.g., avoid high-impact or strenuous activities)." (Friederichs Decl. at 6.)

Plaintiff's X-rays also confirmed Defendant Friederichs' preliminary scoliosis diagnosis, although in a moderate state. (Id.; Attach. MR 220.) According to Defendant Friederichs, the cause of scoliosis is relatively unknown, and in most cases does not cause back pain. (Id. at 6.) Based on his training and experience, Defendant Friederichs did not believe that the fall in the shower caused the moderate scoliosis in Plaintiff's case. (Id.) Defendant Friederichs informed Plaintiff about the nature of scoliosis and the need for future monitoring. He also prescribed 600 mg of Motrin (ibuprofen) for thirty days for Plaintiff's complaints of pain, soreness and tenderness. (Id. at 6-7.)

Defendant Friederichs argues that he did not exhibit deliberate indifference to Plaintiff's medical needs, let alone a serious one, during the December 1, 2005 examination, and is entitled to judgment as a matter of law. (Defs.' Mot. at 18.) In support of the motion for summary judgment, Defendant Friederichs has submitted a personal declaration and copies of Plaintiff's medical records documenting the medical treatment Plaintiff received from Defendant Friederichs on December 1, 2005. Plaintiff does not dispute the evidence contained in the medical records provided by Defendant. Rather, Plaintiff's sole complaint is that Defendant Friederichs denied his requests for an MRI and a referral to an outside specialist. (Compl. 4.) However, Defendant Friederichs asserts that he had no concrete reason to recommend an MRI because Plaintiff presented no neurological deficiencies or other symptoms not adequately covered by the physical examination and the X-rays. (Friederichs Decl. at 7.) In opposition, Plaintiff merely repeats his claims from the complaint and asserts that Defendant Friederichs denied his requests for an MRI and an outside specialist and "would only set an appointment for x-rays." (Oppo. at 5.)

It is clear that the facts alleged by Plaintiff, if true, do not amount to deliberate indifference to serious medical needs by Defendant Friederichs. As discussed above, the medical records submitted by Defendant Friederichs show that Defendant Friederichs examined Plaintiff as scheduled on December 1, 2005, to treat the pains he complained of, *i.e.*, headaches, neck and back pains, and chest soreness. See *supra* at 6-8. Defendant

Friederichs was able to reasonably rule out a concussion and subdural hematoma based on subjective and objective observations. Id. at 6-7. Defendant Friederichs addressed Plaintiff's complaints regarding his back and chest pains and ordered X-rays, which confirmed that Plaintiff was suffering from spondylosis, a common degenerative condition that is generally referred to as age-related wear and tear affecting the neck joints, and moderate scoliosis. Id. at 7. Furthermore, Defendant Friederichs prescribed medication for Plaintiff's complaints of pain, soreness and tenderness and did not disregard them. Id. at 8. Rather, Plaintiff's claim that Defendant Friederichs denied his request for an MRI and a referral to an outside specialist states a difference in opinion in the treatment he received. However, "[a] difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a § 1983 claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a showing of nothing more than a difference of medical opinion as to the need to pursue one course of treatment over another is insufficient, as a matter of law, to establish deliberate indifference, see Toguchi, 391 F.3d at 1058, 1059-60; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970). Furthermore, there is no indication that Defendant Friederichs knew that Plaintiff faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable steps to abate it. See Farmer, 511 U.S. at 837. Or, put differently, there is no indication that the course of treatment Defendant Friederichs chose was medically unacceptable under the circumstances and that he chose this course in conscious disregard of an excessive risk to Plaintiff's health. See Toguchi, 391 F3d at 1058; Jackson 90 F3d at 332. The fact that Plaintiff was able to play basketball just a day after the examination, and continued thereafter to do so on a regular basis, (Pl.'s Depo. 8:19-25, 9:1-13), indicates that he was not in a concussive state or suffering a damaged neurological system which Defendant Friederichs failed to treat. In opposition, Plaintiff has failed, by "go[ing] beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,'" to "designate 'specific facts to show that there is a genuine issue

for trial'" with respect to his medical claim against Defendant Friederichs. Celotex Corp., 477 U.S. at 324. Accordingly, Defendant Friederichs is entitled to summary judgment on this claim. Id. at 323.

2. Claim against Defendant Dr. Aung

The following facts are not in dispute unless otherwise indicated. Plaintiff's claim against Defendant Aung is based solely on the medical examination that occurred on January 23, 2006. (Compl. 4-5; Pl.'s Depo. 32:1-15.) On December 26, 2005, Plaintiff requested to know the results of the X-rays from Dr. Friederichs' examination, and complained of sharp pain in his upper back and a stiff neck. (Aung Decl. at 2; Attach. MR 151, 219-22.) The medical staff scheduled an appointment for January 23, 2006. (Id. at 3; Attach. MR 067.)

On January 23, 2006, the staff weighed Plaintiff and monitored his body temperature, pulse rate, respiration rate and blood pressure. (Id.) The results were found to be normal for someone of Plaintiff's size and age. (Id.) Then Plaintiff was examined at the CTF's satellite medical clinic, North Unit, by Defendant Dr. Aung, who was a staff physician and surgeon at CTF at the time. (Id. at 2-3; Attach. MR 067-68.) Prior to his retirement from CTF in 2009, Defendant Aung had practiced medicine for almost twenty years, and examined and treated thousands of patients with head-related injuries, back and neck problems; neurological deficiencies; muscle strain; headaches; pains and soreness, among other things. (Id. at 2.) At the start of the examination, Defendant Aung informed Plaintiff that his X-ray report was not in his medical chart. (Id. at 3.) To avoid any delay in Plaintiff's diagnosis and treatment by rescheduling the visit, Defendant Aung called the radiology department at CTF's central medical facility which faxed a copy of the X-ray report to him. (Id.) Defendant Aung discussed the findings with Plaintiff based on the X-ray reports, which showed moderate scoliosis and spondylosis as stated in Defendant Friederichs' declaration. (Id.) Defendant Aung then proceeded with an examination based on the "SOAP" format, i.e., subjective, objective, assessment, and plan, which is identical to the steps followed by Defendant Friederichs. See *supra* at 6. Defendant

Aung states that Plaintiff informed him that: "1) he fell in the prison showers three to four months prior; 2) that he had back pain for an unspecified period of time ("months"); 3) that the pain site was the right shoulder-blade area; 4) that he had no weakness or numbness; and 5) that he was employed as a yard-crew member." (Id.; Attach. MR 068.) Plaintiff claims in the complaint that he told Defendant Aung of a "shock" feeling that he was experiencing throughout his entire body, and that Defendant Aung "acknowledged that this was due to the severity of the fall, but he did not want to hear, nor was he concern[ed] with any of [Plaintiff's] ailments." (Compl. 4.) Plaintiff alleges that Defendant Aung replied that "'Doctor(s) doesn't [*sic*] know everything,'" and that he was only going to address what was on Plaintiff's medical request. (Id.) Defendant Aung argues that the medical notes do not reflect any complaint of "shock" feeling by Plaintiff at the January 23rd examination. (Aung Decl. at 5; Attach. MR 068.) Defendant Aung asserts that even assuming Plaintiff reported neck and head injuries and shocks during the examination, the recorded objective and subjective symptoms reflected no serious or lingering effects from the October 2005 fall in the shower. (Id.) Defendant Aung asserts that Plaintiff made no indication of weakness or numbness, two essential factors to help diagnose internal damage. (Id. at 5; Attach. MR 068.) Plaintiff also stated that he was yard-crew member, which entails intensive physical labor and requires excellent physical health. (Id.) Defendant Aung argues that a person with spinal, brain, neck, or nerve damage would not be able to perform such physical labor. (Id.) Defendant Aung noted that Plaintiff did not have a stiff neck and that he had no fever, which negated preliminary meningitis diagnosis (an infection of the fluid that surrounds the brain and the spinal cord). (Id. at 6.) Defendant Aung states that the "lack of a fever is significant because such a fever is a risk factor for infection." (Id.)

When Plaintiff complained of pain in his right shoulder-blade (inner scapular), Defendant Aung narrowed his diagnosis toward a condition affecting the body, *e.g.*, overuse or overstretching of a muscle causing myalgia (muscle pain). (Id.) During the examination, Defendant Aung observed the following: Plaintiff stood, sat, and walked

normally; Plaintiff had a full range of motor skills, including a normal deep-tendon reflex, a strong bilateral hang drip, and normal bilateral upper extremities; Plaintiff presented no symptom indicating any muscle loss; and when Plaintiff's right shoulder-blade area was pressed, Plaintiff reaced with or presented no pain, swelling, or redness. (Id.) Defendant Aung found that the X-ray findings, combined with the physical examination, did not provide any concrete need for further testing. Defendant Aung diagnosed Plaintiff with "possible myalgia" in the shoulder-blade area. (Id.) As a precautionary measure, Defendant Aung ordered an X-ray of Plaintiff' shoulder-blade area to confirm his preliminary diagnosis, to scan for any bone fracture in that area, and to uncover any unobservable problems. (Id.; Attach. MR 150.) The X-ray results came back normal, showing no dislocation between the shoulders and arms and no bone abnormality in the areas. (Id. at 6-7; Attach. MR 218.) Defendant prescribed 650 mg of Tylenol (acetaminophen) for thirty days to relieve Plaintiff's complaints of pain. (Id. at 7.) Defendant Aung explained to Plaintiff that he was prescribing acetaminophen rather than ibuprofen because long-term use of the latter could cause kidney and liver failure, stomach bleeding, and edema, among other things. (Id.) Plaintiff agreed to the transition to acetaminophen. (Id.) Defendant Aung instructed Plaintiff to avoid strenuous exercise and sports to allow the body to heal itself and to alleviate any problems associated with aging or pain . (Id. at 8.)

Plaintiff alleges that he had to raise his voice to an "abnormal level" when he told Defendant Aung about the "shock" feelings he was experiencing since the fall. (Compl. 5.) Plaintiff claims that Defendant Aung's response to this complaint was to take him off ibuprofen and put him on Tylenol and set and appointment for another round of X-rays. (Id.) Plaintiff was clearly not satisfied with the course of treatment prescribed by Defendant Aung, *i.e.*, the refusal to order an MRI. However, similar to his claim against Defendant Friederichs, Plaintiff's disagreement with Defendant Aung's course of treatment does not give rise to a § 1983 claim, see Franklin, 662 F.2d at 1344, and a showing of nothing more than a difference of medical opinion as to the need to pursue

one course of treatment over another is insufficient, as a matter of law, to establish deliberate indifference, see Toguchi, 391 F.3d at 1058, 1059-60. Based on Defendant Aung's declaration and the medical records submitted in support thereof, it is clear that Defendant Aung addressed the concerns stated in Plaintiff's medical request, *i.e.*, to know the results of his previous X-rays and for treatment of his upper back pain and stiff neck. (Aung Decl. at 7; Attach. MR 067.) Assuming that Plaintiff also complained of "shock" feelings during the examination which Defendant Aung allegedly acknowledged but failed to record, there is no indication that Defendant Aung knew, based on the "shock" feelings, that Plaintiff faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable steps to abate it, see Farmer, 511 U.S. at 837. Nor can it be said that the course of treatment Defendant Aung chose was medically unacceptable under the circumstances and that he chose this course in conscious disregard of an excessive risk to Plaintiff's health. See Toguchi, 391 F3d at 1058; Jackson 90 F3d at 332. Based on subjective and objective observations, Defendant Aung reasonably concluded that Plaintiff was not suffering from late complications from his slip-and-fall in the shower: Plaintiff's vital signs were normal; he appeared healthy and muscular; his motor skills and upper extremities were functioning fine; his neurological system was intact; and he had no numbness, weakness, muscle loss, swelling, tenderness, or fever. (Aung Decl. at 8.) Without any symptoms to indicate a serious, systematic problem, Defendant Aung had no concrete medical reason to order an MRI despite Plaintiff's preference and opinion. In opposition, Plaintiff has failed to show that there is a genuine issue for trial. Celotex Corp., 477 U.S. at 324. Accordingly, Plaintiff's claim fails as a matter of law and summary judgment is GRANTED to Defendant Aung on Plaintiff's Eighth Amendment claim. Id. at 323.

Having reviewed the pleadings and all submitted papers on this matter, the Court finds that Plaintiff's allegations do not establish that Defendants acted with deliberate indifference to Plaintiff's serious medical needs in violation of the Eighth Amendment. Accordingly, Defendants are entitled to judgment on these claims as a matter of law. See

Celotex Corp., 477 U.S. at 323.[2]

CONCLUSION

For the foregoing reasons, Defendants Friederichs and Aung's motion for summary judgment (Docket No. 33) is GRANTED.

This order terminates Docket No. 33.

IT IS SO ORDERED.

DATED: 5/19/10

JEREMY FOGEL
United States District Judge

[2] Because the Court finds that no constitutional violation occurred, it is not necessary to reach Defendants' qualified immunity argument.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

ANDREW ARMSTRONG,

Plaintiff,

v.

TIMOTHY FRIEDERICHS, et al.,

Defendants.
_____/

Case Number: CV07-00680 JF

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 5/26/10, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Andrew Emil Armstrong H-44225
Correctional Training Facility
PO Box 689
E-135
Soledad, CA 93960-0689

Dated: 5/26/10

Richard W. Wieking, Clerk