

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
CENTRAL DISTRICT OF CALIFORNIA

ARTHUR WOMACK,)	Case No. CV 08-02176 DDP (CTx)
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANTS'
v.)	MOTION FOR SUMMARY ADJUDICATION
)	OF ISSUES
GENERAL AMERICAN LIFE)	
INSURANCE COMPANY,)	[Motion filed on August 17, 2009]
PROTECTIVE LIFE INSURANCE)	
COMPANY, THE PAUL REVERE)	
LIFE INSURANCE COMPANY,)	
UNUM, TRAVELERS, THE)	
STANDARD FIRE INSURANCE)	
COMPANY,)	
)	
Defendants.)	
_____)	

This matter comes before the Court on the Motion for Summary Adjudication of Issues filed by the defendants General American Life Insurance Company ("General American"), Protective Life Insurance Company ("Protective Life"), and The Paul Revere Life Insurance Company ("Paul Revere") (collectively "Defendants"). Having reviewed the papers submitted by the parties and heard oral argument, the Court grants in part and denies in part Defendants' motion and adopts the following order.

1 **I. BACKGROUND**

2 **A. Factual History**

3 1. Disability Insurance Policies

4 For 20 years, the plaintiff Arthur Womack ("Plaintiff") owned
5 and operated a general dentistry practice. (Plaintiff's Statement
6 of Genuine Issues ("PSGI") ¶ 30.)¹

7 a. General American Disability Policy

8 In 1984, Plaintiff purchased disability insurance from General
9 American. The policy provides for benefits of \$5,000 per month for
10 total disability after a 30-day elimination period, which must be
11 satisfied before benefits become payable. The policy provided that
12 "Total Disability and totally disabled mean that, as a result of
13 sickness or injury or a combination of both, you are unable to
14 perform the material and substantial duties of your occupation."
15 (DSUF ¶ 3.)

16 The policy also includes a proportionate income replacement
17 rider which contains the following definition of partial
18 disability: "Partial Disability and Partially Disabled mean that
19 you are engaged, either full-time or part-time in an occupation,
20 including Your Occupation, but solely because of disability from
21 sickness or injury or both, you are unable to earn at a rate of at
22 least 80% of your Prior Earned Income." (Id.)

23

24

25 ¹In his PSGI, Plaintiff responds to the numbered paragraphs
26 from Defendants' Separate Statement of Undisputed Facts ("DSUF"),
27 but begins numbering his additional statements of fact at paragraph
28 1. The Court will refer to Plaintiff's responses to Defendants'
statements of undisputed fact as Plaintiff's Response ("PR") and
Plaintiff's separate statements of fact as Plaintiff's Statement of
Genuine Issues ("PSGI").

1 b. General American Business Overhead Expense
2 Policy

3 In addition, Plaintiff purchased a business overhead expense
4 (BOE) policy from General American, which provided a monthly
5 benefit up to \$9,000 to cover eligible business overhead expenses
6 during a total disability after a 30-day elimination period, for a
7 24-month benefit period. (Id. ¶ 4.) The BOE policy defined total
8 disability as follows: "Total Disability and totally disabled mean
9 that, as a result of sickness or injury or a combination of both,
10 you are unable to perform the material and substantial duties of
11 your occupation." (Id. ¶ 5.)

12 c. Protective Life Disability Policy

13 In 1993, Plaintiff also purchased an individual disability
14 policy from Protective Life, which provided a \$7,116 per month
15 benefit for total disability after a 90-day elimination period.
16 (Id. ¶ 6.) The policy defines total disability as "injury or
17 sickness restrict[ing] your ability to perform the material and
18 substantial duties of [the insured's] regular occupation to an
19 extent that prevents [the insured] from engaging in [her] regular
20 occupation" so long as the insured is "receiving medical care from
21 someone other than [herself] which is appropriate for the injury or
22 sickness" unless "continued care would be of no benefit to [the
23 insured]."

24 The policy also defines residual disability, which means that
25 as a result of the same injury or sickness which caused the insured
26 to satisfy the elimination period, she suffers "at least a 20% loss
27 of net income in [her] regular occupation" and is "receiving
28 medical care from someone other than [herself] which is appropriate

1 for the injury or sickness" unless "continued care would be of no
2 benefit to [the insured]." (Id. ¶ 7.)

3 2. Plaintiff's Back Injury and Resulting Disability

4 On July 31, 2004, Plaintiff was a passenger in a boat en route
5 to Catalina Island when a large wave threw him to his seat.
6 Plaintiff was in immediate and excruciating pain, could not walk,
7 and was transported for emergency medical treatment. (PSGI ¶ 31.)

8 An x-ray taken of Plaintiff's spine at the emergency room
9 indicated a thirty percent anterior compression fracture at the L1
10 vertebra, mostly acute. (Id. ¶ 12.) The compression at the L1
11 vertebra was revealed by a later MRI to have predated the boating
12 accident. (Id. ¶ 15; PR ¶ 15.) An MRI performed on August 4,
13 2004, revealed what Plaintiff's treating physician at the time,
14 Sylvain Palmer, M.D., thought to be a decrease in height at the T12
15 vertebra "in keeping with the recent compression fracture at this
16 site likely benign." (DSUF ¶ 14; PR ¶ 14.) A contrast MRI
17 performed on August 9, 2004, confirmed the old compression of the
18 L1 vertebra and what Plaintiff's treating physician at the time
19 believed to be a subacute compression fracture at T12 with mild to
20 moderate height loss. (DSUF ¶ 15.) In addition, Plaintiff had
21 severe osteoporosis, which made him susceptible to further
22 fractures. (PSGI ¶ 31.) Because of the location of the fracture,
23 Plaintiff had difficulty bending, twisting, and sitting or standing
24 in a forward leaning position. (Id.)

25 For four months following the boating accident, Plaintiff
26 underwent conservative treatment consisting of pain medications,
27 injections, a back brace to stabilize the spine, and therapy, all
28 of which were unsuccessful in providing relief. (PSGI ¶ 32.)

1 Following this unsuccessful course of treatment, Dr. Palmer
2 performed a "kyphoplasty" surgery on November 16, 2004, at both the
3 T12 and L1 vertebrae. (Id. ¶ 33.) In a kyphoplasty, the surgeon
4 inserts a balloon into the affected vertebra, inflates it to
5 increase height, then injects a synthetic cement-like mixture into
6 the area in the hope of maintaining height and affording pain
7 relief to the patient. (Id.) The kyphoplasty for Plaintiff,
8 however, was a failure at the T12 level. According to the
9 operative report, the T12 level was "quite hard" and the balloon
10 could not expand significantly. When the synthetic material was
11 introduced, there was "leakage into the disc space itself," at
12 which point the procedure was stopped. (Id.)

13 As a result of the failed kyphoplasty surgery at the T12
14 level, Plaintiff was left with a permanently compressed vertebra
15 and continued to be in pain, particularly when leaning forward.
16 (Id. ¶ 34.) Dr. Palmer declared that Plaintiff was "unable to work
17 and rendered permanently disabled from his career as a dentist
18 because of the fractures in his back." (Id.)

19 3. Handling of Plaintiff's Insurance Claim

20 a. Back Injury: 2004-2005

21 Following the boating accident, in August 2004, Plaintiff
22 submitted a claim under his policies, asserting that he suffered a
23 back injury while boating on July 31, 2004. (DSUF ¶ 8.) Dr.
24 Palmer signed Attending Physician Statement ("APS") forms
25 indicating a vertebral fracture causing total disability and
26 restrictions in bending, stooping, twisting, and lifting. (Id. ¶
27 9.) Brian Chenevert, a customer care specialist in charge of
28 administrating Plaintiff's claim, spoke to Plaintiff on September

1 24, 2004. (Id. ¶ 10.) Plaintiff explained that his back injury
2 occurred when a boat in which he was a passenger hit a large wave.
3 He was taking pain medication and Actonil for his osteoporosis. He
4 went to work once or twice a week to take care of paperwork and did
5 not know when he could return to work, although he suggested it was
6 possible he could return at the end of January. (Id.)

7 In order to explore Plaintiff's occupational duties, physical
8 demands, and current status, Unum's² vocational rehabilitation
9 consultant Deborah A. Horvath, M.A., spoke to Plaintiff on November
10 2, 2004. (DSUF ¶ 21.) Plaintiff reported the types of procedures
11 he performed as a dentist, the hours he typically worked, and the
12 current state of his practice given his injury. (Id. ¶ 22.)

13 On November 16, 2004, the same day that Plaintiff underwent
14 the kyphoplasty surgery, Unum's in-house nurse reviewer, Judy
15 Patrock, R.N., advised that Dr. Palmer's restrictions and
16 limitations of "no bending, stooping, twisting, or lifting are
17 reasonable and would, in fact, be not possible [sic] due to the
18 insured's brace." (PSGI ¶ 42.) On November 30, 2004, Unum wrote
19 to Plaintiff, indicating that it had determined he was disabled and
20 entitled to Total Disability benefits under his insurance policies.
21 (Id. ¶ 43.) Defendants sent Plaintiff checks totaling \$40,116
22 covering the period from August 30, 2004 through November 30, 2004.
23 (Id. ¶ 24.) On December 1, 2004, Unum field representative Rick
24 Gaume met with and interviewed Plaintiff and learned he had

25
26 ² Paul Revere was the administrator of Plaintiff's
27 policies. Paul Revere is a wholly-owned subsidiary of Unum, and
28 the adjusters that handled Plaintiff's claim were Unum employees.
The Court will therefore refer to the company adjusting Plaintiff's
claim as Unum and the claims adjusters as Unum employees, for ease
of reference.

1 recently undergone the kyphoplasty surgery, and that it had not
2 resulted in significant improvement. (Id. ¶ 44.)

3 From December 2004 through May 2005, Dr. Palmer and Plaintiff
4 submitted supplemental claim forms indicating that Plaintiff
5 remained disabled due to continued pain from the compression
6 fracture. (Id. ¶ 45.) In April 2005, Unum assigned an expected
7 resolution date on Plaintiff's claim indicating he would not
8 recover for another thirteen to twenty-four months. (Id. ¶ 46.)
9 Between May 2005 and May 2006, Unum did not request any progress
10 reports. (Id. ¶ 47.) Plaintiff's claim continued to be paid
11 throughout 2005 and 2006. (DSUF ¶ 25.)

12 b. Back Injury: 2006

13 In March of 2006, after a year of inactivity, Plaintiff's file
14 came under the supervision of Jeff Parsons, a Director in Unum's
15 Complex Claims Unit. (PSGI ¶ 48.) On March 6, 2006, Parsons
16 recommended surveillance of Plaintiff "to document time [at]
17 office." (PSGI ¶ 49.) The surveillance did not indicate Plaintiff
18 spent any time at the office; rather, it showed him driving to the
19 University of Southern California ("USC") School of Dentistry,
20 riding the train, and dropping a woman off at the airport, among
21 other things. (DSUF ¶ 27.) This was consistent with a
22 supplemental statement Plaintiff provided to Unum in May 2006,
23 indicating that he had begun to volunteer at USC two to three days
24 per week. (PSGI ¶ 52.)

25 Unum ordered updated medical records and required Plaintiff to
26 submit an updated attending physician statement ("APS") certifying
27 his continued disability. The APS was provided by his treating
28 endocrinologist Dr. Michael Truong, who was managing Plaintiff's

1 osteoporosis. (Id. ¶ 53.) Unum received Dr. Truong's APS on June
2 9, 2006.

3 Sometime after June 16, 2006, Brian Chenevert wrote to
4 Plaintiff's attorney in a separate lawsuit in which Plaintiff sued
5 the driver of the boat on which he was injured. (DSUF ¶ 33.)
6 Chenevert asked if Plaintiff had any new treatment providers or
7 additional treatment. (Id.) Plaintiff's attorney indicated that
8 they had no new medical records, but sent a transcript of Dr.
9 Palmer's deposition, which was taken on June 16, 2006. (Id.) In
10 the deposition, Dr. Palmer stated that in approximately 25% of the
11 kyphoplasties she has performed, the patients "just do not
12 respond." (PR ¶ 33.) She also indicated that Plaintiff's
13 osteoporosis "makes it less likely that he will heal
14 advantageously," and that Plaintiff was unable to return to
15 dentistry. (Id.)

16 On November 10, 2006, Unum's in-house consulting physician,
17 Dr. Joel Saks, wrote to Dr. Truong asking about the etiology of
18 Plaintiff's osteoporosis and the existence of any "objective
19 evidence" that Plaintiff's compression fracture at T12 occurred on
20 July 31, 2004. (Id. ¶ 54). Dr. Saks was under the mistaken
21 impression that Plaintiff's coverage under the policies depended on
22 whether his disability was the result of an accident or sickness.
23 (Id. ¶¶ 55-56.) After receiving Dr. Truong's response, Dr. Saks
24 recommended on December 1, 2006, that Plaintiff be examined by an
25 Independent Medical Examiner ("IME"). (Id. ¶ 58.)

26
27
28

1 c. Tibial Tendon Injury: 2006

2 On December 14, 2006, Plaintiff faxed a supplemental claim
3 form advising Unum that he had suffered a tibial tendon injury and
4 had undergone surgery as a result:

5 I just ruptured my posterior tibial tendon and had a
6 harvest graft, osteotomy, ankle fusion requiring 6
7 incisions and 52 staples. Left foot cast and non-weight
8 bearing. Friends and girlfriend provide all assistance.
9 I can't cook, clean, bathe, go alone by myself. I'm
10 totally dependent on others.

11 (Id. ¶ 59.) After learning of Plaintiff's tibial tendon injury and
12 resulting surgery, Unum made no effort to communicate with
13 Plaintiff regarding his injury. (Id. ¶ 60.) On December 27
14 through 29 of 2006, Unum surveilled Plaintiff for nearly 30 hours.
15 The surveillance documented the fact that Plaintiff was on
16 crutches, in a cast, dependent on others, and totally inactive.
17 (Id. ¶ 61.)

18 d. Dr. Weinstein's Examination

19 On January 23, 2007, Unum wrote to Plaintiff advising him it
20 had scheduled a medical examination to be conducted by Dr. Michael
21 Weinstein on February 28, 2007. (Id. ¶ 62.) On the same date,
22 Unum wrote to Dr. Weinstein confirming the exam and enclosing
23 medical records for his review. (Id. ¶ 63.) However, Unum did not
24 mention Plaintiff's tibial tendon injury, nor did they provide him
25 with information relating to the failure of the kyphoplasty
26 surgery. (Id. ¶ 63.) Unum also provided Dr. Weinstein the
27 surveillance from May 2006, but did not provide the more recent
28 surveillance showing Plaintiff's inactivity and dependence on

1 others. (Id. ¶ 64.) Unum asked Dr. Weinstein to report on
2 Plaintiff's thoracic and lumbar range of motion, gait, and the
3 "numerical parameters of time, weight, distance" of Plaintiff's
4 ability for lifting, sitting, standing, walking, bending, and
5 pushing or pulling. (Id. ¶ 65.)

6 During the examination, Dr. Weinstein was unable to perform a
7 complete physical examination on Plaintiff's lumbar and thoracic
8 spine due to the fact that Plaintiff was in a cast and on crutches.
9 (Id. ¶¶ 65-66.) Dr. Weinstein's report acknowledged that his
10 evaluation was "limited today as [Plaintiff] had recent surgery to
11 his left foot and he was on a low profile walker and was walking
12 with crutches." (Id. ¶ 66.)

13 Dr. Weinstein acknowledged, however, that Plaintiff had a "30%
14 T12 compression fracture" and suffered from "chronic thoracolumbar
15 pain." (PR ¶ 45.) Dr. Weinstein stated that a "vast majority of
16 individuals" would be able to return to work four to six months
17 after a compression fracture and that he expected Plaintiff should
18 have been able to do the same on that basis. (Id.)

19 After the examination, Plaintiff realized that Unum had not
20 provided Dr. Weinstein with his actual imaging films, so he later
21 delivered them to Dr. Weinstein personally. After receiving the
22 imaging films, Dr. Weinstein acknowledged in a supplemental report
23 that Plaintiff "does have a significant thoracolumbar kyphosis from
24 the fracture" that would cause pain with prolonged sitting and
25 leaning forward. (PSGI ¶ 67.) Dr. Weinstein opined that in order
26 for Plaintiff to continue working as a dentist, he would need to
27 limit the procedures he performed to ones that would allow him to
28 move around and stretch every hour or two, might have to "modify

1 his practice," and would need "good body mechanics and ergonomics,"
2 such that "the efficiency of his practice might be decreased."
3 (Id. ¶ 67.)

4 e. Follow-Up Investigation of Dr. Weinstein's
5 Recommendations

6 Following Dr. Weinstein's supplemental report, Unum did no
7 follow-up investigation concerning whether the work modifications
8 he recommended would render Plaintiff totally disabled under
9 California law. (Id. ¶ 68.) In addition, it never investigated
10 whether the decreased efficiency Dr. Weinstein referenced would
11 entitle Plaintiff to partial disability benefits. (Id.) Unum
12 performed no investigation into the types of modifications that
13 would be required for Plaintiff to return to work, and claims
14 supervisors decided, contrary to Dr. Weinstein's medical advice and
15 without an alternate medical opinion, that ergonomics would not be
16 helpful to Plaintiff. (Id. ¶ 69.)

17 On March 16, 2007, Unum completed a vocational rehabilitation
18 referral, asking "would any of [Plaintiff's] frequently performed
19 procedures take longer than 2 hours to complete?" (Id. ¶ 71.) In
20 response, Unum's in-house vocational consultant, Gabrielle Allen
21 performed a limited assessment. She was asked only to consider
22 whether Plaintiff's dental procedures required constant sitting for
23 longer than two hours, (PR ¶ 47), but was not asked to consider
24 whether certain procedures required a combination of standing or
25 sitting, (PSGI ¶ 72). After speaking with a dental assistant for
26 her own dentist and a dental consultant she found on the internet,
27 Allen concluded in a March 21, 2007, report that a two-hour

28

1 appointment is the longest typically scheduled, which completed her
2 analysis. (Id.)

3 Parsons concluded that as of the date of Dr. Weinstein's
4 medical examination, Plaintiff was not entitled to disability
5 benefits based on his back condition, but was entitled to further
6 benefits until he recovered from his tibial injury sufficiently to
7 allow him to return to work. (Id. ¶ 73.) On May 11, 2007, Parsons
8 accessed Unum's electronic claims management database to reflect
9 that an "Adverse" decision on Plaintiff's claim was expected to be
10 made effective June 1, 2007. (Id. ¶ 75.) Plaintiff was not
11 advised that Unum had determined that he had recovered sufficiently
12 from his back injury to enable a return to work. (Id. ¶ 74.) At
13 the time Unum made its adverse claim determination, it had not yet
14 received medical records concerning Plaintiff's tibial tendon
15 injury from his treating physician Dr. Smith. (Id. ¶ 76.)

16 On May 23, 2007, Plaintiff faxed to Unum a supplemental claim
17 form reiterating that he remained unable to treat patients in a
18 leaning forward position due to pain in his back and limitations
19 relating to his tibial injury: "I use a cane. My ability to do what
20 I did as daily activities has been dramatically reduced." (Id. ¶
21 39.) On May 29, 2007, Unum reviewed the latest treatment record
22 from Plaintiff's orthopedic surgeon, Ronald Smith, M.D. (Id. ¶
23 38.) As of May 14, 2007, Plaintiff was still wearing an ankle/foot
24 brace "most of the time," and was suffering "a feeling of
25 dysesthesias." (Id.) Dr. Smith planned for Plaintiff to continue
26 wearing the brace for three months, followed by re-examination in
27 four months. (Id.) Unum did not follow up with Dr. Smith
28 concerning Plaintiff's continuing treatment or functional

1 impairment. (Id. ¶ 76.) As of June 2007, Plaintiff was scheduled
2 to undergo six additional weeks of physical therapy for treatment
3 of his left foot and ankle. (Id. ¶ 40.)

4 f. Sharing Plaintiff's Medical Records

5 The same day it received Dr. Smith's records, Robert Bernier,
6 who reported to Parsons and was responsible for Plaintiff's claim
7 file, received a call from Travelers Insurance Company
8 ("Traveler's"). The Traveler's representative advised Bernier that
9 his company insured the boat owner in the personal injury suit
10 Plaintiff had initiated and that they were "going to trial" over
11 Plaintiff's claim he was disabled as a result of the boat accident.
12 (Id. ¶ 77.) Bernier knew that Johnson was working for a party
13 adverse to Plaintiff. (Id. ¶ 78.) Nevertheless, Bernier faxed Dr.
14 Weinstein's IME report to the Traveler's representative without
15 Plaintiff's permission. (Id.) Unum's Quality Compliance
16 Consultant could think of no legitimate business purpose for Unum
17 to send Plaintiff's IME report to an adverse party. (Id. ¶ 88, 92-
18 93.) Bernier claimed in his deposition that he mistakenly believed
19 he had been given authorization to release the records and that he
20 had accidentally confused Plaintiff's claim with another claim in
21 which he had "swapped authorizations" with somebody else at
22 Travelers days before. (Id. ¶ 83.) However, Bernier could recall
23 nothing about this other claim, including the location of the
24 insured, the nature of the disability, the insured's gender or the
25 claim status. (Id. ¶ 84.) Bernier claimed he had never before
26 sent or disclosed otherwise confidential information to a liability
27 insurance company whose interests were adverse to his insured.
28 (Id. ¶ 85.)

1 g. Pre-Denial Investigation Concerning Tibial
2 Tendon Injury

3 On June 4, 2007, Unum's in-house nurse Andrea Brewster spoke
4 with Plaintiff's physical therapist Jose Fojas at Rehab Alliance.
5 (DSUF ¶ 51.) Brewster summarized Fojas' report as having indicated
6 that there were no standing restrictions and that Plaintiff could
7 walk continuously fifteen to twenty minutes or to the point where
8 he began to experience pain. (Id.) However, Fojas' actual report
9 indicated that Plaintiff did have significant standing
10 restrictions. (PR ¶ 51.) His report indicated that "[m]orning
11 tolerance to standing is higher than late afternoon and evenings"
12 and that "Mr. Womack's symptoms reportedly become much more
13 noticeable after 30-35 minutes of continuous standing." At the end
14 of the day, "onset of symptoms are after approx. 10 minutes of
15 continuous standing." (PR ¶ 51; Coleman Decl. Ex. A at GACL01340.)
16 Dr. Saks reviewed Fojas' conclusions and pointed out that Fojas was
17 not responsible for formulating restrictions or limitations. (DSUF
18 ¶ 53.)

19 In a June 19, 2007, report, Dr. Saks advised that Plaintiff
20 was only "6.5 months post a major left foot/ankle procedure,
21 involving major tendon transfer, fusion of several bones of the
22 foot with bone harvest and grafting, cutting and realigning the
23 heel bone and the primary metatarsal. Substantial healing from
24 this procedure is expected to take up to a year." (PSGI ¶ 94.)
25 Dr. Saks recommended that "[c]ontinued follow-up of physician and
26 physical therapy notes should help to define status as healing
27 progresses." (Id.)

28

1 On the same day, Bernier completed a vocational rehabilitation
2 referral to Gabrielle Allen, this time asking whether Plaintiff
3 could walk from patient room to patient room to perform dental
4 procedures throughout the course of an eight-hour day. (Id. ¶ 95.)
5 Allen opined that with control over the timing of patient
6 scheduling, a dentist would not likely be standing continuously for
7 over thirty minutes, walking fifteen to twenty minutes
8 continuously, or sitting for over two hours without a break. (DSUF
9 ¶ 54.) Allen did not consider whether Plaintiff's ability to
10 operate a foot pedal was impaired by his tibial tendon injury.
11 (Id. ¶ 96.)

12 h. Review by Quality Compliance Consultant

13 Without further investigation or analysis, Parsons and Bernier
14 decided on June 20, 2007, to terminate Plaintiff's claim
15 retroactive to June 1, 2007, and referred the file to Unum's
16 Quality Compliance Consultant Mark Reger for approval. (PSGI ¶
17 97.) Reger was a Unum employee with over 30 years of disability
18 claims handling experience. (Id. ¶¶ 88-91.)

19 Reger initially disapproved the proposed denial of Plaintiff's
20 claim, concluding that (1) the file documentation did not support
21 the decision; (2) necessary resources had not been consulted; and
22 (3) the file had not been provided "a thorough, fair, and objective
23 evaluation." (Id. ¶ 98.) Reger noted that Plaintiff "would have
24 some restrictions relative to the amount of time that he could
25 work, need for breaks, etc." (Id.) In addition, Reger noted that
26 because Plaintiff had two separate medical conditions- the T12
27 compression fracture and the tibial tendon injury- a co-morbid
28 review should be conducted. (Id.) Finally, Reger noted that

1 California's legal definition of disability needed to be taken into
2 account and that Unum should evaluate Plaintiff's possible
3 entitlement to partial disability benefits. (Id.)

4 Parsons had a "professional disagreement" with Reger. (Id. ¶
5 99.) He claimed the co-morbid review had been performed by Dr.
6 Saks, but was not worded clearly. (Id.) Parsons instructed Dr.
7 Saks to insert a sentence in his June 19, 2007, report to state
8 that he had considered all pertinent medical conditions. (Id.)
9 Dr. Saks did so by way of an addendum dated June 26, 2007. (Id. ¶
10 100.) No co-morbid review to assess the combined effects of
11 Plaintiff's injuries was actually performed, although such a review
12 is required by Unum's claims manual. (Id. ¶¶ 101, 106.)

13 Parsons and Bernier refused to conduct further investigation
14 of Plaintiff's entitlement to benefits in light of California's
15 definition of disability; rather, they inserted an additional
16 sentence into their denial letter. In addition, they refused to
17 conduct any vocational or financial investigation into whether
18 Plaintiff would suffer at least a twenty percent loss of income
19 upon a return to work as a dentist and thereby be entitled to
20 partial or residual disability benefits. (Id. ¶¶ 102-04.)
21 Instead, they included a reference in the new denial letter to the
22 policy's partial disability benefits provision, together with a
23 statement that "it is within reason to expect you are able to
24 return to work in a significant capacity and that any decrease in
25 efficiency would not be large enough to generate a 20% loss of
26 earnings (the required minimum loss under Residual Disability)."
27 (¶¶ 102-04.)

28

1 On June 27, 2007, the file was again referred to Reger for
2 approval of denying Plaintiff's claim. (Id. ¶ 105.) Reger
3 approved the denial that same day, although he later admitted no
4 co-morbid review had not actually been performed and that he
5 believed the denial of residual disability benefits by Parsons and
6 Bernier was based on speculation. (Id. ¶¶ 107-08.) The denial
7 letter, dated June 28, 2007, was sent to Plaintiff the next day.

8 i. Plaintiff Disputes Claim Denial

9 Plaintiff disputed the denial to Unum, and his treating
10 physicians, Drs. Truong and Palmer, sent letters advising Unum that
11 Plaintiff remained disabled. (Id. ¶ 109.) Furthermore, Dr. Palmer
12 recommended that Unum obtain a Functional Capacity Evaluation (FCE)
13 to objectively assess Plaintiff's work tolerance. (Id.) In
14 response, Dr. Saks advised, without explanation, that such an
15 evaluation would be "unlikely to provide useful information,"
16 notwithstanding the fact that he has recommended FCEs in the past
17 and has done so as recently as 2009. (Id. ¶ 112.) Without further
18 investigation or analysis, Plaintiff's claim was again denied by
19 letter dated January 11, 2008.

20 **B. Procedural History**

21 On March 4, 2008, Plaintiff filed suit against General
22 American, Protective Life, The Paul Revere Life Insurance Company,
23 Unum, Travelers, and the Standard Fire Insurance Company
24 (collectively "Defendants") in Los Angeles Superior Court.
25 Plaintiff raises causes of action for (1) breach of contract; (2)
26 breach of the implied covenant of good faith and fair dealing; (3)
27 intentional interference with prospective economic advantage; (4)
28 invasion of privacy; and (5) conspiracy. Plaintiff prays for

1 special damages, general damages, punitive damages, and attorneys'
2 fees and costs.

3 On April 2, 2008, Defendants removed to this Court on the
4 basis of diversity jurisdiction. On April 9, 2008, Defendants Paul
5 Revere, General American, and Protective Life filed an Answer.
6 (Docket No. 6.) On April 17, 2008, Defendant The Standard Fire
7 Insurance Company filed an Answer. (Docket No. 11.)

8 On August 17, 2009, Defendants Paul Revere, General American,
9 and Protective Life filed this Motion for Summary Adjudication of
10 Issues. Defendants argue that (1) there is no triable issue as to
11 whether Defendants acted in bad faith; (2) Plaintiff's claims for
12 intentional interference with prospective economic advantage,
13 invasion of privacy, and conspiracy fail as a matter of law; (3)
14 Defendants are entitled to summary adjudication of Plaintiff's
15 punitive damages claim; and (4) the breach of contract and bad
16 faith claims must be dismissed against Paul Revere.

17 **II. LEGAL STANDARD**

18 Summary adjudication of an issue is appropriate where "the
19 pleadings, depositions, answers to interrogatories, and admissions
20 on file, together with the affidavits, if any, show that there is
21 no genuine issue as to any material fact and that the moving party
22 is entitled to a judgment as a matter of law" on that issue. FED.
23 R. Civ. P. 56(c). A genuine issue exists if "the evidence is such
24 that a reasonable jury could return a verdict for the nonmoving
25 party," and material facts are those "that might affect the outcome
26 of the suit under the governing law." Anderson v. Liberty Lobby,
27 Inc., 477 U.S. 242, 248 (1986). The court must draw all reasonable
28 inferences in favor of the nonmoving party. Id. at 255.

1 **III. DISCUSSION**

2 **A. The "Genuine Dispute" Doctrine as Applied to "Bad Faith"**

3 An insurer "must give at least as much consideration to the
4 [insured's] interests as it does to its own." Egan v. Mutual of
5 Omaha Ins. Co., 24 Cal. 3d. 809, 818-19 (1979) (citations omitted).
6 An insurer cannot "reasonably and in good faith deny payments to
7 its insured without thoroughly investigating the foundation for its
8 denial." Id. The burden is on the insurer to seek out information
9 relevant to a claim. Id. Furthermore, insurers must communicate
10 with the insured and her physicians in a "manner calculated to
11 elicit an informed response." Hughes v. Blue Cross of Northern
12 California, 215 Cal. App. 3d 832, 846 (1989).

13 A breach of the implied covenant of good faith and fair
14 dealing requires more than just a breach of the contractual duty
15 itself, because bad faith implies unfair dealing rather than
16 mistaken judgment. Chateau Chamberay Homeowners v. Associated
17 Int'l Ins. Co., 90 Cal. App. 4th 335, 345 (2001) (citing Congleton
18 v. Nat'l Union Fire Ins. Co., 189 Cal. App. 3d 51, 59 (1987)). The
19 ultimate test of bad faith liability is whether the refusal or
20 alleged delay in paying was unreasonable. Id. at 346 (citing Opsal
21 v. United Servs. Auto. Ass'n 2 Cal. App. 4th 1197, 1205 (1991)).
22 While reasonableness is ordinarily a question of fact, it becomes a
23 question of law where the undisputed evidence only leads to one
24 reasonable inference. Id. (citing Paulfrey v. Blue Chip Stamps,
25 150 Cal. App. 3d 187, 196 (1983)).

26 A mistaken or erroneous denial of benefits can be reasonable
27 if there is a legitimate dispute as to the insurer's liability.
28 Id. (citing Tomaselli v. Transamerica Ins. Co., 25 Cal. App. 4th

1 1269, 1280-81 (1994)). Before an insurer can be found to have
2 acted in bad faith, "it must be shown that the insurer acted
3 unreasonably or without proper cause." Id. (citing Dalrymple v.
4 United Serv. Auto. Ass'n, 40 Cal. App. 4th 497, 520 (1995)
5 (emphasis in original)). But when there is a genuine issue as to
6 the insurer's liability, "there can be no bad faith liability
7 imposed on the insurer for advancing its side of that dispute."
8 Id.

9 The settled law in California is that when there is a genuine
10 dispute as to the amount of the insured's claim, the insurer is not
11 liable for bad faith. Id. (citing Fraley v. Allstate Ins. Co., 81
12 Cal. App. 4th 1282, 1292 (2000)). But claims of bad faith cannot
13 be defeated by the "genuine dispute" doctrine if: (1) the insurer
14 was guilty of misrepresentation during its investigation; or (2)
15 its employees lied to the insured or lied in depositions; or (3)
16 the insurer dishonestly selected experts; or (4) the insurer's
17 experts were unreasonable; or (5) the insurer failed to conduct a
18 thorough investigation. Id. at 348-49 (citing Guebara v. Allstate
19 Ins. Co., 237 F.3d 987, 996 (9th Cir. 2001)). Furthermore,
20 granting summary judgment to the defendant on the basis of the
21 genuine dispute doctrine is only appropriate when it is
22 "indisputable that the basis for the insurer's denial of benefits
23 was reasonable." Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d
24 1152, 1161 (9th Cir. 2002); Wilson v. 21st Century Ins. Co., 42
25 Cal. 4th 713, 724 (2007).

26 The Court finds there is evidence from which a reasonable
27 juror could conclude that Defendants acted in bad faith. When Unum
28 denied Plaintiff's claim, it knew that (1) he had chronic back

1 pain, particularly with forward-leaning movements, and according to
2 Dr. Weinstein would have to modify his practice to accommodate a
3 return to work, which would result in decreased efficiency, (PSGI ¶
4 67); (2) he was wearing a brace, required the use of a cane, and
5 would have a decreasing ability to stand as the day progressed,
6 (id. ¶ 39; PR ¶ 51); and (3) he was only half-way through the
7 expected recovery time from his reconstructive surgery (PSGI ¶¶ 38,
8 94).

9 Defendants' Quality Compliance Consultant believed that the
10 denial of Plaintiff's claim was not supported by his file,
11 particularly since a co-morbid review had not been conducted, no
12 one at Unum had considered how California's definition of total
13 disability applied to Plaintiff's claim, and no one had assessed
14 Plaintiff's entitlement to partial or residual disability. (Id. ¶¶
15 88-91.) Although Reger approved the denial after Parsons directed
16 Dr. Saks to insert additional language in his report, he later
17 acknowledged in his deposition that no co-morbid assessment had
18 actually been performed and that the denial of partial disability
19 was based on speculation. (Id. ¶¶ 107-08.) No one at Unum had
20 spoken to Plaintiff regarding his tibial tendon injury or
21 concerning the fact that an adverse claims decision had been made.
22 (Id. ¶ 60.) Nor did Defendants consult with Drs. Truong, Smith,
23 and Palmer prior to denying Plaintiff's claim.

24 The Court finds that these decisions by Defendants could
25 support the conclusion that Defendants acted in bad faith with
26 respect to Plaintiff's claim. See, e.g., Saffle v. Sierra Pacific
27 Power Co. Bargaining Unit Long Term Disability Income Plan, 85 F.3d
28 455, 459 (9th Cir. 1996) (rejecting interpretation of "total

1 disability" under own-occupation clause to include modifications of
2 insured's work); Delgado v. Heritage Life Ins. Co., 157 Cal. App.
3 3d 262, 277-78 (1984) (holding insurer's unreasonable
4 interpretation of its own policy provisions to exclude coverage is
5 bad faith); Davis v. Blue Cross of Northern California, 25 Cal.3d
6 418, 427 (1979) (finding bad faith where insurer failed to bring
7 necessary information to the attention of its insured); Miller v.
8 Nat. Am. Life Ins. Co., 54 Cal. App. 3d 331, 339 (1976) (noting
9 that adopting an unduly restrictive interpretation of medical
10 information supports a fraud claim against insurer).

11 It would be inappropriate to grant summary adjudication on the
12 basis of the "genuine dispute" doctrine where there is evidence
13 from which a reasonable jury could conclude that Defendants failed
14 to conduct a thorough investigation and were determined to drop
15 Plaintiff's coverage notwithstanding the fact that their own
16 medical expert's opinions suggested a contrary result. See Chateau
17 Chamberay Homeowners, 90 Cal. App. 4th at 348-49 (citing Guebara v.
18 Allstate Ins. Co., 237 F.3d 987, 996 (9th Cir. 2001)).

19 Furthermore, there is evidence that at least one of Unum's
20 employees, Bernier, may have lied during his deposition concerning
21 his decision to release Plaintiff's medical records to an adverse
22 party. See id. (holding bad faith claim cannot be defeated by the
23 "genuine dispute" doctrine if insurer's employees lied during
24 depositions). The Court therefore denies Defendants' motion with
25 respect to Plaintiff's cause of action for breach of the implied
26 covenant of good faith and fair dealing against General American
27 and Protective Life.

28

1 **B. Plaintiff's Privacy Related Claims**

2 In its Opposition to Defendants' motion, Plaintiffs concede
3 that there is no genuine issue of material fact with respect to its
4 claims for intentional interference with prospective economic
5 advantage, invasion of privacy, and conspiracy. The Court
6 therefore grants Defendants' motion with respect to those claims.

7 **C. Prayer for Punitive Damages**

8 Punitive damages are only available if the plaintiff shows
9 oppression, fraud, or malice by clear and convincing evidence. See
10 Cal. Civ. Code § 3294(a). Malice and oppression are defined as
11 involving "despicable conduct" carried out in "conscious disregard"
12 of the insured's rights. See id. § 3294(c). Evidence that an
13 insurer has breached the duty of good faith and fair dealing is not
14 sufficient to justify a punitive damages award. See Mock v.
15 Michigan Millers Mut. Ins. Co., 4 Cal. App. 4th 306, 329 (1992).
16 The standard California jury instruction defines "despicable
17 conduct" as "conduct which is so vile, base, contemptible,
18 miserable, wretched, or loathsome that it would be looked down upon
19 and despised by ordinary, decent people." 2 Cal. Jury Instr. -
20 Civ. 14.72.1 (9th ed.). Fraud, as defined in § 3294(c)(3) does not
21 require proof of the elements of a cause of action for fraud;
22 rather, it requires an intentional misrepresentation or concealment
23 made with the intent to deprive a person of his rights or to cause
24 injury. Cal. Civ. Code. § 3294(c)(3); Nostrica v. State Comp. Ins.
25 Fund., 70 Cal. App. 4th 911, 948 (1999). Malice includes conduct
26 "which is intended by the defendant to cause injury to the
27 plaintiff." Cal. Civ. Code § 3294(c)(1).

28

1 Defendants argue that the Court should dismiss the punitive
2 damages claim because no reasonable jury could find proof that
3 Defendants acted with "malice," "oppression," or "fraud," by clear
4 and convincing evidence. (Mot. 18:13-16.) Defendants argue that
5 punitive damages are inappropriate because they "relied on medical
6 experts in making the claims decision." (Id. 21:20-21.)

7 The Court finds that a reasonable jury could find Plaintiff's
8 evidence to be clear and convincing proof of malice, fraud, or
9 oppression. A reasonable jury could conclude that conduct such as
10 sending Plaintiff's medical records to an adverse party indicates
11 an intent to injure plaintiff, and that this was part of an effort
12 to justify denying Plaintiff's claim. The evidence also arguably
13 supports the inference that Defendants conducted a biased and
14 incomplete investigation at a time when Plaintiff was suffering
15 from chronic back pain in combination with a very recent tibial
16 tendon injury that Defendants' expert Dr. Saks acknowledged was not
17 yet close to being healed. The Court therefore denies Defendants'
18 motion with respect to Plaintiff's prayer for punitive damages.

19 **D. Breach of Contract and Bad Faith Claims Against Paul**
20 **Revere**

21 Defendants argue that Plaintiff's bad faith and breach of
22 contract claims against Paul Revere fail as a matter of law because
23 no contractual privity exists.³ Plaintiff argues that although
24

25 ³Defendants also point out, in passing, that Unum has not been
26 served. (Mot. 23 n.5; Reply 16:18-19.) During oral argument on
27 Defendants' motion, Plaintiff's counsel acknowledged that Unum has
28 not filed any responsive pleading in this case and Plaintiff has
not pursued any recourse, such as seeking entry of default or
default judgment. The Court therefore finds that Unum is not a
party to this action.

1 "third party administrators" are not liable for breach of contract
2 or bad faith, "Unum purchased the disability blocks of business
3 from General American and Protective Life" and "alter ego liability
4 applies" because Paul Revere is a wholly-owned subsidiary of Unum
5 with no actual employees (Opp. 24:8-12.) Plaintiff has not,
6 however, come forth with evidence to support its claim that Unum is
7 in privity with Plaintiff, nor to establish that alter ego
8 liability applies to Paul Revere. The Court therefore finds that
9 there is no genuine issue of material fact as to Plaintiff's breach
10 of contract and bad faith claims against Paul Revere and grants
11 Defendants' motion in that respect.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court grants in part and denies
14 in part Defendants' motion. The Court grants Defendants' motion
15 for summary adjudication with respect to Plaintiff's third through
16 fifth causes of action and its claims for breach of contract and
17 bad faith against Paul Revere. The Court denies Defendants' motion
18 with respect to Plaintiff's bad faith claim against the remaining
19 Defendants and with respect to Plaintiff's prayer for punitive
20 damages.

21 IT IS SO ORDERED.

22

23

24 Dated: October 1, 2009

25

26

27

28


DEAN D. PREGERSON
United States District Judge