BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARGELIO ARAMBULA, Claimant, v. KINDRED HEALTHCARE, INC, Employer, and ARCH INSURANCE COMPANY, Surety, Defendants.	**IC 2013-032441** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed July 15, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on June 5, 2015. The parties presented oral and documentary evidence and later submitted briefs. Clinton Miner represented Claimant. Nathan Gamel represented Defendants Employer and Surety at hearing, and Eric Bailey represented them during post-hearing briefing. The case came under advisement on April 13, 2016. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;

2. Whether the Claimant suffered an injury caused by an accident arising out of and in the course of employment;

3. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

4. Whether and to what extent Claimant is entitled to benefits for:

a) Temporary disability (TTD/TPD), and
b) Medical care.

All other issues were reserved.

CONTENTIONS OF THE PARTIES

Claimant contends Claimant worked for Employer as a certified nurse's assistant ("CNA") when he suffered a compensable low back injury. Claimant had a preexisting low back condition, but it had been asymptomatic for nine months. Late in a shift on November 29, 2013 he felt back pain when he lifted a resident's leg to reposition a urinal. The pain increased during the remaining hour. He attempted to notify one supervisor promptly. He actually notified another supervisor at the end of his shift when these two supervisors confronted him with a disciplinary "write-up." Claimant believes his initial attempt at notice prompted a spurious disciplinary action. Claimant missed work and sought medical care. When he presented a physician's lifting restrictions to Employer Claimant was fired for insubordination related to the earlier write-up. Eventually, after his claim was denied, Claimant sought medical care from Richard Radnovich, D.O. and others. He has been unable to find work within his lifting restrictions. He is entitled to temporary disability benefits. He needs medical care, possibly surgery.

Defendants contend Claimant's allegation of an unwitnessed accident is not credible. Claimant's report of injury was a spurious response to Employer's allegation of insubordination. He initially refused Employer's insistence that he file an accident report. Claimant has testified to disprovable falsehoods. Claimant has been untruthful with his physicians about drug use. Repeated drug tests showed positive for marijuana and methamphetamine. Claimant's description of his injury has been inconsistent. He initially described symptoms consistent

with a cervicothoracic injury. At hearing he claimed a L5-S1 disk injury to his low back. Claimant did not suffer a compensable accident. If he did, it was limited to a shoulder, upper back, and/or neck injury which resolved within six weeks. Claimant's low back condition was not caused by a compensable accident, if any occurred. Claimant's low back condition is entirely related to a nonindustrial degenerative condition.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and Employer's nurses Anita Sims and Cynthia Payton;

2. Claimant's Exhibits 1 through 12;

3. Defendants' Exhibits 1 through 16, except for portions of Exhibit 12. Excluded portions consisted of written statements which were without foundation because the authors did not testify at hearing. Claimant did not object to redacted versions of these statements as part of Exhibit 14;

4. Post-hearing depositions of pain management specialist Daniel Marsh, M.D., and spine surgeon Timothy Doerr, M.D.

Having analyzed all evidence of record, the Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant received several warnings and written reprimands for failing to care for residents—usually which involved leaving them to lie in their own urine—and for his refusal to take his lunch during the assigned lunch window of time. He received a "final written warning" on November 14, 2013. Documents originally submitted to the Department of Labor for purposes of Claimant's unemployment benefits claim show the November 14 written reprimand was the sixth Claimant had received in less than one year.

November 29, 2013

2. Claimant worked for Employer at its skilled nursing facility on November 29, 2013. His shift was from approximately 2:00 to 10:00 p.m. with about 45 minutes for lunch. Lunch was to be taken between 3:00 and 5:00 p.m. as work allowed.

3. Claimant's workers' compensation claim relates to a resident ("Mr. AT") of Employer's facility. Mr. AT was incontinent and essentially bedridden.

4. Claimant testified as follows: Claimant took lunch during the 8:00 p.m. hour. He returned a few minutes past 9:00 p.m. to clean and change Mr. AT's adult diaper. Also, a plastic urinal, of about one-quart capacity, which was situated between Mr. AT's legs, was overfull. Claimant emptied and rinsed it. Mr. AT expressly declined to be changed and opted to lie in urine-soaked sheets rather than miss a portion of a television program. Claimant acquiesced to Mr. AT's wish. While returning the urinal to its proper position, Claimant lifted Mr. AT's leg and felt pain which has not resolved to the date of hearing.

5. Elizabeth Weinstein had been employed by Employer for over 10 years and recently had earned and been promoted to LPN duties. She was Claimant's supervisor that night. By the time of hearing she had earned a degree as an RN and had ceased work for Employer to work elsewhere.

6. Anita Sims was an RN employed by Employer as a shift supervisor. She testified at hearing, and her written statement, included in Defendants' Exhibit 12, was admitted.

7. Shelly Miles was a CNA who relieved Claimant at the end of his shift.

8. Cynthia Payton was an LPN employed by Employer to work another hall in the facility. She testified at hearing, and her written statement, included in Defendants' Exhibit 12, was admitted.

9. Nurse Weinstein approached Nurse Sims and asked her to witness as Nurse Weinstein gave a written reprimand to Claimant. The reprimand was for failure to take lunch during the approved time. This was not Claimant's first write-up for this offense. By taking a late lunch Claimant left the floor short-handed at a time when residents needed significant care at bedtime. Nurse Weinstein told Nurse Sims that she was worried about confronting Claimant with this reprimand because Claimant had been insubordinate and volatile in his manner in the past. The two nurses waited in the break room for Claimant to come in to punch out at the end of his shift.

10. When confronted by these nurses Claimant was defensive and denied being insubordinate. Claimant said he was working two jobs and would continue to take his lunch when convenient for him. Claimant threatened to quit. He had similarly threatened during previous disciplinary actions. Nurse Sims gave him a sheet of paper on which to write his resignation. Instead of writing a resignation Claimant then said, "Well, and I got hurt, too." He said he was giving notice that he would not be able to work the next day. When instructed to fill out an incident report Claimant refused and left the building.

11. Shortly thereafter, Nurse Weinstein again approached Nurse Sims and asked her to observe an unsanitary condition which had been reported to Nurse Weinstein by CNA Miles. Nurse Sims observed Mr. AT still in his day clothes instead of pajamas, "very wet," wearing an adult diaper which was fastened. There was no urinal between his legs. He did not usually have one. His bedding and clothes were soaked, "saturated to the mattress." Although Mr. AT usually required only one CNA to change him, this time it took two.

12. Nurse Payton was training/assisting Nurse Weinstein that night. She observed Mr. AT lying in his urine. She observed another resident in a nearby room "soaked with sweat"

and needing her clothes changed.

Medical Care

13. On December 3, 2013 Claimant visited Howard Shoemaker, M.D., for back pain. Claimant described the onset of low back pain consistently with his testimony at hearing. He went on to describe "an awkward lifting twisting motion" not well described in his testimony at hearing. Claimant estimated Mr. AT's weight at 385 pounds. Dr. Shoemaker noted, "This causes left lumbar pain radiating up into his left neck area." Claimant reported numbness and tingling in his neck and back. After examination Dr. Shoemaker treated Claimant for a lumbar and a cervical sprain. Dr. Shoemaker stated, "Within a reasonable degree of medical probability, based on the history and physical examination, this patient has a soft tissue back strain that is work related. The patient adamantly denies any other source or injuries for his back pain."

14. On December 8, 2013 Claimant visited St. Luke's ER in Nampa for chest pain. Initially, Claimant denied back pain or other problems. Claimant had suffered a myocardial infarction in January 2011 and was afraid he was having another. After being admitted as an inpatient, he reported "pain to moderate palpation in the left upper scapula area" with no low back injury or symptoms. Upon testing, no MI was found. Claimant was discharged on December 10.

15. Claimant missed his next appointment with Dr. Shoemaker on December 10. At a December 16 visit, Dr. Shoemaker recommended physical therapy. Claimant failed to show for his next visit on January 7, 2014.

16. On December 12, 2013 Claimant visited physician's assistant Vern McCready for back pain. He reported the pain arose while "repositioning a 400+ patient/resident."

17. On December 13 Claimant visited Boulevard Chiropractic in Caldwell. Ryan Hein, D.C. provided a detailed examination report. He recommended 20 visits.

18. On December 16 Claimant visited Peter Roan, M.D., in follow-up after hospitalization. Focused upon chest pain, Claimant did not report any back symptoms. Examination of Claimant's back found no musculoskeletal or neurologic abnormality relating to his back or neck.

19. On December 18, 2013 Claimant visited St. Al's ER in Nampa for chest pain which he complained arose from upper back pain which had increased and radiated. The ER physician assessed chest wall pain due to muscle strain and anxiety.

20. On December 27, 2013 Claimant visited St. Al's ER for low back pain which he related to his work accident. He noted his first session of physical therapy had significantly increased his pain. He did not attend any more scheduled physical therapy visits.

21. On January 22, 2014 PA McCready noted continued lumbar pain radiating to about his left knee. Claimant also complained of numbness and tingling, but the neurological portion of the examination did not show any abnormality. A lumbar X-ray showed degenerative disc space narrowing from L3 through S1, worse at L5-S1.

22. Claimant began seeing Daniel Marsh, M.D., at Exodus Pain Clinic on January 31, 2014. On examination Claimant reported sensory abnormalities in his leg. Claimant's description suggested involvement of nearly all of his lumbar spine, L2 to S1. In post-hearing deposition Dr. Marsh called Claimant's report of these symptoms "nondermatomal." Nevertheless, Dr. Marsh began treatment for SI joint dysfunction and a possible disc injury. He prescribed Lyrica and Norco for pain. In October 2014 Dr. Marsh discontinued the Norco in favor of Percocet.

23. Generally, during examinations in December 2013 and January 2014 Claimant showed inconsistent range of motion and inconsistent straight leg raising tests. He gave inconsistent reports of where his back pain was located. He gave inconsistent reports about the location and extent of neurological indicators. He also gave inconsistent history about smoking and drug use.

24. Beginning February 3, 2014 Claimant began receiving massage therapy through the office of Richard Radnovich, D.O. He received 51 treatments from February through July.

25. A February 4, 2014 lumbar MRI showed degenerative changes at L3-4, worse at L4-5 and L5-S1, but no acute injury.

26. On April 22, 2014 Dr. Marsh performed an epidural steroid injection. According to Dr. Marsh's notes, Claimant reported relief of left hip and thigh pain. In deposition Claimant denied that the injection helped. No second injection was performed.

27. Medical care by Dr. Marsh and others after Claimant's claim was denied was provided on the assumption that Claimant was being truthful about the alleged accident and his subjective symptoms. Dr. Marsh opined that Claimant's degenerative lumbar condition included bulging discs but that, if Claimant's history of accident and subjective symptoms were factual, one disc likely showed an acute herniation as well.

28. A drug screen collected on July 10, 2014 showed positive for marijuana, amphetamine, methamphetamine, Hydrocodone, and Hydromorphone. Only the opioids were explainable by prescriptions.

29. A drug screen collected on August 14, 2014 showed positive for marijuana and Hydrocodone. In deposition on August 22, 2014 Claimant testified that he had "no problems with substance abuse since 1980."

30. A drug screen collected on January 19, 2015 showed positive for marijuana and Oxycodone. A repeat test collected February 11, 2015 confirmed this result.

31. Timothy Doerr, M.D., reviewed records and examined Claimant at Surety's request. On May 12, 2015 he issued his report. He opined that if an injury occurred on the date alleged, it was a left cervicothoracic strain which resolved to MMI in January 2014 without PPI, need for restrictions, or need for additional medical care. Concerning Claimant's low back, "multiple nonorganic findings" "strongly suggest symptom magnification and possible secondary gain." Claimant's low back condition is likely degenerative and was not caused by an accident or injury. Medical treatment for it has been reasonable, but no PPI or restrictions would be relatable to the claimed accident.

Prior Medical Care

32. In January 2009 a CT scan after a syncopal episode revealed degenerative disc disease and bulges at C5 through C7. An X-ray showed degenerative changes in his AC joints bilaterally, worse on right.

33. On February 26, 2013 Claimant complained of hip and leg pain which had bothered him for "a couple of years" but which had been eclipsed by kidney stones and other health issues.

DISCUSSION AND FURTHER FINDINGS OF FACT

34. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

35. Claimant does not present a good first impression. His demeanor became more earnest when he gave inherently improbable testimony. When cross-examined about

important details his answers were evasive, yet this feigned earnestness was amplified.

36. By contrast, Nurses Sims and Payton appeared direct and forthright in their hearing testimony. In substance, their testimony well responded to the questions asked. No deception or evasion was detected.

37. In deposition Claimant described in detail the events of November 29, 2013. He testified, essentially, that every co-worker and supervisor he came in contact with that day was venal, lazy, or wrong.

38. Whether Employer was short-handed that night and whether Claimant was required to work harder than he should or than was usual are matters of testimonial dispute.

39. Although Clamant and Nurse Sims testified about the same conversation, the two versions are not reconcilable as mere differences of perspective. Either one or both has shown a significant failure of memory or is being untruthful.

40. The record shows Employer issued multiple written reprimands to Claimant in the last year of his employment. In deposition Claimant testified that these were prompted by a conspiracy of retaliation among supervisors and coworkers. He told a story about being a whistleblower over coworkers' phone usage in violation of Employer's policy.

41. Claimant testified that as recently as three weeks before he was fired he had received a commendation and bonus for exemplary work. This commendation and bonus is unsupported in the record. Moreover, in the face of multiple written reprimands in the prior months and a "final written warning" which issued on November 14, 2013, this testimony is inherently improbable.

42. The record shows that the written statements in Defendants' proposed Exhibit 12 were made in response to Claimant's claim for unemployment benefits. Redacted versions of

the excluded statements were admitted without objection as part of Defendants' Exhibit 14, the unemployment benefits record.

43. Also in Defendants' Exhibit 14 is a "Resident Roster" dated October 4, 2013. On that date six separate residents were found wet after Claimant's shift. In it reference is made to a urinal being improperly situated for a resident in a room other than the one in which Claimant allegedly suffered his injury. No mention of a urinal is made for Mr. AT.

44. The evidentiary record suggests that a urinal was not in the plan of care for Mr. AT. Testimony of Employer's nurses was that a urinal was not present with Mr. AT when he was discovered wet on November 29, 2013.

45. This evidence in Exhibit 14 is one more indicator that Claimant's testimony should not outweigh the testimony of the nurses where testimony is in irreconcilable conflict. In Defendants' Exhibit 14 the extent of this conflict of testimony is set forth in detail. While the redacted written statements admitted as part of Defendants' Exhibit 14 are not given substantial weight, they are noted to be more consistent with the testimony of Nurses Sims and Payton and largely inconsistent with Claimant's testimony.

46. The remoteness of the date of the Resident Roster from the date of the alleged accident and other factors are insufficient to link them directly to the events of November 29, 2013. However, this record contains supportive indicia that little weight can be afforded Claimant's testimony.

47. Nurse Sims' testimony about Claimant's report to her in which he alleged an industrial accident is afforded more weight than Claimant's version of that conversation.

48. In post-hearing briefs Claimant posits that Mr. AT was clean when Claimant finished his shift but wet himself before CNA Miles made her initial check. Claimant's

testimony is inherently improbable that he acceded to Mr. AT's express request not to be changed and cleaned in favor of a television program in the 9:00 hour, that he emptied and replaced the urinal and hurt himself doing so, that he subsequently changed Mr. AT before he finished his shift at 10:00 or alternatively that Mr. AT was not that wet and Claimant did not have enough help to subsequently change Mr. AT, and that Mr. AT must have significantly wet himself again by the time CNA Miles made her initial check. Claimant's scenario does not explain how or why the urinal was mysteriously absent when CNA Miles and the nurses observed Mr. AT's condition. Moreover, if Claimant did change and clean Mr. AT just before he finished his shift, he does not explain why Mr. AT was found still in his day clothes by CNA Miles.

49. The evidence supports a likelihood that the urinal was not a part of Mr. AT's plan of care. Perhaps Claimant used it to avoid having to change some residents as often. Perhaps Claimant has confabulated another resident's needs with his story about interacting with Mr. AT. The "why" does not matter. The conflict in testimony about whether it was present after Claimant's shift does.

50. Claimant's reported pain and other symptoms are without objective evidence of an acute onset or cause. Indeed, when he sought hospital emergency room attention on December 8, 2013 because he thought he was having another heart attack, he denied having back pain and related problems. Only after he was admitted for care did he allege upper back pain which had migrated around his left side to his chest. Moreover, over time his constellation of symptoms and their locations migrated erratically, perhaps as he learned what was anatomically reasonable and what was not. Dr. Doerr's records review prompted him to describe Claimant's reported symptoms and examination as showing "multiple nonorganic findings."

51. The preponderance of evidence shows it likely that Claimant did not suffer a compensable accident and injury at work on November 29, 2013.

CONCLUSIONS

1. Claimant failed to show he suffered a compensable accident and injury at work on November 29, 2013.

2. All other issues are moot.

RECOMMENDATION

Based on the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 12th day of July, 2016.

INDUSTRIAL COMMISSION

___/s/_____
Douglas A. Donohue, Referee

ATTEST:
___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

CLINTON E. MINER
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dkb

___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARGELIO ARAMBULA, Claimant, v. KINDRED HEALTHCARE, INC, Employer, and ARCH INSURANCE COMPANY, Surety, Defendants.	**IC 2013-032441** **ORDER** Filed July 15, 2016

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to show he suffered a compensable accident and injury at work on November 29, 2013.

2. All other issues are moot.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 15th day of July, 2016.

INDUSTRIAL COMMISSION

___/s/_____
R. D. Maynard, Chairman

___/s/_____
Thomas E. Limbaugh, Commissioner

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2016, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

CLINTON E. MINER
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___/s/_____