IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 11

WCC No. 2016-3824

DENNIS M. GRIFFIN

Petitioner

vs.

ASSOCIATED LOGGERS EXCHANGE

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: After returning to work after an industrial injury, Petitioner, who had previously been warned about arguing with coworkers, was in a fight with a coworker. Petitioner's employer terminated him from his employment pursuant to a clause in its Employee Handbook providing that fighting could result in discipline up to immediate termination. Petitioner disputes that he instigated the fight, and argues he is entitled to TTD benefits retroactive to the date of his termination. Petitioner also challenges Respondent's calculated TTD benefit rate and its denial of liability for a September 29, 2015, medical bill.

Held: This court ruled in Respondent's favor. Petitioner is not entitled to TTD retroactive to the date of his termination because he was terminated for disciplinary reasons as he could not get along with his coworkers and instigated a fight, for which the Employee Handbook authorized immediate dismissal. Petitioner is not entitled to additional TTD for the time he was unable to work because Respondent correctly calculated his TTD rate. Petitioner is not entitled to reimbursement for the September 29, 2015, medical bill, because Petitioner scheduled the appointment on his own and did not receive any primary or secondary medical services; rather, it was a consultation with the physician to discuss his concerns about the appropriateness of his medical care and Respondent's adjusting of his claim.

¶ 1 The trial in this matter was held on March 20, 2017, and April 4, 2017, in Helena, and on April 26, 2017, in Deer Lodge. Petitioner Dennis Griffin appeared as a self-represented litigant. Kelly Wills represented Associated Loggers Exchange (Associated Loggers).

¶ 2 Exhibits: This Court admitted Exhibits 1, 2, 3, 6, 10, 11, 13 through 17, 19, 27 through 29, 32, 33, 34, 37, 39 through 42, 44 through 50, 51-3, 51-4, 51-5, 54-1 through 54-7, 54-9, 54-17, 54-32, 54-33, and 55.

¶ 3 Witnesses and Depositions: This Court admitted Griffin's deposition into evidence and he was also sworn and testified during trial. Additionally, the following witnesses were sworn and testified: Bruce Thomas, Kerri Wilson, Matthew Anderson, Troy Anderson, Mark Gough, Pete Balen, April Kersch, Tony Colter, Sherman Anderson, Nicolas Hunter, Teri Jo Anderson, and Bonnie Anderson.

¶ 4 Issues Presented:

Issue One: Did Sun-up terminate Griffin from his employment for disciplinary reasons caused by his violation of its employment policies, thus excluding Griffin from further eligibility for TTD benefits when modified duty was available, pursuant to § 39-71-701(4), MCA?

Issue Two: Did Associated Loggers properly calculate Griffin's TTD rate?

Issue Three: Is Associated Loggers liable for the medical bill from Griffin's September 29, 2015, consultation with Dr. Sullivan?

Issue Four: Is Griffin entitled to costs, attorney fees, and/or a penalty, pursuant to § 39-71-611, MCA, and § 39-71-2907, MCA?

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 Sun-up Ventures, LLC (Sun-up) is a company affiliated with Sun Mountain Lumber. Sherman (Sherm) and Bonnie Anderson own Sun Mountain Lumber and its affiliated companies, and they run them as family businesses in Deer Lodge. There are around 300 employees working for Sun Mountain Lumber and its affiliated companies, but Sun-up is a small construction company, generally consisting of three employees. The construction crew's primary purpose is to do whatever construction work needs to be done for Sun Mountain Lumber and its affiliated companies, which include a sawmill, a logging shop, a fitness center, and a ranch. Although Sun-up had a supervisor on its crew, Sherm directly supervised the three employees.

¶ 7 Griffin was friends with Sherm's son, Troy Anderson, and Troy's wife, Teri Jo. Troy supervised the repair shop at Sun Mountain Logging, another company affiliated with Sun Mountain Lumber.

¶ 8 After the construction crew's supervisor left Sun-up, Troy recommended Griffin to Sherm.

¶ 9 In May 2015, Sherm hired Griffin to work for Sun-up. Griffin was hired as a full-time employee. Sherm told Griffin he could work all the hours he wanted as long as there was work. Sun Mountain Lumber and its affiliated companies have an Employee Handbook, which states, in relevant part: "A Regular-Full-Time employee is regularly expected to work 40 hours or more per week." Sherm agreed to pay Griffin $16 per hour. Sun Mountain Lumber and its affiliated companies pay all of their employees who work away from home $25 per day in "camp pay" or "per diem," and it is intended to be an expense reimbursement for the expenses associated with working away from home. Because Griffin's permanent residence was in Belgrade and he was going to rent a house in Gold Creek, Sherm agreed to pay Griffin $25 per day worked in "camp pay" or "per diem" as an expense reimbursement.

¶ 10 Shortly after Griffin was hired, Troy gave Griffin a rifle, stating that it was a "signing bonus." However, Troy did not have authority to give a "company signing bonus" and neither Sun Mountain Lumber or any of its affiliated companies reimbursed Troy for the value of the rifle. In actuality, the rifle was a personal gift from Troy and Teri Jo, in large part to thank Griffin for volunteer work he did on the deck at Teri Jo's parents' ranch.

¶ 11 The Employee Handbook states, in relevant part: "Violence in the Sun Mountain Lumber workplace is not tolerated and is grounds for corrective action up to and including termination." The Employee Handbook has a progressive discipline policy, but states that an employee who engages in fighting or other types of violence is subject to immediate termination. At the beginning of his employment, Griffin was provided a copy of the Employee Handbook.

¶ 12 There was a misunderstanding between Sherm and Griffin. When Sherm interviewed Griffin, Sherm told Griffin that he had a supervisory position open, and that it was a possibility that Griffin would be the supervisor. But, when Sherm hired Griffin, Sherm, in his mind, did not make Griffin the supervisor. Because Sherm supervised the construction crew and had been satisfied with their work, he expected Griffin to work alongside the other two employees. However, because Sherm had mentioned that the position open was a supervisory position, Griffin thought he was being hired as the supervisor. For this same reason, the employees in the office at Sun Mountain Lumber thought that Griffin was a supervisor.

¶ 13 When Griffin started, Sun-up's other employees were Mark Gough and Nick Hunter. Hunter had worked for Sun-up for more than 10 years. Gough had worked for Sun-up for three months but had been in construction since 2004, when his service in the Army ended. Sherm was satisfied with their work. Sherm was lenient with their work schedules. Hunter had his own tow truck business, and Sherm allowed him to leave work when he received a call for a tow. Gough was in the process of starting his own business installing windows, doors, and remodeling houses, and Sherm allowed him to take time off at Sun-up so he could work on his own projects.

¶ 14 The working relationship between Griffin, on one hand, and Gough and Hunter, on the other hand, quickly deteriorated. Sherm did not tell Gough or Hunter that Griffin was the supervisor, so they were surprised when Griffin immediately asserted himself as "the boss." Griffin's supervisory style was confrontational, which created significant tension. Gough credibly testified that Griffin was "the type of guy that knows everything," that Griffin refused to listen, and that Griffin was one of the most difficult people with whom he had ever worked. Griffin was extremely bossy, overly critical of Gough's and Hunter's work, argumentative, and extremely demanding. Because Gough did not like confrontation, he frequently walked away from Griffin. Hunter did not mind confrontation, and he and Griffin frequently argued. Neither Gough nor Hunter liked working with Griffin and told Sherm of the problems they were having. Indeed, Gough and Hunter each told Sherm that he could not work with Griffin. On two occasions within Griffin's first month, Sherm met with Griffin and told him that he needed to get along and work with Gough and Hunter. However, Griffin did not change. When Gough quit, one of the reasons was that he did not want to work with Griffin.

¶ 15 On July 7, 2014, Griffin suffered an industrial injury within the course and scope of his employment with Sun-up. Specifically, Griffin was using a table saw and severely cut fingers on his left hand. Griffin was transported to Missoula, where he treated with Charles Sullivan, MD, at Missoula Bone & Joint. Dr. Sullivan performed revision amputations of Griffin's little finger and ring finger, and nerve repair of the ulnar digital nerve of his index finger.

¶ 16 At the time of Griffin's injury, Sun-up was enrolled under Compensation Plan No. 2 of the Montana Workers' Compensation Act and was insured by Associated Loggers. Associated Loggers accepted liability.

¶ 17 In the six weeks before his injury, Griffin worked Monday through Friday, with days off for Memorial Day and Independence Day. He worked 9 hours on most regular work days, 9½ on two days, and 8½ hours on three days, averaging 8.66 hours per day worked. However, like most construction companies, Sun-up's workload varied throughout the year, a point with which Griffin agreed, and Sherm expected that Griffin would average 40 hours per week. This Court finds that Griffin was hired to work 40 hours per week.

¶ 18 In its payroll records, Sun-up kept Griffin's "camp pay" or "per diem" separate from his hourly wages.

¶ 19 Because Griffin worked only three pay periods before his injury, Associated Loggers calculated his temporary total disability (TTD) rate by multiplying the hours he was hired to work, which it deemed to be 40, by his $16 hourly wage. It did not include the $25 per day worked in "camp pay" or "per diem," nor the value of the rifle Troy gave to Griffin. Thus, it calculated his TTD rate to be $426.69.

¶ 20 Griffin returned to work on July 8, 2014, the day following his injury, in modified duty.

¶ 21 On August 1, 2014, Griffin was involved in a fight with Hunter in the shop. Griffin claims that he did not instigate the fight; however, the Court finds that Griffin's testimony in this regard was not entirely credible. Hunter was installing titanium underlayment on a roof they were building. Griffin did not think Hunter should have used such an expensive material and that Hunter was not using the correct fastener, though Griffin admitted that it did not matter for this particular application. Nevertheless, Griffin asked Hunter, "What the hell is this shit?" They started arguing, with Griffin criticizing Hunter's work. Hunter got off the roof and began walking out of the shop. Griffin followed Hunter and continued to antagonize him. Hunter was getting angrier and turned around and told Griffin something along the lines of, "I am walking away so I don't thump you." In response, Griffin poked Hunter in the chest and told Hunter that he did not "have to put up with this shit." Hunter grabbed Griffin, and they began pushing and shoving each other. Hunter pushed Griffin down on a welding table and pinned him. Pete Balen, a truck driver who was in the shop, intervened and started separating them. Hunter backed away, but Griffin took a swing at Hunter, landing a glancing blow around Hunter's eyes. Hunter reengaged and pushed Griffin into a pole, and Balen again separated them. Griffin then said, "Nick, you just screwed yourself."

¶ 22 This Court finds that Griffin instigated the fight by starting the argument, by following Hunter and antagonizing him when Hunter was walking away, and by poking Hunter in the chest, an action that Griffin knew was likely to elicit a physical response. Moreover, he continued to be the instigator by taking a swing at Hunter as Balen initially separated them.

¶ 23 After an investigation of the incident by Sun Mountain Lumber's management, Sherm decided to terminate Griffin because Griffin could not get along with the other employees and because he instigated the fight with Hunter. Sherm met with Griffin on August 11, 2014, with Troy there as a witness. After Sherm informed Griffin of his decision and of his reasons, Griffin became argumentative, asserting that he did not instigate the fight. At that point, Sherm told Griffin that because Griffin was still in his probationary period, he did not even need to have good cause for the discharge. On the Employee Notification/Corrective Action Report, the reason given for Griffin's termination is as follows:

> Inability to follow directions and work with other employees without getting into arguments about how the work was being done and inappropriate behavior around office staff.
>
> Employee was verbally warned on two different occasions (during the first week on or about May 21st[,] 2014, and then again another three weeks into the job) about cooperating with other employees following an argument with a co-worker.
>
> The final incident occurred on 8/1/14 when Denny was involved in a physical altercation with a co-worker. On that same day he was disrespectful and yelling at other employees in the main office.

This Court finds that these are the true reasons why Sun-up discharged Griffin; i.e., Sun-up discharged Griffin because his behavior towards Gough and Hunter, and other employees, was unacceptable and because Griffin instigated the fight with Hunter.

¶ 24 Griffin contacted Associated Loggers and demanded TTD benefits. Associated Loggers denied liability for TTD under § 39-71-701(4), MCA, which provides that a claimant is not entitled to TTD if modified work is available, but he is terminated from employment for "disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment . . . ."

¶ 25 Following Griffin's termination, he returned to his primary residence in Belgrade, and began seeing Robert B. Blake, MD, with Bridger Orthopedic and Sports Medicine in Bozeman. Dr. Blake replaced Dr. Sullivan as Griffin's treating physician.

¶ 26 Dr. Blake performed surgery on Griffin's previously injured left hand on April 16, 2015, and took Griffin off work. Dr. Blake released Griffin to return to work on April 27, 2015. Associated Loggers paid Griffin TTD from April 22, 2015 to April 26, 2015.

¶ 27 Griffin voluntarily returned to Dr. Sullivan in Missoula on September 29, 2015, for a consultation about his medical care and legal claims. Dr. Blake did not refer Griffin to Dr. Sullivan. Griffin did not ask Associated Loggers for authorization to see Dr. Sullivan. At this consultation, Griffin insisted upon reading a multiple page questionnaire to Dr. Sullivan regarding his course of treatment and about how Associated Loggers had treated him. Dr. Sullivan informed Griffin that Dr. Blake's treatment was appropriate, that he did not think that Griffin's carpal tunnel syndrome was related to his injury, but that his left-shoulder injury was caused by his industrial accident.[1] Dr. Sullivan did not provide any treatment and deferred to Dr. Blake for future treatment and work restrictions. Missoula Bone & Joint billed Griffin $80 for this consultation.

[1] The issue regarding Griffin's left-shoulder condition was not before this Court.

¶ 28 Associated Loggers has paid medical benefits for the treatment of Griffin's hand injury. However, Associated Loggers refused to pay for Griffin's September 29, 2015, consultation with Dr. Sullivan on the basis it was not authorized, and was not for medical treatment purposes.

¶ 29 Dr. Blake declared Griffin to be at maximum medical improvement on October 30, 2015.

CONCLUSIONS OF LAW

¶ 30 This case is governed by the 2013 version of the Workers' Compensation Act since that was the law in effect at the time of Griffin's industrial accident.[2]

¶ 31 Griffin bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[3]

Issue One: Did Sun-up terminate Griffin from his employment for disciplinary reasons caused by his violation of its employment policies, thus excluding Griffin from further eligibility for TTD benefits when modified duty was available, pursuant to § 39-71-701(4), MCA?

¶ 32 Section 39-71-701, MCA, governs a claimant's right to TTD benefits, and generally provides that a worker has a right to benefits when he suffers a total loss of wages as a result of an injury, until he reaches maximum healing, with some exceptions.

¶ 33 One of these exceptions is when a worker is terminated from employment for disciplinary reasons. Specifically, § 39-71-701(4), MCA, provides:

[2] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[3] *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

> If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available to the worker for any reason except for the worker's incarceration as provided for in 39-71-744, resignation, ***or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment and if the worker continues to be temporarily totally disabled, as defined in 39-71-116***.[4]

¶ 34 Here, Sun-up terminated Griffin for disciplinary reasons. Specifically, the preponderance of the evidence establishes that Griffin not only was argumentative with coworkers, but he instigated a fight with Hunter which violated Sun-up's policies as set forth in its Employee Handbook, which provided that an employee who engaged in fighting was subject to immediate termination. Thus, Griffin's termination from his employment with Sun-up was "for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment."[5]

¶ 35 Despite Griffin's claim, he was not entitled to progressive discipline because the Employee Handbook specifically stated that an employee who engaged in fighting was subject to immediate termination.[6] Even assuming he was, Sherm verbally warned Griffin about his behavior and interactions with coworkers on two occasions.

¶ 36 Accordingly, this Court concludes that Griffin is not legally entitled to TTD benefits from the date of his termination when modified work was available, pursuant to § 39-71-701(4), MCA.

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[4] (Emphasis added).

[5] § 39-71-701(4), MCA.

[6] *Rupnow v. City of Polson*, 234 Mont. 66, 70-71, 761 P.2d 802, 804-05 (1988) (holding that the City of Polson did not violate its personnel policy which contained a progressive discipline policy when it discharged a police officer because the policy provided that the employer could impose alternative means of discipline and because it gave verbal warnings and written evaluations specifying the areas that needed improvement before it discharged the officer).

Issue Two: Did Associated Loggers properly calculate Griffin's TTD rate?

¶ 37 To determine a claimant's TTD rate – which is 66 2/3% of the wages received at the time of the injury subject to a maximum[7] – "the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, ***except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work***."[8]

¶ 38 Griffin argues that Associated Loggers' calculation of his TTD rate is incorrect for three reasons, which this Court will address in turn.

¶ 39 First, Griffin argues that he was hired to work more than 40 hours per week, and that Associated Loggers therefore incorrectly calculated his rate on a 40-hour week basis. However, this Court has found that Griffin was hired to work 40 hours per week, and Griffin did not introduce sufficient evidence from which this Court could find that he was hired to work more than that.[9]

¶ 40 Second, Griffin argues that Associated Loggers should have included the $25 per work day in "camp pay" or "per diem" as part of his wages.

¶ 41 Section 39-71-123, MCA, defines "wages," in relevant part, as follows:

> (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:
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> . . .
>
> (e) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value;
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> . . . .
>
> (2) The term "wages" does not include any of the following:
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> (a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, and other expenses, as set forth in department rules;

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[7] § 39-71-701(3), MCA.

[8] § 39-71-123(3)(a), MCA (emphasis added).

[9] *See Flink v. Am. Alt. Ins. Co.*, 2000 MT 224, 301 Mont. 223, 7 P.3d 416 (holding that if claimant is hired to work more than 40 hours per week and is injured before working four pay periods, the WCC must make a finding as to the amount of overtime the employee would have worked, which can be based on the hours that other employees worked).

¶ 42 In turn, ARM 24.29.720, the Department of Labor & Industry's rule regarding expense reimbursements, states, in relevant part:

> PAYMENTS THAT ARE NOT WAGES--EMPLOYEE EXPENSES
>
> (1) Effective January 1, 1993, payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred in the course and scope of employment are not wages if all of the following are met:
>
> (a) the amount of each employee's reimbursement is entered separately in the employer's records;
>
> (b) the employee could reasonably be expected to incur the expenses while traveling on the business of the employer;
>
> (c) the reimbursement is not based on a percentage of the employee's wages nor is it deducted from wages; and
>
> (d) the reimbursement does not replace the customary wage for the occupation.
>
> (2) Reimbursement for expenses may be based on any of the following methods that apply:
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> . . .
>
> (b) for meals and lodging, at a flat rate no greater than the amount allowed to employees of the state of Montana pursuant to 2-18-501(1)(b) and (2)(b), MCA for meals, and 2-18-501(5), MCA for lodging, unless, through documentation, the employer can substantiate a higher rate;
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> . . . .

¶ 43 The $25 per work day that Sun-up paid Griffin as "camp pay" or "per diem" is not wages under § 39-71-123(2)(a), MCA, and ARM 24.29.720. The payment meets the elements in ARM 24.29.720(1)(a)-(d). Additionally, ARM 24.29.720(2)(b) allows for a flat rate of $25, as it is less than the amount allowed to State employees for meals and lodging.[10]

¶ 44 Third, Griffin argues that the value of the rifle Troy gave him should be considered part of his wages. However, the value of the rifle Troy gave to Griffin is not part of his wages under § 39-71-123(1), MCA, because Sun-up did not provide it to Griffin as remuneration for his work. Rather, Troy gave it to Griffin as a personal gift to thank him for work he did for Teri Jo's parents.

[10] *See* § 2-18-501(1) and (5), MCA (allowing $23 per day for meals, and $12 per day for lodging).

¶ 45 Accordingly, Associated Loggers correctly calculated Griffin's TTD rate.

Issue Three: Is Associated Loggers liable for the medical bill from Griffin's September 29, 2015, consultation with Dr. Sullivan?

¶ 46 An insurer "shall furnish reasonable primary medical services" caused by a compensable injury and shall furnish "secondary medical services" "upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment."[11]

¶ 47 "Primary medical services" are defined as "treatment prescribed by the treating physician, for conditions resulting from the injury or occupational disease, necessary for achieving medical stability."[12]

¶ 48 "Secondary medical services" are defined as "those medical services or appliances that are considered not medically necessary for medical stability. The services and appliances include but are not limited to spas or hot tubs, work hardening, physical restoration programs and other restoration programs designed to address disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation facilities."[13]

¶ 49 Griffin's visit to Dr. Sullivan on September 29, 2015, does not qualify as either a primary or secondary medical service. Dr. Sullivan did not provide any medical treatment. Rather, the visit was a requested consultation initiated by Griffin so he could ask Dr. Sullivan about Dr. Blake's treatment and about Dr. Sullivan's thoughts about Associated Logger's adjusting of his claim. It was not requested by his treating physician, Dr. Blake, nor authorized by Associated Loggers.

¶ 50 Accordingly, this Court concludes that Associated Loggers is not liable to pay the medical bill associated with Griffin's September 29, 2015, consultation with Dr. Sullivan.

Issue Four: Is Griffin entitled to costs, attorney fees, and/or a penalty, pursuant to § 39-71-611, MCA, and § 39-71-2907, MCA?

¶ 51 Because Griffin is not the prevailing party, he is not entitled to his costs or attorney fees (despite being self-represented).[14] For this same reason, Griffin is not entitled to a penalty.[15]

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[11] § 39-71-704(1)(a) and (b), MCA.

[12] § 39-71-116(29), MCA.

[13] § 39-71-116(34), MCA.

[14] *See* § 39-71-611, MCA.

[15] *See* § 39-71-2907, MCA.

JUDGMENT

¶ 52 Griffin is not entitled to any additional TTD benefits.

¶ 53 Griffin is not entitled to an increase in his TTD rate.

¶ 54 Griffin is not entitled to reimbursement for the medical bill he incurred on September 29, 2015.

¶ 55 Griffin is not entitled to his costs or attorney fees pursuant to § 39-71-611, MCA.

¶ 56 Griffin is not entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 57 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 27th day of July, 2018.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Dennis M. Griffin
Kelly M. Wills

Submitted: April 26, 2017