STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

ANITA COLLAZO	)	
	)	
VS.	)	W.C.C. 2007-02368
	)	
CITY OF PROVIDENCE	)	
CITY OF PROVIDENCE	)	
	)	
VS.	)	W.C.C. 2007-01592
	)	
ANITA COLLAZO	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated for hearing before the trial judge and remain consolidated at the appellate level. W.C.C. No. 2007-01592 is an employer's petition to review alleging that the employee's condition has reached maximum medical improvement (MMI). The trial judge granted the employer's petition and the employee filed a claim of appeal, asserting that although her condition has reached MMI, she is totally disabled rather than partially disabled. W.C.C. No. 2007-02368 is an employee's petition to review alleging that the employee's incapacity increased from partial to total incapacity as of April 19, 2006 or, in the alternative, that the employee is totally disabled pursuant to the statutory "odd

lot" doctrine as codified in R.I.G.L. § 28-33-17(b)(2). The trial judge found that the employee had failed to prove either of the allegations and denied the petition. The employee has filed a claim of appeal from that decision and decree. After a thorough review of the record and consideration of the arguments of the respective parties, we deny the employee's appeals and affirm the decision and decrees of the trial judge.

Anita Collazo was employed in various clerical positions by the City of Providence since 1984; the last seven (7) or eight (8) years of her employment as the court clerk in the Probate Court. Her primary responsibilities included reviewing, filing and docketing petitions which required a significant amount of typing and writing. She also assisted members of the public who came into the clerk's office. The heaviest item the employee lifted were the docket books weighing about twenty (20) pounds. Ms. Collazo is a high school graduate and completed one (1) to one and one half (1 ½) years of college.

A memorandum of agreement dated March 19, 2003 states that the employee sustained a work-related injury on April 29, 2002 which is described as right carpal tunnel syndrome. The memorandum of agreement indicates that she began receiving weekly benefits for partial incapacity on August 23, 2002. Ms. Collazo explained that she first saw a doctor for her condition on April 29, 2002 and she stopped working on August 23, 2002 when she had right carpal tunnel release surgery. She was out of work from that point until she accepted a suitable alternative employment (SAE) position in the Board of Canvassers Office in May 2003. After two (2) or three (3) months, she left this position after experiencing difficulty doing filing because she could not always feel the number of documents she was filing. In May 2004, Ms. Collazo attempted to return to Probate Court in an SAE position, but she was not permitted to return.

After the 2002 surgery, Ms. Collazo had difficulty participating in physical therapy and began to complain of increasing pain in her right shoulder. On March 3, 2004, a pretrial order was entered in W.C.C. No. 2004-01067 which amended the description of the employee's injury to read "right carpal tunnel syndrome, left carpal tunnel syndrome, reflex sympathetic dystrophy." On June 9, 2004, pursuant to a pretrial order entered in W.C.C. No. 2004-01753, the description of the injury was further amended to read "right carpal tunnel syndrome, left carpal tunnel syndrome, reflex sympathetic dystrophy, right shoulder."

The employee testified that she had difficulty performing daily household chores and personal hygiene, and even changed all of her doorknobs and faucets to handles to make them easier for her to manipulate. She acknowledged that she does drive short distances when necessary and uses her home computer to check e-mail. Ms. Collazo related that she takes Oxycontin twice a day and Fentora as needed for breakthrough pain, both of which make her drowsy. She also utilizes a TENS unit and traction device at home. The employee felt that she could not return to her former employment because of the repetitive use of her arms in typing and writing, but agreed that she might be able to perform a job that did not involve repetitive use of her arms, such as a greeter or salesperson. At the time of her testimony, Ms. Collazo had just been approved for Social Security Disability Insurance benefits.

The pertinent medical evidence in the record consists of the affidavits and reports of Drs. Arnold-Peter C. Weiss, Mehrdad M. Motamed, Thomas Morgan, Stanley J. Stutz, and William A. Palumbo, as well as the depositions and records of Drs. Jerrold Rosenberg, Norman M. Gordon, and Stephen Saris.

Dr. Rosenberg, a specialist in physical medicine and rehabilitation with a subspecialty in electrodiagnostic medicine, first saw Ms. Collazo on May 30, 2002 when she was referred for

testing by Dr. Geret Dubois due to persistent right hand and right thumb pain and numbness, as well as bilateral shoulder pain. The testing at the time was suggestive of mild right carpal tunnel syndrome, but revealed no evidence of cervical radiculopathy or brachial plexopathy. The employee underwent right carpal tunnel release by Dr. Dubois in August 2002. Repeat testing in November 2002 was normal on the right with evidence of mild carpal tunnel syndrome on the left. At that time, the employee was complaining of persistent and exacerbated right shoulder and hand pain, as well as numbness in her left hand.

Dr. Rosenberg conducted EMG and nerve conduction studies on the employee on August 2, 2004 at the request of Dr. Leonard Hubbard due to complaints of pain, numbness and weakness in the hands, elbows and arms. The test results were consistent with reflex sympathetic dystrophy (RSD) on the right and some residual carpal tunnel syndrome findings on the left. Ms. Collazo then began treating with Dr. Rosenberg, which included participation in a physical therapy program. The doctor saw her on a monthly basis and in a report dated April 19, 2006, stated that her condition had reached MMI. He continued to see her monthly with no significant change in condition noted in his reports.

Dr. Rosenberg testified that his initial diagnoses were tendonitis and carpal tunnel syndrome, which then progressed to RSD and then became chronic pain syndrome. He noted that Ms. Collazo also developed reactive depression as a result of these conditions and their effect on her ability to work and function. The doctor opined that the employee was unable to perform the duties of her former employment as a court clerk because she had limited use of her upper extremities. Specifically, she is unable to lift more than five (5) pounds, cannot do any repetitive activity, and cannot lift her arms above shoulder level. When asked whether Ms.

Collazo was employable, considering her age, education, background, abilities, training, and physical restrictions, Dr. Rosenberg responded:

> She basically is an office personnel person with basic education level, and unable to use her upper extremities in any real fashion, which essentially rules her out of any functional labor or clerical occupation.

Ee's Ex. G at 15.

On cross-examination, the doctor admitted that he actually had no knowledge of the employee's education level. He did note that she may also have limitations on driving due to the effect of the medication she takes.

Dr. Weiss, an orthopedic surgeon specializing in hand and wrist surgery, evaluated the employee on October 25, 2005 at the request of the employer. The primary finding on examination was hypersensitivity of the scar in the palm of the right hand. There were no findings consistent with RSD. The doctor's diagnosis was bilateral carpal tunnel syndrome status post release with chronic pain syndrome. Dr. Weiss stated in his report that the bilateral carpal tunnel syndrome was causally related to her work activities, but that he could not "establish any specific etiology for the patient's chronic pain at this juncture." Er's Ex. 2 at 2. He concluded that the employee could only do a limited amount of typing or writing, specifically less than ten (10) minutes per hour. The doctor also noted that the employee's condition had reached MMI.

Dr. Morgan, a neurologist, examined the employee on February 20, 2006 at the request of the employer. He noted that she had exquisite tenderness to light touch of the right hand, but did not exhibit any of the clinical signs of RSD such as changes in the skin, swelling, discoloration, excessive sweating, or hair loss. He concluded that she had no objective signs of any physical impairment and could perform the duties of her regular job without restrictions.

Dr. Motamed, an orthopedic surgeon, evaluated Ms. Collazo on September 20, 2006 at the request of the employer. The examination revealed significant limitation of movement of the right wrist, hypersensitivity of the scar in the right palm, and some restriction in movement of the right shoulder. The doctor noted that the employee may have had an episode of RSD after surgery which may be causing the limitation of movement of the wrist; however, he also pointed out that an MRI of her wrist revealed some disassociation of the scapholunate joint which suggested some trauma to the wrist, which the employee denied. Dr. Motamed stated that the employee could not perform her job as a court clerk, but could do other types of secretarial and sedentary work which did not require repetitive movement of the wrist or rapid ability to type. He also concluded that her condition had reached MMI.

Dr. Palumbo examined Ms. Collazo on April 24, 2007 for purposes of her application for Social Security Disability Insurance benefits. The employee complained of constant pain in her right hand radiating up her arm to the base of her neck, as well as pain and numbness in her left hand. She informed the doctor that she can hold only light objects with her left hand and practically nothing with her right hand and has difficulty writing with her right hand. During the examination, Dr. Palumbo noted swelling and tenderness of the right hand, wrist and forearm, and numbness involving the fingers of the left and right hands. He indicated that her condition was permanent, but did not specifically comment on her ability to work.

Dr. Saris, a neurosurgeon, examined the employee on September 25, 2007 at the request of the employer in regards to her application for disability retirement benefits. The employee complained of moderate to severe pain primarily in her right wrist and thumb which radiates up her arm to her shoulder and neck. The doctor found no signs of RSD during his examination and no objective abnormalities regarding her right upper extremity and neck. He did note giveaway

in testing the muscles of her arm which was suggestive of symptom exaggeration. Dr. Saris testified that, based upon his examination and the records he reviewed, the employee could have returned to work many years ago and it would not have posed a risk to her health. Er's Ex. 5 at 5-7.

On cross-examination, Dr. Saris explained that complex regional pain syndrome is when an individual has pain in an area of the body which is not substantiated by any diagnostic testing or objective physical findings. The doctor stated that he does not believe that the condition is a legitimate medical diagnosis.

Two (2) days later, on September 27, 2007, Dr. Gordon, a neurologist, evaluated Ms. Collazo at the request of the employer for purposes of her application for disability retirement benefits. In his report, the doctor noted that the employee's complaints regarding her left wrist were "mild and inconsequential," and his examination of her left upper extremity was completely normal. Ee's Ex. K at 6. When asked to specify the physical findings which led to his conclusion that Ms. Collazo was unable to perform the duties of a court clerk, Dr. Gordon responded:

> Well, it was more the history in the medical records that led me to that conclusion. The examination really revealed a voluntary unwillingness to perform certain movements because of the pain that she was experiencing, but she had – she had limited range of motion of her right wrist, and I believe the thumb as well. She had limited ability to grasp by flexing her thumb.

Ee's Ex. K at 7. The doctor acknowledged that there was not much objective evidence to see during the examination, but he did observe the employee favoring her right upper extremity when she left the office and got into her car.

Dr. Gordon also stated in his report that Ms. Collazo was essentially unemployable. He explained that this statement was based upon his lengthy experience with patients like Ms.

Collazo who have complex regional pain syndrome, or RSD, who develop chronic pain syndrome which makes them unable to perform any type of repetitive activity. He acknowledged that the employee would be capable of performing a job that did not require repetitive use of her right arm. The doctor explained further that the employee appeared to exaggerate her symptoms, but it was not uncommon for individuals with chronic pain to subconsciously favor the painful limb. He did not believe that the employee was malingering. Dr. Gordon also stated that he found no signs of RSD or complex regional pain syndrome, but Ms. Collazo now suffered from a chronic pain syndrome.

Both parties presented reports and testimony from vocational rehabilitation counselors who evaluated the employee's potential to return to some form of employment. Ms. Collazo presented Edmond J. Calandra, who met with her on December 12, 2005. Mr. Calandra reviewed the employee's medical records, education, and employment history. He noted that the medical information he had available indicated that the employee was restricted from using her right hand and arm as anything more than a helper which would significantly limit her ability to utilize the clerical/office skills she had acquired from her previous employment. Mr. Calandra concluded that despite the fact that the employee was bright and articulate with good communication skills, she was not employable because she could not perform the full range of activities associated with a sedentary job. Mr. Calandra acknowledged Ms. Collazo would be able to perform jobs that did not use her upper extremities in a repetitive fashion, but he was skeptical as to the availability of such positions and her ability to compete for such a job.

The employer also presented a vocational rehabilitation counselor, Michael La Raia. He met with Ms. Collazo on May 22, 2007 and found her to be very professional and personable. The employee advised him that she did not feel that she was capable of any type of gainful

employment due to the pain she experienced in both wrists, primarily on the right. After meeting with the employee and reviewing her employment history, Mr. La Raia indicated that the employee possessed many assets which would be beneficial in obtaining alternative employment, inclduing: (1) organizational and clerical skills; (2) a pleasant appearance and presentation; (3) an ability to communicate and work with the public; (4) a record of long term consistent employment, as well as the ability to obtain promotions; and (5) the demonstrated ability to hold a position of responsibility. Mr. La Raia concluded that Ms. Collazo was employable and had great potential. He testified that possible employment opportunities included work as a receptionist, phone operator, or dispatcher, as well as furniture or appliance salesperson.

After considering the evidence, the trial judge determined that the employee failed to prove that her incapacity increased from partial to total incapacity. The trial judge found that the testimony of Drs. Rosenberg and Gordon did not establish that the employee was totally disabled, but rather that she remained partially disabled. He did not agree with Dr. Saris that the employee could return to work full duty. With regard to the employee's allegation that she was totally disabled pursuant to the "odd lot" doctrine as codified in R.I.G.L. § 28-33-17(b)(2), the trial judge found the testimony of Mr. La Raia more persuasive than that of Mr. Calandra and denied this allegation. The employer's petition alleging that the employee's condition had reached MMI was granted. The employee then filed claims of appeal from both decrees.

When undertaking a review of a trial judge's decision we are bound by the provisions of R.I.G.L. § 28-35-28(b), which dictates that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." We are precluded from engaging in a *de novo* review of the evidence and substituting our own judgment for that of the trial judge without first determining that the trial judge was clearly wrong. Diocese of

Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). Bearing this deferential standard in mind, after a thorough review of the record, we find no error on the part of the trial judge and deny the employee's appeals.

The employee has filed four (4) reasons of appeal regarding her petition for total disability which present two (2) basic arguments. First, the employee contends that the trial judge erred in not finding total disability because after rejecting the opinion of Dr. Saris, the trial judge was left with the uncontradicted medical opinions of Drs. Rosenberg and Gordon that the employee was totally disabled. Second, the employee argues that the trial judge erred in relying on the opinion of Mr. La Raia over that of Mr. Calandra because Mr. La Raia failed to address whether the employee would have reasonable access to the jobs he thought she would be capable of performing, and he did not consider the reports and deposition of Dr. Rosenberg in assessing the physical capabilities of the employee.

The employee seeks a finding that she is totally disabled pursuant to R.I.G.L. § 28-33-17(b)(2) which states:

> In all other cases, total disability shall be determined only if, as a result of the injury, the employee is physically unable to earn any wages in any employment; provided, that in cases where manifest injustice would otherwise result, total disability shall be determined when an employee proves, taking into account the employee's age, education, background, abilities, and training, that he or she is unable on account of his or her compensable injury to perform his or her regular job and is unable to perform any alternative employment. The court may deny total disability under this subsection without requiring the employer to identify particular alternative employment.

Ms. Collazo initially contends that based upon the expert medical opinions of Drs. Rosenberg and Gordon, the trial judge should have found that she is totally disabled as defined in the first phrase of the statute, *i.e.*, that she "is physically unable to earn any wages in any employment."

Id. Our review of the reports and depositions of the two (2) physicians reveals that although they made statements that Ms. Collazo was not employable, the restrictions they placed on her physical activities did not equate to total disability under this provision of the statute.

Dr. Rosenberg, who began seeing the employee on a monthly basis in 2004, makes no reference to the employee's ability to work or her physical restrictions in any of his reports. He does note on September 19, 2007 that she has a twenty-five percent (25%) impairment of the upper extremities which equates to a fifteen percent (15%) impairment of the whole person. The doctor testified that as of April 2006 when he found her condition had reached MMI, the employee was unable to lift more than five (5) pounds, could not do any repetitive activity with her upper extremities, and was unable to lift her arms above her shoulders. He never stated that the employee was totally disabled from any and all work and the restrictions he placed on her activities were not so overwhelming as to preclude any reasonable possibility of employment. *See* Soprano Construction Co., Inc. v. Maia, 431 A.2d 1223 (R.I. 1981) (numerous restrictions placed on employee's return to job market by doctor nullified his opinion that employee could do light, selected work).

Dr. Rosenberg did testify that the employee was "not employable," but this statement was in response to the following question:

> Now, Doctor, based upon the histories you've taken from her over the course of her treatment, with also taking into account your findings on physical examination in light of the diagnoses you reached, and taking into account the restrictions or limitations that you placed upon her, do you have a [sic] opinion which you can state to reasonable degree of medical certainty and probability in your area of expertise as to whether Miss Collazo, based upon her age, her education, her background, her abilities, and her training is employable, given the restrictions and limitations you have placed upon her?

Ee's Ex. G at 14-15. As he subsequently acknowledged, the doctor had no foundation for answering this question which addresses the "odd lot" definition of total disability, not simply the physical inability to earn wages in any employment. Dr. Rosenberg did not know the employee's education level, employment history, abilities, or training. His statement that the employee was not employable does not establish total disability under the provision of the statute in question.

Dr. Gordon evaluated the employee on September 27, 2007, but the most recent reports and testing he reviewed were from August 2004. Despite the statements in his report that Ms. Collazo was "essentially unemployable," and that he did "not think she will be able to return to work," Dr. Gordon admitted that she could perform a job that did not require repetitive use of her right arm. Ee's Ex. K at 17 and report of 9/27/07 at 3. The doctor indicated that the employee's disability was due to chronic pain syndrome in the right arm; his examination of the left arm was normal and he described the employee's complaints regarding the left arm as "mild and inconsequential." Ee's Ex. K at 6. Clearly, the doctor's testimony does not establish that Ms. Collazo is physically unable to earn wages in any type of employment.

The employee "bears the burden of proving allegations contained in [her] petition for compensation by a fair preponderance of credible evidence." Blecha v. Wells Fargo Guard-Co. Serv., 610 A.2d 98, 102 (R.I. 1992). The trial judge determined that the expert medical evidence offered by Drs. Rosenberg and Gordon did not establish that the employee was totally disabled and he therefore concluded that she did not sustain her burden of proof. We cannot say that the trial judge was clearly erroneous in his evaluation of the opinions rendered by these physicians.

In her third and fourth reasons of appeal, the employee argues that the trial judge erred in relying upon the opinion of Mr. La Raia concerning her allegation of total disability pursuant to

the "odd lot" provision of the statute because there was no evidence that the occupations he mentioned were available so as to allow Ms. Collazo reasonable access to the labor market, and the foundation for Mr. La Raia's opinion was lacking because he did not review Dr. Rosenberg's reports or deposition. We find no merit in these contentions.

Rhode Island General Laws § 28-33-17(b)(2) imposes the burden on the employee seeking total disability benefits to prove that due to her work-related injury, she is unable to perform her regular job and any alternative employment, taking into account her age, education, background, abilities, and training. The statute does not impose any burden upon the employer to establish that there are actual job opportunities that would be available to the employee. The employee does not cite any case law to support her contention that the employer must prove that the employee would have access to the type of jobs mentioned by Mr. La Raia. On the contrary, § 28-33-17(b)(2) specifically states that "[t]he court may deny total disability under this subsection without requiring the employer to identify particular alternative employment" (emphasis added).

In the present matter, the trial judge, citing Mr. La Raia's assessment of the employee as well as his own observations, found that Ms. Collazo had many positive attributes and skills which would be advantageous to her in obtaining some type of alternative employment. When this litigation began, the employee was only forty-six (46) years old. She had no limitations regarding her ability to sit, stand and walk. Both vocational experts acknowledged her excellent communication skills and pleasant, professional demeanor. Mr. La Raia testified that Ms. Collazo had great potential for employment. The trial judge was not clearly erroneous in concluding that Ms. Collazo did not satisfy the stringent standards for a determination of total disability under the "odd lot" statutory provision. *See* Lombardo v. Atkinson-Kiewit, 746 A.2d

679, 689 (R.I. 2000) (distinguishing standard for qualifying for continuing partial disability benefits in a "gate" case and qualifying for total disability benefits as an "odd lot").

Further, the employee argues Mr. La Raia's opinion lacked the necessary foundation because he did not review Dr. Rosenberg's reports and deposition, and therefore he did not have an accurate assessment of the employee's physical capabilities. Frankly, reviewing Dr. Rosenberg's reports would not have provided any information as to Ms. Collazo's physical capabilities because the doctor never makes any comment in his reports regarding her physical restrictions or abilities. The only statement from Dr. Rosenberg regarding the employee's physical limitations is in his deposition when he testifies that she is unable to lift more than five (5) pounds, cannot do any repetitive activity, and cannot lift her arms above her shoulders. Ee's Ex. G at 14. During Mr. La Raia's testimony he was specifically asked about the restrictions Dr. Rosenberg placed on Ms. Collazo and he stated that they would not have any effect on his opinion. Tr. at 116-17.

It is clear from the extensive information Mr. La Raia gathered from the employee and from the medical records made available to him that he was operating under the assumption that Ms. Collazo had very limited use of her hands and arms. In addition, Dr. Rosenberg had concluded that the employee's condition had reached MMI at least as of April 2006. Our review of Mr. La Raia's report and testimony, in conjunction with all of the medical evidence in the record, reveals that his opinions were based upon an accurate and complete assessment of the employee's physical capabilities. We find his opinions to be both competent and probative. As such, the trial judge properly exercised his discretion in choosing to rely upon the opinions of Mr. La Raia over those of Mr. Calandra. *See* Parenteau v. Zimmerman Eng'g, Inc., 111 R.I. 68, 299 A.2d 168 (1973).

The employee's appeal in W.C.C. No. 2007-01592 regarding the finding of MMI is based upon her assertion that, although she concedes that her condition has reached MMI, she is totally disabled at MMI, rather than partially disabled. In light of our affirmation of the trial judge's determination that the employee has not established that she is totally disabled, the employee's appeal regarding the finding of MMI is denied.

Based upon the foregoing discussion, we deny and dismiss the employee's appeals and affirm the decision and decrees of the trial judge. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Hardman and Ferrieri, JJ., concur.

ENTER:

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Olsson, J.

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Hardman, J.

_____
Ferrieri, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

CITY OF PROVIDENCE)
)
VS.) W.C.C. 2007-01592
)
ANITA COLLAZO)

FINAL DECREE OF THE APPELLATE DIVISION

This matter came on to be heard by the Appellate Division upon the claim of appeal of the respondent/employee and upon consideration thereof, the employee's appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on October 8, 2008 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Hardman, J.

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Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Megan J. Goguen, Esq., on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
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CITY OF PROVIDENCE)

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PER ORDER:

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John A. Sabatini, Administrator

ENTER:

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Olsson, J.

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Hardman, J.

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Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Megan J. Goguen, Esq., on

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