INTER-OFFICE MEMORANDUM

TO: All Attorneys

FROM: W. Joseph Truce, Esquire

DATE: July 25, 2005

RE: **Take Nothing Award on Stroke Case - Lacuna versus Hemorrhagic Stroke**

In issuing the enclosed **"Take Nothing Award"** on a stroke case, Judge Jane Madsen relied on our argument that a sudden emotional upset (which occurred at work in this case) would cause a hemorrhagic stroke as opposed to a Lacuna which the applicant suffered in the case of **Ninoska Hernandez vs. Bank of America**.

In preparing our medical evidence in this case, we started with the medical proposition that unlike a myocardial infarction (heart attack) there is **no medical evidence** that **"stress"** can cause, contribute to, and/or precipitate a cerebral vascular accident (stroke).

The applicant, Ninoska Hernandez, **was a loan processor** for the Bank of America, and on the morning of September 25, 2002 was advised that she had made a mistake on one of her loans.

Both the applicant and her supervisor testified that at this time the "applicant's mouth was drooping on the left-hand side" and there was no dispute in the medical record that this physical symptomotology was the beginning of the applicant's stroke.

Our QME in neurology, Dr. Jay Jurkowitz, pointed out that there are two types of strokes as follows:

1. A Lacuna stroke

2. A hemorrhagic stroke.

Dr. Jurkowitz went on to point out that a Lacuna stroke is generally caused by longstanding hypertension (which the applicant had in this case) and a hemorrhagic stroke can be caused by a sudden emotional upset (such that the applicant had in this case).

However, Dr. Jurkowitz also pointed out that if the events of September 25, 2002 were stressful enough to raise the applicant's blood pressure to such an extent to cause a cerebral vascular accident, the resulting stroke would be a hemorrhagic stroke and not a Lacuna stroke and the bleed would have been identifiable on an MRI or a CT scan...."

As there was no **"bleed,"** Dr. Jurkowitz concluded that the applicant had a Lacuna stroke and concluded that the events at work on September 25, 2002 did not cause, contribute to, and/or aggravate the applicant's stroke.

As in most cases we have, the applicant's internal specialist simply offered the following syllogism without any explanation as to the exact mechanism of the stroke:

1. The applicant gave a history of stress on the job with the Bank of America;

2. The applicant has hypertension;

3. The applicant had a stroke;

4. Therefore, both her stroke and the hypertension are related to stress at work.

In addition to the above medical evidence we also submitted testimony from the applicant's supervisor who Judge Madsen felt to be credible.

WJT/kst/ib

Enclosure: Finding & Award and Decision

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

NINOSKA HERNANDEZ, *Applicant* v. BANK OF AMERICA; IAG/AMERICAN INTERNATIONAL CLAIMS SERVICES, *Defendants.*	Case No. MON 301272 **FINDINGS & ORDER**

Law Offices of Gullixson & Kennedy
by Richard Gullixson, attorney for applicant.
Law Offices of Kegel, Tobin & Truce
by Joseph Truce, attorney for applicant.

An application having been filed herein; all parties having appeared, and the matter having been regularly submitted, the Honorable Jane Madsen, Workers' Compensation Administrative Law Judge, finds and orders as follows:

FINDINGS OF FACT

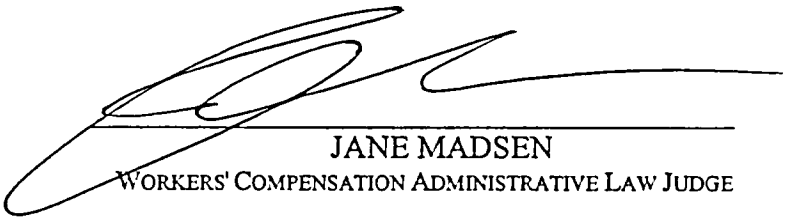
1. Ninoska Hernandez did not sustain injury arising out of and occurring in the course of her employment on September 25, 2002.

2. All other issues, with the exception of medical legal costs, have been rendered moot.

ORDER

IT IS ORDERED as follows:

(a) That applicant take nothing by reason of her application filed herein on March 4, 2003.



JANE MADSEN
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on: 07-07-05
On all parties on the
Official Address Record.
By: Agatha Magaña

STATE OF CALIFORNIA

DIVISION OF WORKERS' COMPENSATION

Case No. MON 301272

NINOSKA HERNANDEZ	vs.	BANK OF AMERICA; AIG/AMERICAN INTERNATIONAL CLAIMS SERVICES
WORKERS' COMPENSATION JUDGE:		JANE MADSEN
DATE OF (CLAIMED) INJURY:		09/25/02

OPINION ON DECISION

INJURY AOE/COE: Labor Code Section 3202.5[1] states: "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. 'Preponderance of the evidence' means [2] that evidence [3] that, when weighed with that opposed to it has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

It is well settled applicant has the initial burden of proof with regard to the issue of injury. Wher vs. WCAB, 50 CCC 165. Weighing the entire record in this case and comparing the testimony of the witnesses, it is apparent applicant did not sustain a specific injury on September 25, 2002.

Applicant has submitted multiple medical reports as evidence. It appears from reviewing applicant's trial brief and applicant's response to defendant's trial brief, applicant relies primarily on the opinion of Dr. Schatz to support the contention applicant sustained an industrially related cardiovascular accident on September 25, 2002 which resulted in psychiatric and orthopedic complications. Reviewing Dr. Schatz' reports as a whole, the doctor has described a continuing trauma over the applicant's entire period of employment rather than a specific injury on September 25, 2002.

As applicant's attorney pointed out in his June 10, 2005 brief, Dr. Schatz did note applicant's history of a newly discovered significant mistake at work on the date of her stroke. (Applicant' Exhibit 5, report of Dr. Schatz February 11, 2004 at p.2)

Reading all of Dr. Schatz' reports together, it appears his theory of compensability of applicant's stroke is based on a history taken from the applicant of perceived severe, unremitting stress at work. Referring once again to p. 2 of the February 11, 2004 report, Dr. Schatz stated: "I will reiterate, the patient suffered a stroke due to the severe stress at her

place of work. In general, her bank and loan work was very stressful due to the nature of the business."

Dr. Schatz' earlier report of June 9, 2003 also notes the history of the specific incident on September 25, 2002. There is an obvious typographical error as to the date of the incident and stroke, but the nature of the specific incident is described accurately. Dr. Schatz stated on p.5 "The patient is a 42-year-old female who worked as a senior loan specialist. At work she was overloaded; although she was hired to do only 40 loans a month, she was doing up to 280 loans per month at the time of her stroke. She also had to train nasty, unmotivated individuals who did not wish to work. The job stress strain led to a stroke on September 26, 2002."

Both parties presented evidence as to the number of hours applicant worked and the nature of her workload. Defense witness, Caren Loveall, was most persuasive. She testified it was the policy of Bank of America that overtime was not mandatory, that Ms. Hernandez would not have had more than 80 files maximum, that files would never be piled on the floor because allowing files on the floor would violate federal banking rules and that Ms. Hernandez left work early on September 25, 2002. (Summary of evidence pp.15, 16)

Applicant herself testified her supervisor Ms. Loveall was 100 percent supportive, and she did not feel at all harassed on the job. She further testified she was physically able to do the job. (Summary of evidence pp. 5, 6)

Applicant and her sister, Karla Vindell, both testified applicant's memory has been impaired since the stroke. It is difficult to ascertain how much of applicant's current recollection is accurate.

Ms. Loveall was clear in her testimony with regard to the chronology of events on September 25, 2002. There was no animosity between Ms. Loveall and applicant. Therefore, as to perceived stress at Bank of America, Ms. Loveall is deemed the more credible witness.

As to whether the discovery of a mistake at work would be sufficient to precipitate a stroke, it is not probable in this case. Dr. Jurkowitz, in his two reports dated November 17, 2004, stated Ms. Hernandez had a lacuna stroke not a hemorrhagic stroke. Dr. Jurkowitz stated a lacuna stroke is not precipitated by a sudden rise in blood pressure, even if such a rise had occurred on September 25, 2002. Dr. Alan Ross reviewed Dr. Jurkowitz' opinion and concurred.

There is no report from Dr. Schatz addressing Dr. Jurkowitz' discussion of the type of stroke Ms. Hernandez had. Although Dr. Schatz did review and comment on an earlier report of Dr. Jurkowitz in his report of February 11, 2004, it appears Dr. Schatz was not sent the November reports of Dr. Jurkowitz. Further, Dr. Schatz does not discuss the type of stroke Ms. Hernandez had at all. This apparent omission by Dr. Schatz and Dr. Schatz' unclear differentiation between a specific injury of September 25, 2002 and a continuing trauma over the entire period of employment, render his reports less persuasive as to the issue of causation.

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Therefore, based upon the testimony of Ms. Loveall and the medical reports of Jay Jurkowitz M. D. dated November 17, 2004 and Alan Ross M.D. dated February 17, 2005, it is determined applicant did not sustain a specific injury on September 25, 2002.

All other issues, with the exception of medical legal costs, have been rendered moot.

JANE MADSEN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

JM:am