STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SENTRIX PHARMACY AND DISCOUNT, LLC, AND KENNETH ZIELINSKI,

Petitioners,

vs.

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION; WAL-MART STORES, INC.; SEDGWICK CMS; BRIDGEFIELD EMPLOYERS INSURANCE COMPANY; PUBLIX SUPER MARKETS, INC.; LIBERTY INSURANCE COMPANY; EMPLOYERS INSURANCE COMPANY OF WAUSAU; FLORIDA CITRUS BUSINESS & INDUSTRIES; ASSOCIATED INDUSTRIES INSURANCE COMPANY, INC.; BROADSPIRE SERVICES, NEW HAMPSHIRE INSURANCE COMPANY, INC.; ILLINOIS NATIONAL INSURANCE COMPANY; and XL INSURANCE AMERICA, INC.,

Respondents.
_____/

Case Nos. 16-7158 through 16-7173, 16-7175, 16-7176, 16-7178 through 16-7183, 16-7199, 16-7200, 16-7233 16-7238 through 16-7247

FINAL ORDER DENYING REQUEST BY WAL-MART AND PUBLIX FOR ATTORNEYS' FEES, COSTS, AND INTEREST

By Order issued on May 11, 2018, the Administrative Law Judge relinquished jurisdiction as to Petitioner Zielinski (Zielinski), but reserved jurisdiction over any claims filed by a carrier or employer (collectively, carrier) or the Department of Financial Services (DFS) for attorneys' fees, costs, or other relief against Zielinski or any other person besides Petitioner Sentrix (Sentrix), provided such claims were filed with the Division of Administrative Hearings (DOAH) by June 11, 2018. A bankruptcy court had stayed claims against Sentrix, as a debtor in bankruptcy, but had permitted claims against Zielinski to proceed.

Two motions were timely filed. Respondents Wal-Mart and Publix (collectively, Wal-mart) filed a verified claim on June 8, 2018, seeking relief against Zielinski and former opposing counsel, Andrea M. Franklin (Counsel), and Respondent Illinois National filed a motion on June 11, 2018, seeking relief against Zielinski.

On November 7, 2018, Wal-mart filed a Notice of Settlement of Claim for Attorney's Fees, Costs and Pre-Judgment Interest Filed by Wal-mart . . . Against . . . Zielinski Only. According to the notice, the parties had disputed whether an injunction contained in Sentrix's plan of reorganization applies to Zielinski, but Sentrix and Wal-mart settled Wal-mart's claims for attorneys' fees, costs, and other relief against Zielinski, and the bankruptcy court recently approved the settlement. The notice states that Wal-mart is dismissing its claims against Zielinski, but not Counsel. By an Order to Show Cause to be issued after this Order, the Administrative Law Judge will determine whether he may relinquish jurisdiction: (1) of Zielinski as to the claims of Illinois National and (2) of Sentrix as to all matters, so as to be able to close the above-styled DOAH files.

It is clear from Wal-mart's notice of settlement that the Administrative Law Judge may now relinquish jurisdiction of Zielinski as to the claims of Wal-mart. Addressing only the claims of Wal-mart against Counsel, this Order determines that Wal-mart has not stated a claim on which relief may be granted. In making this determination, this Order treats as true Wal-mart's factual allegations other than any conclusory allegations as to improper purpose or frivolousness.

Wal-mart's verified claim for attorneys' fees, costs, and prejudgment interest against Counsel relies upon sections 120.569, 57.105, and 440.32, Florida Statutes, and Florida Rule of Civil Procedure 1.380. On July 5, 2018, Counsel filed a Motion to Strike Wal-mart's verified claim on the ground that Wal-mart had failed to comply with section 57.105(4), which is discussed below, and requested attorneys' fees and costs. On July 24, 2018, Counsel filed a response to the motion that addresses all grounds stated in the verified claim and requests the Administrative Law Judge to retain jurisdiction to award attorneys' fees and costs incurred by Counsel in defending charges that allegedly were unsupported by the facts and law.

Applied to administrative proceedings by section 57.105(5), section 57.105(1) authorizes an award of reasonable attorneys'

fees plus interest if the losing party has filed a claim or defense that is unsupported by the facts or law. However, as a precondition to recovery, section 57.105(4) requires the party seeking fees to serve the losing party with the motion, which may be filed only if, within 21 days after service, the losing party fails to withdraw or correct the challenged claim or defense. Courts require strict compliance with this safe-harbor provision. See, e.g., Anchor Towing, Inc. v. Dep't of Transp., 10 So. 2d 670 (Fla. 3d DCA 2009) (written warning that motion for attorney's fees would be filed is insufficient). Wal-mart's claim fails to allege compliance with the safe-harbor provision of section 57.105(4)--presumably because Wal-mart has not complied with section 57.105(4)--so it is not entitled to relief under section 57.105.

Section 440.32(1) authorizes a judge of compensation claims or "any court having jurisdiction of proceedings in respect of any claim or compensation order" to award "the cost of such proceedings" against the party, if the judge or court determines that the proceeding was "instituted or continued without reasonable ground." Section 440.32(2) authorizes the above-described judge or court to award "the cost of the proceedings, including reasonable attorney's fees," against the offending attorney, but not the party, if the judge or court determines that the proceeding was "maintained or continued frivolously." Section 440.32(3) authorizes the above-described judge or court to award "reasonable expenses," including a "reasonable attorney's fee," against the person signing a pleading, motion, or other filed paper that is not "well grounded in fact" and "warranted by existing law" or that is interposed for any "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

An Administrative Law Judge is not a judge of compensation claims, but, by some statutes, DOAH or an Administrative Law Judge may be treated as a "court," so the initial question is whether, in a reimbursement-dispute proceeding, an Administrative Law Judge has jurisdiction over a "claim or compensation order." Clearly, the reimbursement-dispute proceeding does not involve a "compensation order," so the dispositive question is whether a reimbursement-dispute proceeding involves a "claim," which is not defined in chapter 440.

A reimbursement-dispute proceeding involves a dispute between a carrier and a health care provider under section 440.13(7). A health care provider submits to the

carrier a "claim" for reimbursement for services that the provider has supplied to an injured employee. See § 440.13(3)(i), (4)(a), and (6), Fla. Stat. If the carrier disallows or "adjusts"--i.e., "reduces"--the claim, the health care provider may file with DFS a "petition" for resolution of reimbursement dispute. Although an allegedly unpaid or underpaid "claim" underlies each reimbursement dispute, DFS and DOAH acquire jurisdiction over a reimbursement dispute only upon the filing of a "petition," so as to suggest that section 440.32 is not applicable to a reimbursement-dispute proceeding. Reinforcing this conclusion is the availability of several other attorneys' fees provisions applicable to administrative proceedings under chapter 120--and thus a reimbursement-dispute proceeding--and likely inapplicable to proceedings subject to section 440.32. See Lane v. Workforce Bus. Servs., 151 So. 3d 537, 539-40 (Fla. 1st DCA 2014) (section 57.105 inapplicable to proceedings under chapter 440). Wal-mart is not entitled to relief under section 440.32.

Section 120.569(2)(e) requires all pleadings, motions, and other filed documents to be signed by the party or party's attorney and deems the signature to be a certificate that the person has read the document and, "based upon reasonable inquiry," has not filed it for "any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation." If a filing is signed in violation of these requirements, the Administrative Law Judge "shall" impose upon the person signing the document, the represented party, or both an "appropriate sanction," which may include "reasonable expenses" incurred due to the filing, including reasonable attorneys' fees.

In Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So. 2d 272 (Fla. 1st DCA 1990), the court considered section 120.57(1)(b)5., which, with minor differences as to the state of mind of the signer, is now section 120.569(2)(e). In the recommended order in a bid case, the hearing officer--on his own initiative, but mindful of the mandatory duty imposed upon him by the statute--awarded attorneys' fees against the bid protestor and in favor of the agency and intervenor, which the agency had selected to award the contract. The hearing officer found that the protestor's bid was nonresponsive and its protest was frivolous because it "presented no justifiable question for resolution and was without basis in fact or in law." Id. at 275.

The court noted the similarities between section 120.57(1)(b)5. and Federal Rule of Civil Procedure 11, so that case law under rule 11 would be useful in applying section 120.57(1)(b)5. The court characterized the prefiling inquiry imposed upon the person signing a filing as an "objective standard, 'reasonableness under the circumstances.'" Id. at 276. "Willfulness" is not required to be shown, and courts are not to use hindsight in assessing the conduct of counsel and parties in terms of "what was reasonable to believe at the time the pleading . . . was submitted." Id. at 276. The court added: "A reasonable inquiry may depend upon such factors as how much time for investigation was available to the signer, and whether the pleading . . . was based on a plausible view of the law." Id. at 276. Rule 11 is not intended "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," (citation omitted), but the prohibition as to an improper purpose is "to discourage dilatory or abusive tactics and to streamline the litigation process." Id. at 276. Relief under rule 11 focuses on the "nature of the conduct of counsel and the parties, not the outcome." (Citation omitted). Id. at 276.

Significantly, the court noted the importance of a timely remedy. The purpose of rule 11 is to deter subsequent abuses--a purpose that is poorly served "if the offending pleading is fully litigated and the offender is not punished until the trial is at an end." (Citations omitted). Id. at 277.

Lastly, comparing rule 11 and section 120.57(1)(b)5., the court concluded that the legislature did not intend to incorporate within the meaning of "improper purpose" the other prongs of rule 11 requiring factual and legal support for a filing. Id. at 277-78. The wisdom of the court's refusal judicially to add these prongs to section 120.57(1)(b)5. has been confirmed by the legislature's later decision to apply section 57.105 to administrative proceedings: if "frivolous" or "improper purpose" were to encompass the broad provisions of section 57.105(1) concerning a lack of factual or legal basis, then section 120.569(2)(e) would incorporate the broad standards of section 57.105(1) unmitigated by the 21-day safe harbor provision of section 57.105(4).

The Mercedes Lighting court stated that "a reasonably clear legal justification" for the filing precludes a finding of an improper purpose. Id. at 278. This statement is not inconsistent with the court's determination that an improper or frivolous purpose does not mean a lack of factual or legal

basis; this statement signifies that a factual or legal justification typically precludes a finding of an improper or frivolous purpose. The court cited with apparent approval a commentator's suggestion that an improper purpose might be exhibited by "excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." (Citations omitted). Id. at 278.

Turning to the issue before it, the Mercedes Lighting court determined that the challenger had a reasonably clear legal justification for bringing the bid protest, so as to negate any improper purpose, and the award of attorneys' fees had "severely weakened" the "preventative effect" of section 120.57(1)(b)5. because the hearing officer had not addressed the offending filing "at the earliest stage at which a violation of the statute can be determined." Id. at 279.

The first filings in the present cases were Sentrix's petitions for resolution of reimbursement disputes, which were signed by Zielinski, not Counsel, and filed with DFS in the latter half of 2016. An example of a petition is in Case No. 16-7158, where Zielinski stated that the carrier should have paid $14,940.91 because:

> A carrier who fails to respond to a written request for authorization by the close of the third business day after receipt of the request, consents to the medical necessity of such treatment. Upon closure of the third business day after Sentrix received confirmation that the request for prior authorization was received by the carrier, Sentrix relied upon Florida's presumption of authorization as set forth in Section 440.13(3)(d) and rendered medical services to the insured pursuant to an open workers' compensation claim.

DFS dismissed the petitions on the ground that a health care provider seeking reimbursement for services to an injured employee must receive authorization from the carrier prior to providing nonemergency services. Late in 2016, Counsel appeared by signing and filing a request for hearing on the dismissal in each of approximately 45 cases. An example of a request for hearing is in Case No. 16-7158, where Zielinski, as petitioner, and Sentrix, "acting on behalf of petitioner," stated that

section 440.13(3)(d) gives a carrier three business days to respond to a request for authorization from an authorized health care provider--failing which, the carrier is deemed to have consented to the medical necessity of such treatment. The petition alleged that Sentrix provided the carrier with a written request for prior authorization and implied that Sentrix provided the services to the injured employee thereafter. The petition added that, prior to filling a prescription, in the ordinary course of business, Sentrix contacted the prescribing physician to verify that the physician was authorized to treat the injured employee pursuant to an open workers' compensation claim. As reflected on the request for hearing, Counsel's address was at Sentrix, although the signature block did not indicate any relationship to Sentrix.

After DFS transmitted the files to DOAH--and retained hundreds more, pending the resolution of these cases--the Administrative Law Judge consolidated the cases and set them for hearing in February 2017. On December 16, 2016, DFS filed a Motion to Dismiss for a failure to allege preauthorization. On December 22, 2016, DFS moved for a continuance due to the impossibility of completing discovery in the large number of pending cases. On the following day, the Administrative Law Judge granted the motion for a continuance and reset the hearings for March 2017. On December 28, 2016, DFS filed notices to carriers advising them of the pending proceedings involving reimbursement claims that they had disallowed. Numerous petitions to intervene were filed in early 2017, and all petitions were granted. By this time, the style of each case had dropped Zielinski and showed Sentrix as the petitioner. On January 10, 2017, the Administrative Law Judge denied the December 16 motion to dismiss on the ground that the allegation of evidence of preauthorization satisfied the requirement to plead this condition precedent, but warning that the alleged evidence may not suffice as proof of preauthorization.

On January 17, 2017, Sentrix filed notices of voluntary dismissal, signed by Counsel, in two cases. As would be the case with subsequent notices of voluntary dismissal, the notices revealed no reason for dismissing these cases, and the Administrative Law Judge relinquished jurisdiction of each proceeding without objection. In these filings, Counsel used the same address as Sentrix, but now described herself as general counsel of "Vividus LLC."

On January 18, 2017, counsel for Wal-mart entered a notice of appearance. Also on January 18, 2017, Counsel initiated

discovery by filing notices of taking depositions, and carriers initiated discovery by filing notices of taking the deposition of Zielinski, the corporate representative of Sentrix, the pharmacist with the longest tenure with Sentrix, Dr. Samuel Gerson, and Nicholas Spagnuolo. Dr. Gerson was the physician who signed many of the prescriptions at issue.

On January 18, 2017, Counsel filed a Motion for Protective Order as to the deposition of Zielinski. The motion contended that opposing counsel did not coordinate the taking of Zielinski's deposition, Zielinski's deposition was not reasonably calculated to lead to the discovery of admissible evidence, and each proceeding was being prosecuted by Sentrix, not Zielinski, so a carrier could not notice Zielinski's deposition as though he were a party. The coordination argument was not frivolous, so it is unnecessary to assess the other arguments, which, at minimum, were unpersuasive. However, this discovery had been initiated by parties other than Wal-mart.

On January 18, 2017, DFS filed a response to the Motion for Protective Order. Interestingly, the response warned Counsel of her ethical duty not to make a false statement to the Administrative Law Judge, but the warning seemed to apply to Counsel's inadvertent reference to a carrier as "Respondent" when, at the time, the sole respondent was DFS.

On January 19, 2017, a carrier filed a Motion to Quash the depositions of various corporate representatives on the ground that Counsel had not coordinated the depositions with the carrier's counsel. On January 20, 2017, Counsel served various discovery requests on DFS.

On January 19, 2017, the Administrative Law Judge conducted a telephone conference call of nearly two hours' duration and memorialized the rulings by Order issued on the next day. The Order noted that counsel for Wal-mart did not participate in the conference call, likely because counsel had appeared in the case on the preceding day. The Order denied Sentrix's Motion for Protective Order and granted the carrier's Motion to Quash. The Order redesignated the carriers as respondents rather than intervenors and addressed a notice that had been issued by DFS, after the transmittal of the files to DOAH, ostensibly giving carriers a deadline by which to file requests to intervene. The Order provided each carrier with an opportunity, by the end of January 2017, to detail the grounds on which it relied in disallowing the claim of Sentrix for reimbursement, even if the carrier had failed to identify such grounds at the time of

disallowing the claim. The Order also continued the hearing to early May 2017.

On January 23, 2017, Wal-mart timely filed a statement of issues and motion to amend prior pleadings. The statement identified several carrier defenses: (1) whether the prescribing physician--typically, Dr. Gerson--had been authorized by the carrier by way of section 440.13(3)(d) (referral care) or 440.13(2)(f) (one-time change of physician exercised by injured employee); (2) if the prescribing physician had not been authorized, whether Sentrix could have been entitled to reimbursement; (3) whether the medication had been prescribed fraudulently by, among others, an attorney "knowingly assist[ing], conspir[ing] with, or urg[ing] any person to fraudulently violate any of the provisions of [chapter 440]," in violation of section 440.104(4)(e); (4) whether the prescription constituted overutilization or was medically necessary; and (5) whether the prescription violated practice parameters of treatment set forth in chapter 440. The statement reserved the right to add additional issues, but did not claim a right to attorneys' fees.

During this time period, several other carriers filed statements of the issues. On January 24, 2017, Counsel voluntarily dismissed another case.

On January 26, 2017, a carrier filed a motion for summary disposition on legal grounds. The carrier cited the statute limiting reimbursement to authorized health care providers and observed that the statute that implies medical necessity when the carrier fails to respond to the provider within three business days does not render the provider "authorized"; in other words, the three-day statute applies only to already-authorized health care providers. The carrier also noted that Sentrix was not a health care provider.

On January 27, 2017, DFS filed a Motion to Identify the Issues, which restated its defense of a lack of authorization. DFS stated that it did not object to the carriers' raising other defenses, but warned, "the sheer number of cases, co-Respondents [i.e., carriers], and viable issues to be raised should be balanced with the just, speedy, and inexpensive determination of all aspects of the case." Likewise, at various times, Sentrix objected to allowing the carriers, pursuant to the scope of a de novo hearing, to state grounds for disallowance not stated by DFS or by the carriers themselves prior to DFS's dismissal of the petitions. Sentrix's objection was more easily dismissed

than DFS's warning, but the Administrative Law Judge ruled that the carriers must be allowed to raise all defenses to reimbursement, so as to avoid the result of requiring them to reimburse Sentrix for claims against which good defenses existed.

On January 30, 2017, Counsel, on behalf of Sentrix, filed its Statement of the Issues. Much of the statement outlined the procedures governing reimbursement claims and reimbursement disputes. But the statement added statutory citations for the claim that a pharmacist is a health care provider and the right of an injured employee to choose his or her pharmacy or pharmacist. The statement conceded that Sentrix bore the burden of proof. Adding to the level of detail previously provided, the statement claimed that a carrier must respond within three business days to a "request for treatment by a pharmacy." It appeared that possibly the dispute arose from Sentrix's treatment of a pharmacy, rather than a pharmacist, as a health care provider, although that distinction appeared correctable. More ominous was the reference to treatment by a pharmacist as opposed to a prescribing, treating physician; although a pharmacist, like a physician is a health care provider under chapter 440, the statutes do not as clearly differentiate between their respective roles when the pharmacist is merely filling a prescription issued by a treating physician.

It also appeared from its Statement of the Issues that Sentrix may have been misapplying the statute that implied consent to medical necessity, possibly to imply authorization of a health care provider, even though the statute applies only to an authorized health care provider. In general, DFS identified these issues in its reply filed on February 8, 2017.

Also on January 30, DFS filed a Motion to Compel, which revealed a discordant approach to discovery taken by Sentrix and Counsel personally, whose reported comment as to the scope of discovery available to DFS and the carriers betrayed either a fundamental ignorance as to the scope of the proceedings that Sentrix had initiated or the scope of proper discovery within such proceedings. Motion to Compel, p. 8. Again, though, the lack of cooperation in discovery displayed by Sentrix and Counsel was not directed toward Wal-mart.

In the meantime, the carriers continued to serve discovery requests, including requests to take the depositions of the above-described affiliates of Sentrix. On February 9, 2017, Counsel, on behalf of Sentrix, voluntarily dismissed two more

cases. On the next day, counsel Craig M. Oberweger entered an appearance for three of the Sentrix affiliates whom carriers were trying to depose. In mid-February, carriers served additional discovery requests on Sentrix. Four days after entering an appearance, Mr. Oberweger filed notices that he would be unavailable from March 5 through April 1, 2017.

On February 15, 2017, the Administrative Law Judge issued an Order on the carrier's January 26 motion seeking a summary disposition of the cases. The Order concluded that a pharmacist is a health care provider, but that Sentrix had misread the key statute, section 440.13(3)(d). In particular, the first sentence of the statute restricts its scope to an authorized health care provider, and the second sentence, which does not restate that the health care provider must be authorized, sets forth the consequence of a failure of a carrier timely to respond to a request for authorization: i.e., deemed consent to the medical necessity of treatment. The Order concluded that the second sentence obviously applied only to an authorized health care provider. As the Order stated, Sentrix's interpretation made "no sense," was "illogical," and produced unnecessary conflict with other provisions of chapter 440, such as the key provision of section 440.13(3)(a) that predicates reimbursement for nonemergency services upon a health care provider's prior authorization by the carrier. However, noting the case law discouraging a premature dismissal of a case, the Order allowed Sentrix until February 22, 2017, to file amended allegations on the issue of authorization.

On February 20, 2017, Counsel, on behalf of Sentrix, filed a Motion to Enlarge Time. The motion noted that a dozen carriers involved in over 30 reimbursement claims had filed myriad theories on which the claims must be denied. Counsel stated that she needed time to research each new issue raised by each carrier; "conduct due diligence in surmising the facts underlying each issue," including whether the prescribing physicians were authorized to treat the injured employee; apply the law to the facts; and "formulate a cogent and legally sound argument." The motion asked for a 20-day extension.

On February 21, 2017, two carriers objected to the length of the extension sought on the ground that, by now, Sentrix should have already had a clear understanding of its authorization argument. By Order issued the same date, the Administrative Law Judge found merit in the opposing contentions of Counsel and the carriers and extended the filing deadline by 12 days to March 6, 2017.

On March 2, 2017, DFS filed a Motion for Sanctions based on Sentrix's supplemental response to discovery following an Order compelling it to file responsive answers. DFS noted that the supplemental responses were substantially the same as the initial responses, which had been deemed insufficient.

Also on March 2, an attorney from the "Office of General Counsel" of Vividus, LLC, filed a Motion to Withdraw Counsel--i.e., Counsel--that included no explanation the action. Counsel's final communication, prior to her response to Wal-mart's verified claim, occurred on March 31, 2017, when she filed a letter advising the Administrative Law Judge that, on March 1, 2017, Sentrix had filed answers to interrogatories under Counsel's efiling number without Counsel's approval; these are the responses addressed in DFS's March 2 motion for sanctions. The letter noted that, on the following day, Sentrix's general counsel had filed a document withdrawing Counsel from representation. The letter concluded by noting that Counsel wished to notify the Administrative Law Judge of this "deception."

The issue raised by Wal-mart's verified claim is whether, as to Wal-mart, Counsel filed one or more documents in violation of the above-described prohibitions against improper purpose or frivolousness during the six weeks between Wal-mart's appearance and Counsel's departure. She did not.

The petitions for resolution of reimbursement disputes, which do not bear Counsel's signature, were over-simplified demands for reimbursement of claims that Zielinski or Sentrix had submitted to carriers. The first filings by Counsel revealed a clear misreading of a key statute. Although the statutory scheme is not without ambiguity in addressing the reimbursement of pharmacists' reimbursement claims, Counsel's petitions did not reach these more nuanced issues. Certainly, it is impossible to insulate Counsel from a finding of improper purpose or frivolousness on the basis of a finding that her initial filings were supported by the law and facts. On the other hand, as noted by Mercedes Lighting, a lack of factual and legal support does not dictate a finding of improper purpose or frivolousness. In hindsight, it now appears that Sentrix and Zielinski never could have stated a claim on which relief could be granted, but, judging the matter at the time, such a conclusion would have been premature and, if appealed, would likely have yielded a remand from an appellate court.

Counsel's progress in refining her claims was not unreasonably slow. In the early stages of the litigation, due to the number of cases and carriers, over two dozen filings might be docketed in a single day. Coordinating depositions, obtaining the positions of opposing counsel, and other routine prehearing activities took Counsel much longer than normal, so as to leave Counsel with correspondingly little time for thinking and rethinking the theory of the case.

To her credit, in requesting an extension of time, Counsel seems to have given serious thought to the task that the Administrative Law Judge had assigned her in restating the claims for relief. Although it appears that her withdrawal from the cases may have been involuntary, Counsel voluntarily disclosed the deception that, it seems, Sentrix had perpetrated on the Administrative Law Judge and DOAH, as well as the opposing parties, when filing nonresponsive answers to interrogatories under Counsel's efiling number. On balance, it is impossible to characterize Counsel's filings during the relevant six weeks as reflective of an improper purpose or frivolousness. Additionally, Wal-mart's claim for attorneys' fees is untimely. Wal-mart is not entitled to relief under section 120.569(2)(e).

Rule 1.380(a)(4) authorizes an order requiring counsel to pay a movant's reasonable expenses, including attorneys' fees, in obtaining an order compelling discovery unless the movant fails to certify in the motion that it made a good faith effort to resolve the matter without court action, opposition to the motion was justified, or other circumstances render such an award as unjust. Undoubtedly, Wal-mart's verified claim describes some discovery abuses, but it is impossible to discern the perpetrator, given Counsel's brief representation of Sentrix, her apparently involuntary termination, and Wal-mart's failure to distinguish the acts and omissions of Counsel from those of the attorneys who later represented Sentrix. Certainly, for the early, brief period during which Counsel participated in these cases, the request for sanctions is also untimely. Wal-mart is not entitled to relief under rule 1.380.

Based on the foregoing, it is

ORDERED THAT:

1. The verified claim for attorneys' fees, costs, and interest filed by Wal-mart and Publix against Andrea M. Franklin, Esquire, is denied.

2. Ms. Franklin's claims for attorneys' fees and costs against Wal-mart's counsel is denied. Even if Wal-mart's section 57.105 claim is unsupported by the facts and law, Wal-mart's section 120.569(2)(e) claim, though denied, is not entirely without support by the facts and law, nor, on its face, was Wal-mart's claim filed for an improper purpose or frivolous. Also, Ms. Franklin would have been required to expend legal fees, without possibility of reimbursement, to address the section 120.569(2)(e) claim. Additionally, to the extent that Ms. Franklin's claims for attorneys' fees and costs rely on section 57.105, they fail for an apparent lack of compliance with the safe-harbor provision of section 57.105(4).

DONE AND ORDERED this 14th day of November, 2018, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of November, 2018.

COPIES FURNISHED:

David Davis Hershel, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399
(eServed)

Thomas Nemecek, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399
(eServed)

Tara L. Said, Esquire
Eraclides, Gelman, Hall, Indek,
Goodman, Waters, & Traverso
801 West Romana Street, Suite D
Pensacola, Florida 32502
(eServed)

Kimberly J. Fernandes, Esquire
Kelley, Kronenberg, Gilmartin, P.A.
201 South Monroe Street, Suite 5
Tallahassee, Florida 32301
(eServed)

Nicole Florentino, Esquire
Eraclides, Gelman, Hall, Indek,
Goodman, Waters, & Traverso
1661 Sandspur Road
Maitland, Florida 32751
(eServed)

James N. McConnaughhay, Esquire
McConnaughhay, Duffy, Coonrod, Pope,
Weaver, Stern, & Thomas, P.A.
1709 Hermitage Boulevard, Suite 200
Tallahassee, Florida 32308
(eServed)

James T. Armstrong, Esquire
Walton, Lantaff, Schroeder, & Carson, LLP
7680 Universal Boulevard, Suite 260
Orlando, Florida 32819
(eServed)

Kip O. Lassner, Esquire
Cole, Scott, & Kissane, P.A.
600 North Pine Island Road, Suite 500
Plantation, Florida 33324
(eServed)

Matthew J. Lavisky, Esquire
Butler, Weihmuller, Katz, & Craig, LLP
400 North Ashley Drive
Tampa, Florida 33602
(eServed)

Tabitha G. Harnage, Esquire
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0333
(eServed)

Tim Jesaitis, Esquire
The Law Office of Tim Jesaitis, P.A.
Post Office Box 388
St. Petersburg, Florida 33731-0388
(eServed)

Craig Oberweger, Esquire
Palm Law Partners, P.A.
1801 North Military Trail, Suite 120
Boca Raton, Florida 33431
(eServed)

Brian C. Dowling, Esquire
The Workers' Compensation Group, P.A.
100 Terra Mango Loop, Suite A
Orlando, Florida 32835
(eServed)

Jordan L. Rappaport, Esquire
Rappaport Osborne & Rappaport, PLLC
1300 North Federal Highway, Suite 203
Boca Raton, Florida 33432
(eServed)

Camille J. Iurillo, Esquire
Iurillo Law Group, P.A.
5628 Central Avenue
St. Petersburg, Florida 33707
(eServed)

Kenneth Zielinski
Sentrix Pharmacy and Discount, LLC
15688 80th Drive North
Palm Beach Gardens, Florida 33418

Sentrix Pharmacy and Discount, LLC
15688 80th Drive North
Palm Beach Gardens, Florida 33418

Jeffrey A. Rubinton, Esquire
Rubinton & Associates, P.A.
3801 Hollywood Boulevard
Hollywood, Florida 33021
(eServed)

Julie Jones, CP, FRP, Agency Clerk
Division of Legal Services
Department of Financial Services
200 East Gaines Street
Tallahassee, Florida 32399-0390
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.