Omega Acupuncture, PC v Lacewell
2023 NY Slip Op 33688(U)
September 19, 2023
Supreme Court, Kings County
Docket Number: Index No. 522601/2020
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of September, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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OMEGA ACUPUNCTURE, PC, RAF SPORTS CHIROPRACTIC PC, ROSS A. FIALKOV, DC, PAWEL GIERUKI, LAC, SILVER NEEDLE ACUPUNCTURE PC, NEW HEALTH ACUPUNCTURE PC, JOSEPH GAMBINO, DC, JJ&R CHIROPRACTIC PC, JOSEPH GAMBINO DC PC, WOO YUP KANG DC, BALDWIN CHIROPRACTIC PC, BO-KWAN KANG, PT, YOO & KANG PHYSICAL THERAPY PC,

Petitioners,

-against-

LINDA LACEWELL, in her official capacity as the Superintendent of the New York Department of Financial Services; the NEW YORK DEPARTMENT OF FINANCIAL SERVICES; CLARISSA M. RODRIGUEZ, in her official capacity as the Chair of the New York Workers' Compensation Board; and the NEW YORK WORKERS' COMPENSATION BOARD,

Respondents.

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ORDER

Index No. 522601/2020
Mot. Seqs. 1-3

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion, Affidavits (Affirmations) and Memorandum of Law	1-7, 16, 33-41; 42-43; 83-85
Opposing Affidavits (Affirmations) and Memorandum of law	22-31, 62-74; 46-48; 87
Reply Affidavits (Affirmations And Memorandum of Law	53-57, 79-82; 50; 88

Upon the foregoing papers in this Article 78 proceeding, petitioners Omega Acupuncture, PC, RAF Sports Chiropractic PC, Ross A. Fialkov, DC, Pawel Gieruki, LAC, Silver Needle Acupuncture PC, New Health Acupuncture PC, Joseph Gambino, DC, JJ&R Chiropractic PC, Joseph Gambino DC PC, Woo Yup Kang DC, Baldwin Chiropractic PC, Bo-Kwan Kang, PT,

and Yoo & Kang Physical Therapy PC (collectively, Petitioners)[1] move (Motion Seq. 1), by order to show cause, for an order prohibiting respondents New York Department of Financial Services (DFS), Linda Lacewell in her official capacity as the Superintendent of DFS (Superintendent), New York Workers' Compensation Board (WCB) and Clarissa M. Rodriguez in her official capacity as the Chair of the WCB (Chair) (collectively, Respondents) from:

> "enforcing, enacting and implementing the '12 RVU Ground Rules' (consisting of Medicine Ground Rules 1A and 1B of the Acupuncture Fee Schedule, Physical Medicine Ground Rules 1A, 2 and 3 of the Chiropractic Fee Schedule, and Physical Medicine Ground Rules 2 and 3 of the Physical Medicine Fee Schedule for Occupational and Physical Therapists) and the 'Treatment Scope Ground Rules' (General Ground Rules 1B, 6 and 7 of the Workers' Compensation Acupuncture Fee Schedule, and the General Ground Rule 10 of the Chiropractic Fee Schedule) contained in the Workers' Compensation Fee Schedules [and] determining that such rules and the no-fault insurance regulations adopting such rules are irrational, arbitrary, capricious, and contrary to statute..."

Respondents DFS, WCB, the Superintendent and Chair cross-move (Motion Seq. 2) for an order: (1) to dismiss the amended petition as improperly filed without leave of court; or, in the event that the court retroactively grants Petitioners leave to amend the petition; (2) to dismiss the Petitioners' challenge to the Daily RVU Cap, Chiropractic Ground Rule 10, their new State Administrative Procedure Act (SAPA) claim and the eleven new Petitioners based on statute of limitations; or (3) to give Respondents thirty (30) days to file an answer to the amended petition. Additionally, DFS, WCB, and the Chair cross-move (Motion Seq. 3), for an order to strike the arguments improperly raised for the first time in the Petitioners' reply memorandum of law and assembly caucus position paper.

Motion Seq. 1 and 2 were previously returnable before Justice Mark I. Partnow. By decision dated August 16, 2021, Respondents' cross motion was granted to the extent that the

[1] By decision dated August 16, 2021, Justice Mark I. Partnow granted leave to amend the original petition, retroactively. The amended petition added eleven new Petitioners and one additional cause of action.

court permitted the retroactive filing of an amended petition and extended Respondents' time to file an answer. The branch of Respondents' cross motion seeking dismissal of the (amended) petition based on statute of limitations grounds and Petitioners' order to show cause were held in abeyance pending the filing of Respondents' answer. The instant decision will address the portions of the prior motions held in abeyance in addition to Motion Seq. 3.

On November 18, 2020, the original Petitioners, who are two health providers, commenced this Article 78 proceeding, by order to show cause, by filing a verified petition challenging regulations promulgated by DFS under Insurance Law § 5108 and 11 NYCRR § 68.1. On March 11, 2021, the original Petitioners, along with 11 new health providers, filed an amended petition challenging regulations promulgated by DFS under Insurance Law § 5108 and 11 NYCRR § 68.1 ("Regulation 83") concerning the nature and amount of fees reimbursable by insurers for treatment (including medical care, physical therapy, chiropractic care, and acupuncture) provided to patients who were injured in motor vehicle accidents (NYSCEF Doc No. 40 at ¶ 36). The nature of reimbursable services and fees are set forth in fee schedules promulgated by WCB and adopted by DFS. Specifically, Petitioners challenge what they refer to as the "12 RVU Ground Rules" and the "Treatment Scope Ground Rules" contained in the fee schedules.

The "12 RVU Ground Rules" is a limit to reimbursement for treatment to 12 relative value units (RVUs) per patient per day, regardless of the number of providers a patient has visited or the number of treatment modalities a patient receives in a given day.[2] The challenged fee schedules allegedly denote that 30-45 minutes of physical treatment has a relative value of 8.8-11.91 RVUs, chiropractic spine manipulation has a value of 4.57-7.10 RVUs, and 30-35 minutes of acupuncture has a value of 9.88 RVUs (*id.* at ¶¶ 23, 52). According to the amended petition, the way the fee schedule calculates RVUs is such that the 12 RVU cap can be easily reached by a single provider who can provide less than an hour's worth of treatment leaving other providers with no RVUs to work with for that patient (*id.*). Petitioners argue that instead of capping the amount of treatment and reimbursement at 12 RVUs for *each* health provider, the 12 RVU Ground Rules prohibit providers from *collectively* providing more than 12 RVUs of treatment to a patient on any given day even though they are not employed by the same practice,

[2] An RVU is a numerical value that is assigned to a particular service (NYSCEF Doc No. 40 at ¶ 23).

have no idea if any other provider treated the patient, or how much treatment was provided to the patient (*id.* at ¶ 24). The Petitioners contend that the 12 RVU cap applies to various specialties, specifically noting that it applies to the entire gamut of services listed in the workers compensation fee schedule for some practitioner specialties (*id.* at ¶ 25). Thus, any treatment provided by acupuncturists, chiropractors, physical therapists, and occupational therapists are subject to the 12 RVU cap (*id.*). Petitioners allege that the 12 RVU cap applies to all the services listed in the WCB Fee Schedule and that, even if Health Provider B treated the patient after Health Provider A on a particular day, an insurance carrier can deny payment for Health Provider A's bill if Health Provider B used up most or all of 12 units (*id.*).

Petitioners assert that there is harm to them and others in their class as there is no way for a health provider who is treating a patient to know with any certainty whether the patient has already received treatment or will be subsequently treated by another provider on the same day, what type of treatment the patient has or will receive, or how many RVUs have or will be used up by the provider on that same day (*id.* at ¶ 26). Petitioners note that the 12 RVU cap applies even if different specialties are treating different diagnoses, irrespective of the patient's treatment history, and notwithstanding which body part or parts are being addressed by the treatment (*id.*). Moreover, they contend that patients cannot be expected to track how many RVUs of treatment they are receiving per provider on any given day, and if they neglect to or refuse to divulge the information to a subsequent provider, then the latter provider has no recourse if its bills are denied per the 12 RVU cap as the no-fault regulations prohibit providers from seeking reimbursement directly from the patient (*id.*). The petition further argues that since health providers have 45 days to submit a bill to the carrier and the carrier has 30 days to deny the bill, the provider would be unaware if it violated the 12 RVU cap until long after it provided treatment (*id.* at ¶ 27). The petition contends that a provider could be supplying a course of treatment for months before being made aware that its bills will not be reimbursed as a result of exceeding the 12 RVU cap (*id.*).

The amended petition claims that the financial harm imposed by the 12 RVU cap is self-evident and that services rendered by a health provider in good faith can be vitiated by what another unrelated provider does is unheard of, giving each treatment "to a toss of the dice in a game with terrible odds" (*id.* at ¶ 30). It asserts that running a medical office is an expensive endeavor in New York State and the probable impact of the 12 RVU cap is that it will drive

providers out of business (*id.*). Furthermore, petitioners claim that the impact has already begun to have an unsurprising effect by limiting treatment options to insured policy holders and insured parties in New York State, the very opposite result that no-fault law was created for (*id.*). Petitioners assert that upon information and belief, many health providers have ceased operation as a result of the adoption of this rule (*id.*). The specific ground rules challenged by what Petitioners collectively refer to as the 12 RVU ground rules are Medicine Ground Rules 1A and 1B of the Acupuncture Fee Schedule, Physical Medicine Ground Rules 1A, 2, and 3 of the Chiropractic Fee Schedule, and Physical Medicine Ground Rules 2 and 3 of the Physical Medicine Fee Schedule for Occupational and Physical Therapists (*id.* at ¶ 51).

The amended petition asserts that the Treatment Scope Ground Rules, the other set of rules at issue here, are also harmful in that they hamstring acupuncturists' and chiropractors' ability to bill common services that have traditionally been reimbursable under no-fault law (*id.* at ¶ 28). Petitioners contend that the rules are contrary to the law because Insurance Law § 5102 requires that reasonably necessary services be reimbursed and Insurance Law § 5108 requires Respondents to promulgate regulations with respect to charges for the professional health services in the no-fault context (*id.* at ¶ 29).

The challenged Treatment Scope Ground Rules concern regulations in the WCB Acupuncture Fee Schedule and the WCB Chiropractic Fee Schedule which: (1) require a patient to receive a referral for acupuncture treatment; (2) deny additional reimbursement for moxibustion [3] and other complementary integrative medicine techniques that are often combined with acupuncture; and (3) mandate that an acupuncturist may only bill for CPT codes (services) listed in the Acupuncture Fee Schedule (*id.* at ¶ 80). These ground rules are General Ground Rules 1B, 6, and 7 of the Workers' Compensation Acupuncture Fee Schedule, and General Ground Rule 10 of the Chiropractic Fee Schedule (*id.* at ¶ 74). The amended petition alleges that these regulations "hamstring" an acupuncturist's ability to bill for common services that have always been reimbursable under no-fault law and by limiting reimbursable treatment to four CPT codes, even though acupuncturists are licensed to perform the same heat, electric stimulation, pressure, infrared and other therapies that a medical doctor, chiropractor, physical therapist, or occupational therapist can perform (*id.* at ¶¶ 80-81).

[3] An external treatment, based on the theory of traditional Chinese medicine, which usually bakes acupoints with burning moxa wood.

The amended petition alleges that the foregoing approach is discriminatory, irrational, and contrary to Insurance Law § 5012, which authorizes reimbursement for reasonably necessary services, and Insurance Law § 5018, which requires Respondents to promulgate regulations with "respect to charges for professional health services" in the no-fault context (*id.* at ¶¶ 82-83). Since "professional health services" are defined as services that require licensing by New York State and are performed within the scope of that license, Petitioners allege that adopting a rule that disallows a class of health care providers from billing for treatment within the scope of their license is contrary to the enabling statute (*id.* at ¶ 29, 83).

The amended petition further asserts that Respondents violated the State Administration Procedure Act (SAPA) § 202 concerning rule making procedures by: (1) failing to provide either the full text or a description of the subject, purpose and substance of the proposed rules concerning the fee schedules, and merely incorporated them by reference; (2) incorporating fee schedules by reference that were created on July 3, 2019, the same date as SAPA, and therefore not in existence prior to the attempted incorporation; (3) failing to identify the address of the website on which the full text of the fee schedules had been posted so interested parties would have the opportunity to review and comment on the proposed rule; and (4) failing to provide sufficient public access to such information without extensive searching (*id.* at ¶¶ 86-90).

The amended petition also contends that Respondents violated SAPA 201-a by not accomplishing the objectives of the Rules and fee schedules in a manner which minimizes adverse impacts on existing jobs and promotes the development of new employment opportunities, and by failing to include an impact statement and methodology underlying its rule making (*id.* at ¶ 77).[4] Petitioners claim that Respondents violated SAPA 102-a, the small business regulation guides, by failing to post on its website one or more guides explaining the actions that a small business may take to comply with the 12 RVU Ground Rules (*id.* at ¶ 92).

Ultimately, the amended petition asserts three causes of action alleging that Respondents' enforcement of the 12 RVU Ground Rules and the Treatment Scope Ground Rules are: (1) arbitrary and capricious as against DFS and the Superintendent; (2) arbitrary and capricious as against WCB; and (3) is a violation of SAPA. Petitioners seek a temporary and permanent injunction restraining Respondents from enforcing such rules.

[4] While this paragraph is enumerated "77," it is the second paragraph labeled "77" in the amended petition and is located after paragraph 91 but before paragraph 92.

In their memorandum of law, Respondents set forth the legislative history and statutory scheme enabling the fee schedules. Respondents argue that the instant action was brought to frustrate the public interest and undermine long-established cost containment measures that the Legislature, WCB, and DFS have enacted to ensure patients have access to necessary treatments without rising insurance premiums. The Respondents contend that by asking the court to undermine the daily RVU Cap used by WCB in workers' compensation and by DFS in no-fault insurance matters, Petitioners seek to open a loophole in what Respondents describe as carefully calibrated fee schedules that are intended to limit waste, fraud, and abuse.

Respondents assert that Petitioners are profit motivated and fall outside the zone of interests served by the cost containment measures they are challenging. They further argue that the bulk of Petitioners' challenges are time-barred as the fee schedules they take issue with have been on the books for years and were promulgated in December 2018, well beyond the four-month Article 78 limitations period set forth in CPLR 217. Additionally, Respondents claim that Petitioners' challenge to Ground Rule 10 is similarly time-barred as it appeared in the 2018 WCB Fee Schedules, while WCB's decision to disallow separate coverage of moxibustion stems from a separate document called the Medical Treatment Guidelines that has been in effect since at least 2014.

Even if the court were to reach the rationality of the 12 RVU cap, Respondents argue that it should be upheld under the arbitrary and capricious standard as the cap plays an important role in preventing abusive overbilling. Without the cap, Respondents allege that an unscrupulous provider could simply bill an unlimited amount of unnecessary treatment in any given visit. Additionally, without the same cap applying across all practitioners and modalities, an unscrupulous medical practice could achieve the same result by passing a patient from one colleague to another. Respondents note that the daily RVU cap is a simple and straightforward measure to prevent overbilling but does not stand in the way of necessary treatment as a patient in need of procedures in excess of the cap can either obtain a variance or receive the treatment on a different day.

As to Petitioners' SAPA cause of action, Respondents assert that SAPA does not apply to fees under $100, and that the largest possible single fee in the challenged fee schedule is $46.17. Respondents claim that WCB and DFS have fulfilled SAPA's requirement as analyzed by SAPA's "substantial compliance" standard. They note that they circulated the content of the

proposed fee schedules to interested parties in a wide variety of formats, generating over 2,000 pages of public comments which lead to substantial alterations resulting in a stronger measure and an increase of the Daily RVU Cap from 8 to 12 units.

In its cross motion, Respondents contend that Petitioners' challenges to the 12 RVU cap, Chiropractic Rule 10, and their SAPA claim are subject to dismissal because they are time-barred. Respondents argue that the four-month statute of limitations applicable to Article 78 proceedings begins to run on the date that a regulation is promulgated. With respect to the 12 RVU cap, Respondents contend that the challenged regulations are enumerated in: (1) the 2018 WCB Fee Schedules, which were formally adopted in the State Register on December 26, 2018; and (2) the 34th Amendment to DFS Regulation 83 applying the 2018 WCB Fee Schedules to no-fault law, which was formally adopted in the State Register on February 27, 2019. Respondents note that the statute of limitations to challenge these regulations and the 12 RVU cap ran on April 26, 2019, and June 27, 2019, respectively.

Respondents further assert that Petitioners do not purport to challenge the 2019 WCB Fee Schedules, adopted on December 11, 2019, effective on January 1, 2020, and that in any event, these schedules did not make substantive changes to the daily RVU cap other than applying it to the newly covered field of acupuncture on the same basis as it previously applied to physical therapy, occupational therapy, and chiropractic treatment. Even if Petitioners were separately aggrieved by the 2019 WCB Fee Schedules, Respondents contend that the subsequent agency action does not bring the 2018 WCB Fee Schedules or the daily RVU cap into the limitations period or serve to toll or renew the statute of limitations. With respect to the Treatment Scope Ground Rules, Respondents contend that it is likewise time-barred because it appeared in the 2018 WCB Fee Schedule, which was promulgated in December 2018. Moreover, Respondents note that the only specific chiropractic practice they contend should have been covered, manipulation under anesthesia (MUA), has been disapproved since at least 2013 and thus any challenge to such disapproval in the instant action is untimely.

Regarding Petitioners' SAPA claim, Respondents argue that the four-month statute of limitations began to run when the challenged rule became effective. Respondents assert that the SAPA claim in the amended petition is vague and is seemingly only directed against WCB and

challenges the 2018 and 2019 WCB Fee Schedules.[5] Respondents state that Petitioners' SAPA claim would be time-barred against both fee schedules. As for WCB's 2018 Fee Schedules, Respondents note that it became effective on April 1, 2019, and thus the SAPA claim would have run four months later, on August 1, 2019. As for the 2019 Fee Schedules, Respondents assert that they went into effect on January 1, 2020, and the SAPA limitations period for the 2019 Schedules would have run on April 1, 2020. Additionally, Respondents point out that when the limitations period had 12 days left to run, Former Governor Cuomo tolled the limitations period via executive order until November 3, 2020. Respondents assert that the limitations period ran 12 days thereafter, on Monday, November 15, 2020. Since the amended petition, which Respondents contend first gave notice of the Petitioners' new SAPA claim, was not filed until March 10, 2021, Respondents argue that it is thus untimely.[6]

Respondents also contend that the SAPA claim put forth in the amended petition cannot be viewed as an outgrowth of their previous Article 78 arbitrary and capricious argument because the new argument is fundamentally distinct, asks different legal questions under a different standard of review, and concerns the administrative mechanics of rule promulgation in the State Register rather than the substance of the agency's action. Furthermore, the new SAPA claim sets forth a fundamentally new theory, where WCB's regulations are illegal not because they are arbitrary and capricious on the merits, as argued in the initial petition, but rather that they were promulgated "in a shrouded manner bereft of necessary transparency." Thus, since the addition of this new claim is beyond the statute of limitations and is entirely unrelated to their original pleading, respondents assert that it cannot be added at this late date in the special proceeding as the original allegations did not provide the Respondents with notice of the need to defend such allegations.

In opposition, Petitioners contend that their challenge to the 12 RVU Ground Rules is timely because the statute of limitations begins to run when a regulation becomes effective. Petitioners assert that they dispute DFS' adoption and application of the WCB Fee Schedules,

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[5] Respondents note that the new claim is confusing, makes no distinction between the four regulations at issue, or the two agencies that promulgated them, and does not mention DFS whereas other parts of the amended petition specifically designated DFS as a respondent and the actions it took.

[6] Although the original petition was filed on November 13, 2020, Respondents' position is that, for statute of limitations purposes, the SAPA claims cannot relate back to the filing of the original petition and the limitations period and must therefore be measured from the filing date of the amended petition.

which became effective on October 1, 2020, pursuant to emergency regulation, and claim that their filing of the original petition on November 18, 2020, was timely.

Petitioners further assert that Respondents' arguments with respect to the untimeliness of the newly asserted SAPA claim lack merit because: (1) the amended petition was properly filed nineteen days after Respondents filed their answer (well within the four-month statute of limitations from the effective date of the rule, pursuant to SAPA § 202 [8]); (2) the amended petition contains the same challenges to the same WCB Fee Schedules; and (3) the claims in the amended petition arise from the same transactions and occurrences as in the original petition, and make the same substantive arguments as to why those rules should be stricken. Essentially, Petitioners contend that their new SAPA claim should relate back to the original petition, as the original pleading gave notice of the transactions and occurrences underlying the SAPA claim.

In addition, Petitioners assert that the fact that Respondents raised the issue of SAPA compliance in their answer to the original petition, their supporting affidavits, and attached and referenced SAPA releases, reflects that the newly added claim is premised upon the same facts, transactions, and occurrences as the original petition. Petitioners thus argue that Respondents cannot claim that they are prejudiced by the newly added SAPA claim. Petitioners further contend that the fact that Respondents previously moved to consolidate this proceeding with *Rehab Acupuncture et al. v Linda Lacewell et al*, (Sup Ct, New York County, Rakower, J., index No. 158112/20), a case in which the Petitioners filed an amended petition which included a SAPA claim, is further proof that Respondents would not be prejudiced.

Respondents, in reply, reiterate that the time in which to challenge the 12 RVU cap has expired. In addition, Respondents dispute Petitioners' contention that the statute of limitations begins to run from the time that an individual Petitioner is aggrieved by such regulation, rather than from the date of the regulation's promulgation or issuance. Respondents assert that even if Petitioners were correct that the time limit in which to bring a special proceeding runs from the effective date of the regulation rather than from the date that it was promulgated, any challenge to the daily 12 RVU cap would still be time-barred because the 2018 WCB Fee Schedules, which contained the cap, became effective on April 1, 2019. Respondents further contend that DFS' subsequent adoption of the WCB Fee Schedules was a "ministerial action," and that the law does not allow Petitioners to save their time-barred claim against the 2018 WCB Fee Schedules by associating them with a later action taken by another agency. Respondents also dispute that the

SAPA claim relates back to the arbitrary and capricious claims in the original petition because it requires different factual allegations as to underlying conduct. With respect to the eleven additional petitioners, Respondents reiterate their argument that those claims are time-barred.

New York's Comprehensive Motor Vehicle Insurance Reparations Act (Insurance Law §§ 5101 et seq.) (CMVIRA) and the regulations implementing the Act (11 NYCRR §§ 65 et seq) (Regulation 68) (collectively, the no-fault law) require automobile insurers to provide personal injury protection benefits to insureds. Regulation 68, which governs the responsibilities of motor vehicle insurance carriers processing no-fault claims, currently requires insurance carriers doing business in New York to cover "basic economic loss" suffered by parties to motor vehicle accidents (*see* 11 NYCRR 65-1.1). "Basic economic loss" includes, but is not limited to, expenses incurred for medical services and supplies to injured persons (*see* Insurance Law § 5102 [a] [1]). It also includes chiropractic, physical therapy, acupuncture, and occupational therapy treatment (*id.*). Insurers are required to compensate injured accident victims for "all necessary expenses" incurred during to the automobile accident, up to a $50,000 maximum (*see* Insurance Law § 5102 [a] [1]).

Health providers who bill for services provided to motor vehicle accident victims must bill the patients' motor vehicle insurance carriers. There is no fee schedule for health services that was specifically enacted to apply in the no-fault context. However, Insurance Law § 5108 (a) directs that charges for health services "shall not exceed the charges permissible under the schedules prepared and established by the chairman of the workers' compensation board for industrial accidents, except where the insurer or arbitrator determines that unusual procedures or unique circumstances justify the excess charge." Insurance Law § 5108 (b) further directs DFS' Superintendent to consult with the WCB Chair to "promulgate rules and regulations implementing and coordinating the provisions of [CMVIRA] and the workers' compensation law with respect to charges for professional health services [specified in Insurance Law § 5102 (a) (1)], including the establishment of schedules for all such services for which schedules have not been prepared and established by the [WCB Chair]."

WCB previously created its own fee schedules, pursuant to statutory authority found in Workers' Compensation Law § 13 (a), which directs the Chair, after having received input from various New York State medical and professional societies and other interested parties, to prepare and establish a schedule of charges and fees for medical treatment and care in

accordance with the rules promulgated by the Chair. The Legislature's purpose in enacting Insurance Law § 5108 and the fee schedules promulgated thereunder is to "significantly reduce the amount paid by insurers for medical services, and thereby help contain the no-fault premium" (*Goldberg v Corcoran*, 153 AD3d 113, 118 [2d Dept 1989], quoting Governor's Program Bill, 1977 McKinney's Session Laws of NY, at 2449 [internal quotation marks omitted]).

Pursuant to Insurance Law § 5108 (b), DFS promulgated 11 NYCRR § 68.1, referred to as "Regulation 83," which adopted, "with appropriate modification," the existing WCB Fee Schedule for use in no-fault cases (*see* 11 NYCRR § 68.1 [a]). While DFS adopted the "charges" in the WCB Fee Schedules, it did not adopt the "reporting and procedure requirements" set forth therein (*see* 11 NYCRR 68.1 [b] [1]). Regulation 83 further states that "[t]he general instructions and ground rules in the workers' compensation fee schedules apply," but the rules referring to "workers' compensation claim forms, preauthorization approval, time limitations within which health services must be performed, enhanced reimbursement for providers of certain designated services, and dispute resolution guidelines" do not apply unless otherwise specified.

The challenged 12 RVU Ground Rules and Treatment Scope Ground Rules stem from the following four regulations adopted by WCB and DFS over the last three years:

(1) The 2018 WCB Fee Schedules. Proposed on June 6, 2018, revised on October 3, 2018, filed on December 11, 2018, adopted on December 26, 2018, and effective April 1, 2019. This Fee Schedule increased reimbursement rates for all practitioners by at least 5% - as the regulatory impact statement for the legislation states that prior, there had been no increases since 1996 - and increased the daily RVU cap level to 12 RVUs (from 8 RVUs) in response to public comment. This regulation also specified:

> "When multiple physical medicine procedures and/or modalities are performed on the same day, reimbursement is limited to 12.0 RVUs per patient per accident or illness or the amount billed, whichever is less. ***Note:*** When a patient receives physical medicine procedures and/or modalities from more than one provider, the patient may not receive more than 12.0 RVUs per day

> per accident or illness from all providers" (WCB R. 2678-2679, [7] NYSCEF Doc No. 66).

(2) The 34th Amendment to Regulation 83. Filed on February 6, 2019, adopted via emergency rulemaking on February 27, 2019, adopted as a final rule on August 7, 2019, and implementation delayed by 18 months until October 1, 2020, in order "to give no-fault insurers time to study the impact the fee schedule changes will have on loss costs so they may appropriately adjust premiums to cover those costs." By this Regulation, DFS adopted the 2018 WCB Fee Schedules promulgated by WCB Chair for use in no-fault.

(3) The 2019 WCB Fee Schedules. Proposed on July 3, 2019, adopted on December 11, 2019, and effective January 1, 2020. Adopted after the legislature amended Workers' Compensation Law § 13-b, to permit acupuncturists, physical and occupational therapists and other health disciplines to bill insurers directly. The proposed amendment added a new fee schedule for acupuncturists, and physical and occupational therapists.

According to WCB's Deputy General Counsel, Heather McMaster, the major significant impact of the 2019 Fee Schedules was promulgating a new fee schedule that combined acupuncture with physical and occupational therapy and subjecting the new schedule to the already existing 12 RVU cap.

(4) The 35th Amendment to Regulation 83. Adopted via emergency rulemaking on December 31, 2019, and finally adopted on April 22, 2020. This amendment adopted WCB's 2019 Fee Schedules for no-fault use, but delayed implementation to October 1, 2020, the same date that the 34th Amendment to the 2018 WCB Fee Schedules would go into effect primarily in order to give insures and providers enough time to update their bill processing systems.

CPLR 217, which specifies the time period in which an action must be commenced against a body or officer, expressly provides:

> "(1) Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the

[7] Respondents, in support of their verified answer, submitted the certified WCB administrative record (NYSCEF Doc Nos. 64-66), which is comprised of 3606 bates stamped pages, as well as the certified DFS administrative record (NYSCEF Doc No. 69), which is comprised of 1296 bates stamped pages.

> person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time.".

"A strong public policy underlies the abbreviated statutory time frame: the operation of government agencies should not be unnecessarily clouded by potential litigation" (*Matter of Best Payphones, Inc. v Dept. of Info. Tech. and Telecom.*, 5 NY3d 30, 34 [2006]; *Solnick v Whalen*, 49 NY2d 224, 232 [1980] [emphasis added]). "A determination is final and the statute of limitations begins to run when the agency's definitive position on the issue becomes readily ascertainable to the complaining party, so that the petitioner knew or should have known that it was aggrieved" (*Save The View Now v Brooklyn Bridge Park Corp.*, 156 AD3d 928, 932 [2d Dept 2017] [internal quotation marks omitted], quoting *Matter of Riverkeeper, Inc. v Crotty*, 28 AD3d 957 [3d Dept 2006]; *see New York State Assn. of Counties v Axelrod*, 78 NY2d 158 [1991]; *Matter of Zimmerman v Planning Bd. of Town of Schodack*, 294 AD2d 776 [3d Dept 2002]). "A determination is final and binding within the meaning of CPLR 217 when the decision maker arrives at a definitive position on the issue that inflicts an actual, concrete injury" (*SR PPW, LLC v City of New York*, 216 AD3d 969, 970 [2d Dept 2023], quoting *Town of Huntington v County of Suffolk*, 195 AD3d 851 [2d Dept 2021]; *see also Stop-The-Barge v Cahill*, 1 NY3d 218 [2003]).

The Court of Appeals "has identified two requirements for fixing the time when agency action is final and binding upon the petitioner" (*Matter of Best Payphones, Inc.*, 5 NY3d at 34). "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*id.*; *see Stop-The-Barge* 1 NY3d at 223; *see also Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]). "In the context of quasi-legislative determinations such as the one at issue here, actual notice of the challenged determination is not required in order to start the statute of limitations clock; rather, the statute of limitations begins to run once the administrative agency's definitive

position on the issue becomes readily ascertainable to the complaining party" (*Matter of School Admin. Assn. of New York State v New York State Dept. of Civil Service et al.*, 124 AD3d 1174, 1176-1177 [2d Dept 2015] [internal quotation marks omitted]; *see Matter of Riverkeeper, Inc.*, 28 AD3d at 961).

"When making the determination as to whether an agency determination is final, courts must consider the completeness of the administrative action and make a pragmatic evaluation as to whether a position has been reached that inflicts an actual, concrete injury" (*Smith v State of New York*, 201 AD3d 1225, 1228 [3d Dept 2022], quoting *Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing and Wagering Bd.*, 97 AD3d 1044 [3d Dept 2012]).

Here, the 2018 WCB Fee Schedules were promulgated on December 11, 2018, with the Notice of Adoption published in the December 26, 2018, issue of the New York State Register, to take effect on April 1, 2019 (NYSCEF Doc No. 65 at 999). Furthermore, the DFS Superintendent adopted the fee schedules that the WCB Chair prepared and established, 2018 WCB Fee Schedules, for use in no-fault pursuant to Insurance Law § 5108 on February 6, 2019, with notice of same being published in the New York State Register in the February 27, 2019, issue to take effect on October 1, 2020 (NYSCEF Doc No. 28 at 45).

In the instant action, the fee schedule was officially promulgated when WCB and DFS each published their notice of adoption in the New York State Register amending the fee schedules since the agencies' definitive position on the fee schedule was readily ascertainable to the petitioners at the time of such publication (*Matter of Gill v New York State Racing & Wagering Bd.*, 50 AD3d 494, 495 [1st Dept 2008] [holding that the causes of action accrued for statute of limitations purposes, at the latest, the day the rule was promulgated]; *see Lenihan v City of New York*, 58 NY2d 679, 681 [1982] [holding that the reclassification plan must be deemed to become fully operative and final and binding when the resolution was *officially promulgated*] [emphasis added]; *but see Matter of Hospital Assn. of New York v Axelrod*, 164 AD2d 518, 524 [3d Dept 1990]). The publication notice on December 26, 2018, in the New York State Register clearly stated that the WCB amended 12 NYCRR Sections 329-1.3, 333.2, 343.2 and 348.2 to update the fees paid for medical treatment in workers' compensation claims (NYSCEF Doc No. 65 at 999). The notice further included the text of the final rule and included the amendments to the relevant Title 12 NYCRR sections after assessing and addressing public

comment on the proposed changes. Likewise, the notice of adoption on February 27, 2019, in the same publication unequivocally provided notice that the DFS was amending 11 NYCRR 68.1 ("Regulation 83") to adopt the WCB fee schedule for use in no-fault pursuant to Insurance Law § 5108 and contained therein the text of the amended rule as well as specific reasons underlying the finding of necessity.

Thus, the court finds that Petitioners' challenge to the 2018 WCB Fee Schedules and its adoption by the DFS to apply to no-fault is untimely. Petitioners' challenge to the WCB's and DFS' adoption of said fee schedules expired on April 26, 2019, and June 27, 2019, respectively. There was no further action to be taken by the WCB or DFS, as the determination was clearly made to apply the fee schedules without further action by either agency. Contrary to petitioners' position, the statute of limitations did not begin to run on the effective date as the notice of adoption signaled the completion of agency action, inflicted an actual, concrete injury on petitioners, and left no doubt that there would be no further administrative action. Rather, the effective date of the change by DFS was delayed, according to the notice of adoption, to give insurers time to appropriately adjust no-fault premium rates to absorb the noticeable increase in no-fault claims costs (*id.*). Thus, in support of the strong public policy underlying the abbreviated statutory time frame, the court finds that WCB's and DFS' actions were final and binding at the time the schedules were officially promulgated, when notice of adoption was given in the New York State Register, rather than the effective date.

Furthermore, the portion of the amended petition challenging what is referred to as the Treatment Scope Ground Rules is likewise dismissed as untimely. It appears that the petitioners are challenging manipulation under anesthesia's and moxibustion's exclusion from the Chiropractic Fee Schedule, which has been disapproved since 2013, when the WCB established Medical Treatment Guidelines specifically disapproving manipulation under anesthesia for chiropractors. Since the use of manipulation under anesthesia and moxibustion have been disapproved since 2013, any challenge to those determinations must be dismissed as untimely.

To the extent the amended petition challenges the Chiropractic Fee Schedule rather than the prohibition of the use of manipulation under anesthesia, that challenge is dismissed as untimely. Petitioners' challenge to the Chiropractic General Ground Rule 10 is untimely as the challenged provisions appeared in the 2018 Chiropractic Fee Schedule for billing which, for statute of limitations purposes, became final and binding when notice of their adoption was

statute of limitations purposes, became final and binding when notice of their adoption was published in the New York State Register on December 26, 2018. Additionally, the 2018 Chiropractic Fee Schedule was adopted by the DFS Superintendent for use in no-fault pursuant to Insurance Law § 5108 on February 6, 2019, with notice of same being published in the New York State Register on February 27, 2019. Thus, the instant petition is untimely as the fee schedule became final and binding for use in no-fault, for statute of limitations purposes, on February 27, 2019.

As for petitioners newly included SAPA claim in the amended petition, "[t]he relation-back doctrine enables a plaintiff to correct a pleading error—by adding either a new claim or a new party—after the limitations period has expired" (*Marcotrigiano v Dental Specialty Associates, P.C.*, 209 AD3d 850, 851-852 [2d Dept 2022], quoting *Buran v Coupal*, 87 NY2d 173 [1995]). "[U]nder the relation-back doctrine, a [petitioner] may interpose a claim or cause of action which would otherwise be time-barred, where the allegations of the original [petition] gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original [petition]" (*Campbell v Bradco Supply Co.*, 192 AD3d 967, 969 [2d Dept 2021], quoting *Carlino v Shapiro*, 180 AD3d 989, 990 [2d Dept 2020]). "A new legal theory of recovery may be asserted, so long as it arises from the same transactions alleged in the original [petition], but the doctrine is unavailable where the original allegations did not provide the [respondents] notice of the need to defend against the allegations of the amended [petition]" (*Carlino,* 180 AD3d at 990, quoting *Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007]). Here, the newly added SAPA claim puts forth a fundamentally new theory in that the WCB regulations were promulgated "in a shrouded manner bereft of the necessary transparency."

The court finds that the relation-back doctrine does not apply and petitioners' SAPA claim must be dismissed as untimely since it challenges the procedures and administrative mechanics of rule promulgation rather than what was challenged in the original petition, that the enacted rules were arbitrary and capricious in that the government action was taken without sound basis in reason or regard of the facts (*see generally Matter of Peckham v Calogero*, 12 NY3d 424 [2009]). Contrary to petitioners' contentions in opposition to the instant cross motion, the allegations in the original petition gave no notice of the facts, transactions, and occurrences giving rise to the newly asserted SAPA cause of action as the original petition contested the

substance of the fee schedules and did not raise any issues regarding the procedures the agencies followed when promulgating the regulations at issue (*see Campbell,* 192 AD3d at 969).

Respondents' mot. seq. no. three seeks to strike new arguments made in Section IV of the Petitioners' reply brief. "The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to introduce new arguments or new grounds for requested relief" (*Ditech Financial, LLC v Connors*, 206 AD3d 694, 695 [2d Dept 2022], quoting *Castro v Durban.* 161 AD3d 939, 942 [2d Dept 2018]). Since the respondents did not have an opportunity to oppose the new arguments submitted in a reply, it would be improper for the court to consider and grant a petition based on arguments first raised in reply papers (*Harleysville Ins. Co. v Rosario*, 17 AD3d 677, 677-678 [2d Dept 2005]). In any event, since the amended petition was found to be time-barred, the court need not consider the arguments raised in support, in opposition, or in reply to Petitioners' motion new or otherwise.

All arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by this court, regardless of whether they are specifically discussed herein. Accordingly, it is hereby

ORDERED that Petitioners' motion (Motion Seq. 1) is denied as moot; and it is further

ORDERED that the branch of Respondents' cross motion (Motion Seq. 2) seeking to dismiss the amended petition as time-barred is granted; and it is further

ORDERED that the amended petition is hereby dismissed in its entirety; and it is further

ORDERED that the branch of Respondents' cross motion (Motion Seq. 3) seeking to strike new arguments made in Section IV of the Petitioners' reply brief is denied as moot.

This constitutes the decision, order, and judgment of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice