WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 2001-2434
Date: December 4, 2001
Panel: Heather McDonald
Subject: Cancellation of Personal Optional Protection Coverage — Notification Requirements

PERSONAL OPTIONAL PROTECTION (PROCEDURAL FAIRNESS) (LEGITIMATE EXPECTATIONS) — "X" was a self-employed roofing contractor who suffered serious head injury at work — X lacked personal optional protection ("P.O.P.") coverage at time of accident but was unaware that coverage cancelled due to non-payment — X requested decision to cancel P.O.P. be overturned on basis of doctrine of legitimate expectations and Board's failure to comply with *Assessment Policy Manual* #20:50:50 requirements — Appeal Division panel held that Assessment Department failed to follow requirements but breaches were technical and do not give rise to remedy — No denial of natural justice — Requirements directory, not mandatory, and failure to follow does not nullify P.O.P. cancellation — Consequence of non-remittance stated on P.O.P. application form and two written warnings in advance of cancellation fulfill duty of fairness — Manager's "rubber stamp" approval and post-cancellation registered mail notification make no substantive difference — Board's history of fairness to X does not create estoppel or other legal barrier to Board's right to cancel P.O.P. — Doctrine of legitimate expectations does not arise because X was not aware of requirements in policy #20:50:50 and nothing in conduct or words of collections officer could have given rise to expectation — Inconsistency between policy #20:50:50 and practice inappropriate and should be amended by Panel of Administrators.

Policy: *APM*: #20:50:50
Decisions: *Teskey* v. *Law Society of British Columbia* (1990), 71 D.L.R. (4th) 531 (B.C.S.C.); *Leprette* v. *Canada*, [1992] F.C.J. No. 1023 (F.C.T.D.) (Q.L.); *Furey* v. *Conception Bay Centre, Roman Catholic School Board* (1993), 104 D.L.R. (4th) 455 (Nfld. C.A.); *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

Cancellation of P.O.P. Coverage – Notification Requirements [assmt. dept.]
Appeal Division Decision No. 2001-2434

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Introduction

(1) "X" was a self-employed roofing contractor who suffered a serious head injury on May 14, 2000 when he fell from scaffolding while at work. Although X had applied for personal optional protection ("P.O.P.") from the Workers' Compensation Board (the "Board") in August of 1999 and P.O.P. coverage was in effect for him for some time after he made his application, the Board cancelled the P.O.P. on April 14, 2000. The Board cancelled X's P.O.P. coverage because no payments had been made on the P.O.P. account. The cancellation was retroactive to January 27, 2000. Thus at the time of his work injury, X lacked P.O.P. coverage. At the time of his accident, X did not know that the Board had already cancelled his P.O.P. coverage. Because he lacked P.O.P. coverage, the Board denied his claim for compensation for injuries sustained in the May 14, 2000 work accident.

(2) X subsequently paid assessments to the Board for the year 2000, and requested the director of the Assessment Department to overturn the earlier decision of the department to cancel his P.O.P. coverage. In a decision dated November 3, 2000, the director denied X's request.

(3) On appeal to the Appeal Division, X's position is that the Board's cancellation of his P.O.P. contravened Board policy in section 20:50:50 of the *Assessment Operating Policy Manual* (the "Manual"). X also relies on the doctrine of legitimate expectation in submitting that he reasonably believed the Board was not going to cancel his P.O.P. coverage without giving notice to him of the cancellation. X requests the Appeal Division to overturn the Board's decision to cancel his P.O.P.

(4) **Issue(s):** Did the Board contravene policy in section 20:50:50 of the Manual? If so, what remedy, if any, arises from the contravention? Are the procedural requirements in section 20:50:50 of Manual policy directory or mandatory in nature? Does the doctrine of legitimate expectations arise such that X's P.O.P. coverage should remain in effect for the year 2000?

Procedural Matters

(5) A workers' adviser from the Ministry of Labour's Compensation Advisory Services represented X in these appeal proceedings. I held an oral hearing on August 28, 2001 at which X and two witnesses appeared to give evidence on his behalf. As well, a collections officer from the Assessment Department provided evidence. The director of the Assessment Department also attended at the hearing to assist me in my inquiry under the *Workers Compensation Act* (the "Act"). The participation of the collections officer and the director was not for them to argue the case or to defend the Assessment Department's position in the appeal proceedings. Rather, they attended to provide factual information and background regarding the events particular to this case, and to describe the department's practice in cancelling P.O.P. coverage.

(6) My jurisdiction in this case arises under section 96(6) of the Act. An employer may appeal an assessment decision to the Appeal Division on the grounds of error of law, error of fact, or contravention of published policy. In this case, X is alleging that the Board contravened published policy in cancelling his P.O.P. coverage.

Background and Evidence

(7) X initially registered his roofing firm with the Board in March of 1998, and obtained P.O.P. coverage for himself at that time. This coverage remained in effect until October 22, 1998, when the Board cancelled it because X's account was delinquent. X had made no payments for P.O.P. and had not complied with the requirement to report payroll for the second and third quarter of 1998. X was injured at work on October 20, 1998. The Board accepted his claim for compensation and paid him compensation benefits on that claim, but the Board also deducted monies from his wage loss compensation and applied it to the outstanding balance owed for P.O.P. coverage.

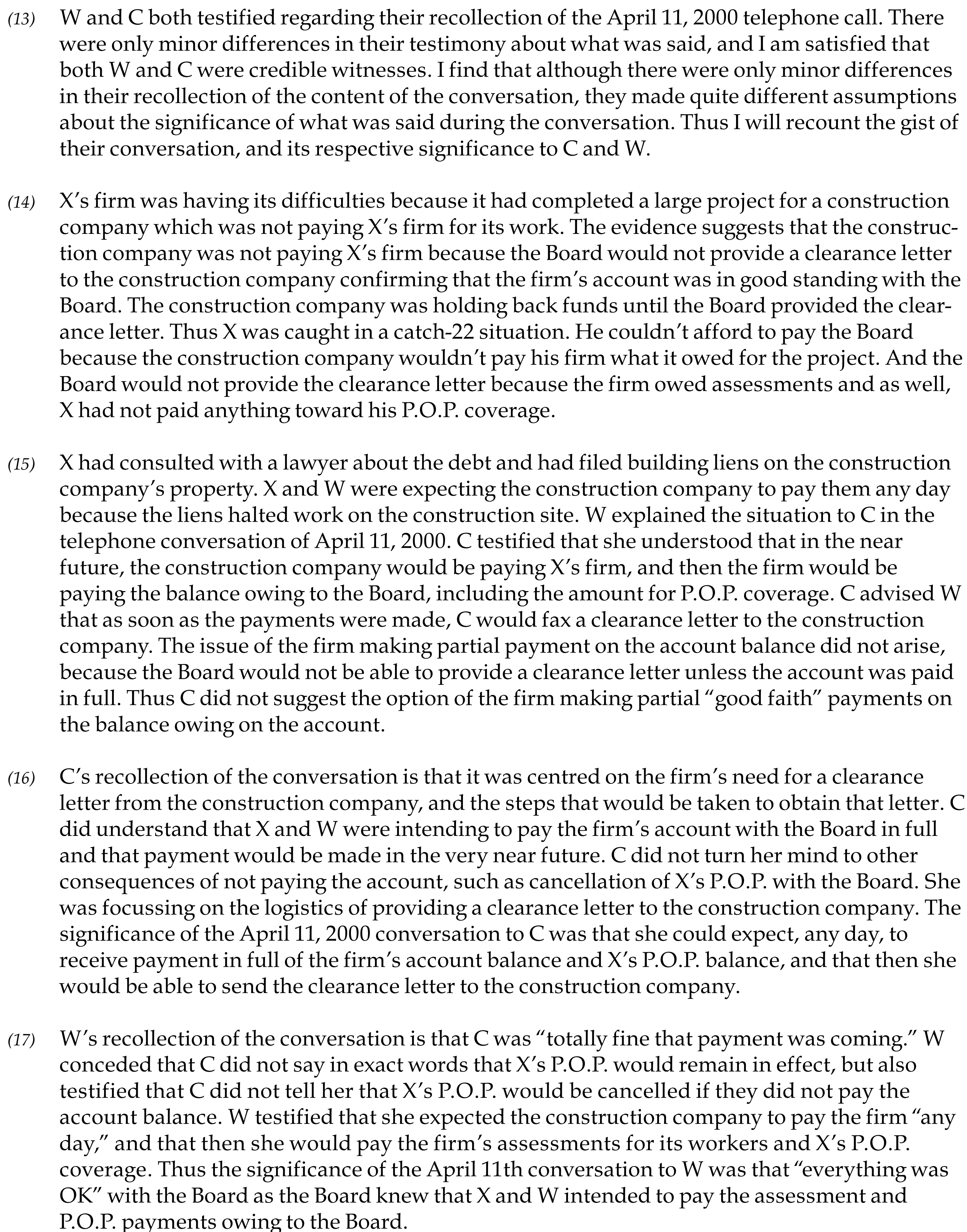
(8) On August 27, 1999, X contacted the Board and established an account for workers of his firm. On August 30, 1999, the Board sent X a letter confirming that it had reactivated his firm account and that assessment payments (regarding the payroll for his workers) were due on October 15, 1999. X also came in to a Board area office on August 30, 1999 and applied for P.O.P. coverage for himself. The Board granted X P.O.P. coverage effective August 30, 1999, the date he gave his completed application to the Board. The Board wrote to X on November 5, 1999, notifying him that P.O.P. for himself was effective August 30, 1999. The letter advised X that an assessment rate of 6.89%, the cost of this coverage was $151.58 per month. The letter enclosed a copy of X's application for P.O.P., accepted by the Board. The letter noted that the application outlined the terms and conditions of P.O.P. coverage, and that X should retain a copy for his records. X signed the application under a line stating "I have read, understood and accept the terms and conditions on the reverse of this application." One of the terms on the reverse side indicated that the Board may cancel P.O.P. for non-compliance of remittance or reporting requirements.

(9) On November 28, 1999, the Board sent X a letter which X concedes that he received. The subject line in the letter stated, in bold print; "PLEASE NOTE — Your Personal Optional Protection Insurance May Be Cancelled." The letter advised that X's account was outstanding and requested that he pay the account or the Board "will have no other option but to cancel your Personal Optional Protection if we do not receive your payment by January 27, 2000."

(10) Another letter dated January 31, 2000 from the Board to the worker followed this letter. The letter similarly advised X that his account had an outstanding balance, but this time advised that the Board would have no other option but to cancel the P.O.P. if it did not receive payment by March 29, 2000.

(11) X and his wife W testified at the oral hearing. They acknowledged receiving the Board's letters of November 28, 1999 and January 31, 2000, and conceded that they did not pay the account with the Board. W testified that when she received the first remittance, she put it aside. The next remittance was for a substantial amount, so substantial that it scared her. In February 2000, she telephoned the contact name on the invoices. That person was a collections officer, "C," in the Assessment Department. It turned out that there was an error in the amount and the account was revised significantly downward. W testified that there was no money to pay the Board because X hadn't been paid for sixty days. They were taking out loans to pay employees and to purchase materials. C testified that she spoke on the telephone with W on February 10, 2000 and that W gave her correct information regarding the firm's payroll. C sent this information to the employer service centre to make the necessary adjustments. C was also expecting a letter from X reducing his amount of P.O.P. coverage. C understood that the firm's account balance and X's amount owing for P.O.P. would be paid by February 28, 2000. There is a note on the employer's account from C documenting this phone call.

(12) On February 18, 2000, C left a voice mail message with W requesting her to phone, as the Board had not yet received any payment on the revised account balance. C and W engaged in telephone tag for some weeks until finally, on April 11, 2000, they were able to speak directly to each other on the telephone.



(13) W and C both testified regarding their recollection of the April 11, 2000 telephone call. There were only minor differences in their testimony about what was said, and I am satisfied that both W and C were credible witnesses. I find that although there were only minor differences in their recollection of the content of the conversation, they made quite different assumptions about the significance of what was said during the conversation. Thus I will recount the gist of their conversation, and its respective significance to C and W.

(14) X's firm was having its difficulties because it had completed a large project for a construction company which was not paying X's firm for its work. The evidence suggests that the construction company was not paying X's firm because the Board would not provide a clearance letter to the construction company confirming that the firm's account was in good standing with the Board. The construction company was holding back funds until the Board provided the clearance letter. Thus X was caught in a catch-22 situation. He couldn't afford to pay the Board because the construction company wouldn't pay his firm what it owed for the project. And the Board would not provide the clearance letter because the firm owed assessments and as well, X had not paid anything toward his P.O.P. coverage.

(15) X had consulted with a lawyer about the debt and had filed building liens on the construction company's property. X and W were expecting the construction company to pay them any day because the liens halted work on the construction site. W explained the situation to C in the telephone conversation of April 11, 2000. C testified that she understood that in the near future, the construction company would be paying X's firm, and then the firm would be paying the balance owing to the Board, including the amount for P.O.P. coverage. C advised W that as soon as the payments were made, C would fax a clearance letter to the construction company. The issue of the firm making partial payment on the account balance did not arise, because the Board would not be able to provide a clearance letter unless the account was paid in full. Thus C did not suggest the option of the firm making partial "good faith" payments on the balance owing on the account.

(16) C's recollection of the conversation is that it was centred on the firm's need for a clearance letter from the construction company, and the steps that would be taken to obtain that letter. C did understand that X and W were intending to pay the firm's account with the Board in full and that payment would be made in the very near future. C did not turn her mind to other consequences of not paying the account, such as cancellation of X's P.O.P. with the Board. She was focussing on the logistics of providing a clearance letter to the construction company. The significance of the April 11, 2000 conversation to C was that she could expect, any day, to receive payment in full of the firm's account balance and X's P.O.P. balance, and that then she would be able to send the clearance letter to the construction company.

(17) W's recollection of the conversation is that C was "totally fine that payment was coming." W conceded that C did not say in exact words that X's P.O.P. would remain in effect, but also testified that C did not tell her that X's P.O.P. would be cancelled if they did not pay the account balance. W testified that she expected the construction company to pay the firm "any day," and that then she would pay the firm's assessments for its workers and X's P.O.P. coverage. Thus the significance of the April 11th conversation to W was that "everything was OK" with the Board as the Board knew that X and W intended to pay the assessment and P.O.P. payments owing to the Board.

(18) The firm's lawyer, who was dealing with the building liens against the construction company, also contacted C by telephone. The lawyer did not testify at the oral hearing, but supplied a letter dated December 14, 2000, outlining his recollection of events. The lawyer's letter relates having a telephone conversation with a female collections officer regarding payment of the firm's account. He notes that the debt litigation between X's firm and the construction company was eventually settled, with the parties entering a consent dismissal order in the court. A condition of the parties' agreement was that monies owing to the Board by X's firm would be paid directly to the Board by the construction company's lawyers.

(19) Thus, unfortunately, the construction company did not pay X's firm in the prompt fashion expected by X and W in April 2000. The lawyers for the construction company did not pay until November of 2000, when litigation between X's firm and the construction company had settled. In the meantime, between April and November 2000, no payment was made on the firm's account or X's P.O.P. coverage. Neither X nor W contacted the Board to explain the delay or discuss other payment options. C, the collections officer, forgot to make a "bring forward" note to herself on the file, and in fact, completely forgot about the matter.

(20) The lawyer for X's firm indicated in his December 14, 2000 letter that:

> It was my understanding as a result of my conversation with the collections officer at the W.C.B. that they were simply looking for their payment and that it would presumably not be a problem for coverage of [X's] very serious accident claim.

(21) C could not remember, in any detail, the telephone conversation with X's lawyer and did not make a note in the firm log about the conversation. However, she was clear in her testimony at the oral hearing that she did not make anyone a promise that X's P.O.P. coverage would remain in effect while the Board waited for payment from the firm for assessments and from X for his P.O.P. coverage. In fact, she didn't discuss P.O.P. coverage at all. I find that C did not make any assurances in that regard to W or X's lawyer. The matter did not arise in C's conversations with them, as those conversations were focused on the issue of the clearance letter and the requirement that the firm's account be paid in full before the Board would issue a clearance letter.

(22) X's lawyer said that his understanding from his conversation with C was that "presumably" there would be no problem for coverage of X's very serious accident claim. I find that he has reconstructed this understanding after the fact, as X's very serious accident did not occur until May 14, 2000, and his conversation with C took place sometime in April 2000. I prefer C's direct evidence at the oral hearing that the matter of P.O.P. coverage never came up in any conversation during that time, as the issue was the clearance letter, not P.O.P. coverage. The more reasonable explanation for the understanding by X's lawyer is that he, like his client, simply assumed that "all was well" in general terms with the Board provided that the Board eventually received payment in full from X's firm. The matter of X's P.O.P. coverage continuing in the meantime, before the Board received payment, did not arise in the April 2000 conversations. At the time of the April 2000 telephone conversation, X's lawyer did not specifically turn his mind to that matter.

(23) W testified that over the next several weeks, she and X continued to expect the construction company to pay its debt. They were not worried about the Board cancelling X's P.O.P. coverage as W believed that the collections officer C was prepared to wait for payment. In the meantime, the firm started several new jobs for other clients. The evidence is that X's firm received payment for those jobs prior to May 14, 2000. However, X's living expenses (food, shelter and clothing for his family) took precedence over the debt to the Board, and the earnings from those jobs were thereby exhausted.

(24) C, the collections officer, testified that she had the authority to recommend the cancellation of a P.O.P. account, but in this case she did not make that recommendation, as she understood that payment from X and W was imminent.

(25) Officers in the Assessment Department's employers' service centre routinely check delinquent P.O.P. accounts, and produce a list of such accounts that is then given to employer service representatives ("E.S.R.s"). The director of the department testified that it is not unusual for there to be 5,000 such delinquent P.O.P. accounts that are about to be cancelled. The E.S.R.s review the delinquent list and crosscheck it with accounts receivable to ensure that the Board has not, in the meantime, received payments on the accounts. The E.S.R.s also check the log notes made by collection officers, and will make the decision to cancel a P.O.P. account if it is delinquent. They do not normally notify the collections officers of such a decision. A cancellation letter is a "system-generated" letter that is not signed by anyone, but simply refers to the E.S.R. title. The letter is produced by the computer system and then mailed to the delinquent employer at the address specified in the firm file. A copy of the letter is not kept on the firm file, but in a separate letter registration system.

(26) Section 20:50:50 of the Manual provides that the Board may cancel P.O.P. when an employer fails to pay assessments and the payment is in excess of two months overdue. It goes on to state as follows:

> Assessment Officers, Collection Officers, and Assessment Department staff may make the recommendation for cancellation of Personal Optional Protection for one of the above reasons, *and forward their recommendation to their respective section managers for authorization. Where cancellation is recommended and approved, all Personal Optional Protection on the account is to be cancelled*. In cases where the applicant is an independent operator (i.e. no payroll, Personal Optional Protection only), the entire account is to be cancelled.
>
> When Personal Optional Protection is cancelled by the Board for non-compliance with assessment requirements, *a registered letter confirming the cancellation must be sent to the applicant immediately*. This letter also states that the individual may re-apply for Personal Optional Protection when the account is brought to a current status.
>
> [emphasis added]

(27) The director of the Assessment Department testified that approximately ten years ago, the department changed its practices with respect to "housekeeping matters" regarding cancellation of accounts. Registered letters were often not being picked up by employers, so instead the department changed to using the regular mail system. Further, the officers had a better knowledge of accounts than would managers, who simply "rubber-stamped" the officers' recommendation to cancel accounts. Therefore the department also did away with the requirement that a manager approve a recommendation to cancel an account. The director testified that the Manual was not amended to reflect these changes, but that they are on the amendment agenda for the year 2001. In the director's view, the Manual requirements for a registered letter and manager approval are procedural matters that do not affect the substantive matter of account cancellation. For the director, the substantive policy is the circumstances in which the Board is entitled to cancel an account.

(28) The Board's copy of the cancellation letter to X is dated April 14, 2000. The recipient's address on the letter is the same address to which the Board sent its other letters, which X and W have acknowledged receiving. The Board cannot prove that this letter was in fact mailed to them, as it would be able to do if it had been sent by registered mail. X and W testified that they never received the Board's cancellation letter. There was also evidence from X's mother and W's mother that they both exhaustively went through the firm's correspondence with the Board and could not find the letter of April 14, 2000. They did, however, find the two previous letters advising that the Board might cancel X's P.O.P. coverage if assessments were not paid. Although it is a mystery as to what happened with the April 14, 2000 letter, I find that the witnesses were credible and that indeed, the letter either never arrived at X's address, or that it was somehow lost or misplaced by them without ever having being opened.

(29) The worker suffered a serious head injury on May 14, 2000. His wife, W, and his mother, P, were visiting him in the hospital intensive care unit when a Board representative advised them that there was no P.O.P. coverage for X. They were very surprised, as they had not received the cancellation letter. Subsequently they went through the firm's correspondence with the Board and could not find the letter. They requested a copy from the Board, and it took many months for the Board to find a copy and send it to them. There was no copy on the firm e-file and it took some time for the Board to realize that a copy of the letter was filed elsewhere, apart from the firm file, on a letter registration system.

(30) The evidence is that while X is recovering from his head injury, he has residual symptoms involving emotional distress, impaired attention and concentration, decreased visual-spatial memory, impaired motor skills and decreased vestibular function (poor saccadic eye movement). He requires occupational therapy to address safety and independence issues in the home, counselling for anxiety and depression, occupational rehabilitation, neurophysiotherapy, and other treatment. With respect to the occupational therapy, the evidence is that there are long waiting lists at the hospitals for such services available to the general public. Without funding from the Board or another insurer for private occupational therapy services, there is little chance that X will be able to receive occupational therapy in the near future.

Submissions on X's Behalf

(31) After the hearing, I sent the workers' adviser copies of case law and legal text excerpts relating to the doctrine of legitimate expectations, and the distinction between mandatory requirements and directory requirements. The Appeal Division provided the workers' adviser with an opportunity to provide further submissions with respect to that law, and he did provide comprehensive written submissions. I have carefully reviewed all of the submissions made on X's behalf, and will summarize the main ones for the purpose of this decision.

(32) X's position is that Manual policy in section 20:50:50 provides the Board with the discretion to cancel P.O.P. coverage, but it requires that the Board do so with fairness to the individual. A manager must approve a staff officer's recommendation to cancel the coverage, and there is a "safeguard" of sending immediate notice of cancellation by registered mail to the individual. Notice to the individual allows him or her to make other arrangements for coverage by either ceasing their operations and working for someone else who has coverage, or by seeking coverage from a private insurance firm, or by ensuring that they pay their accounts to the Board and have P.O.P. reinstated. X submits that when the Board fails to ensure that notice of cancellation is sent by registered mail, it unfairly deprives the individual of the right to dispute the decision, or to attend to his or her own safety by ensuring that some type of insurance coverage is in place before venturing to work in dangerous situations.

(33) X's related argument is that the doctrine of legitimate expectations supports a remedy in this case of overturning the Board's decision to cancel his P.O.P. coverage. He submits that under Manual policy in section 20:50:50, whether or not the registered mail and manager approval procedures are deemed necessary, the nature of the interest at stake in cancelling P.O.P. coverage is so important that cancellation should only be done when the highest procedural safeguards are followed.

(34) X submits that Manual policy in section 20:50:50 creates a legitimate expectation that the Board will follow the specified procedure to cancel P.O.P. coverage. The evidence was that X and W were intending to pay the Board and discussing payment with C, the collections officer. X's prior claims experience in 1998, when he was injured and the Board accepted his claim for compensation despite the fact that he hadn't paid assessments or P.O.P. coverage at that time either, would also lead to an expectation that coverage would be in place until he was officially informed that the Board had cancelled P.O.P. The workers' adviser says:

> That, along with the fact that [X] had received two letters on the current assessments indicating that payment may be cancelled and the coverage was indeed not cancelled, combined with the fact that they were proactive in dealing with the collections officer in attempting to confirm arrangements for payment, and on the fact that they believed they had an understanding in relation to payments and that no cancellation was going to be made on the basis of those understandings, we submit that there is a clear and legitimate expectation that no cancellation would have occurred until they were informed.

(35) The workers' adviser submits that X was prejudiced by the Board's failure to follow its own policy in section 20:50:50. X continued to work under the assumption that he still had P.O.P. coverage. His life has been thrown into turmoil by his inability, without Board funding, to obtain timely rehabilitation treatment to assist him in recovering from his head injury.

(36) The workers' adviser relies on *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, wherein Madam Justice L'Heureux-Dube stated:

> As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: . . . Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded . . . Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

(37) See also *Edison v. Canada*, [2001] F.C.J. No. 1064.

(38) X submits that the Board may change its practice or policy, but that it should not change published policy without consultation with, and knowledge to, affected parties. A procedure in published policy gives rise to a legitimate expectation that the Board will follow the policy. In this case, X was unaware that the Board had changed its policy. He had prior experience under another claim where the Board continued P.O.P. coverage despite the fact that his firm account and P.O.P. account were delinquent. X and W assumed, after their conversations with the collections officer, that the Board understood they would make good their delinquent account as soon as they received payment from the construction company; they believed that arrangement was acceptable to the Board.

(39) With respect to the issue of directory vs. mandatory requirements, the workers' adviser submits that the procedural requirements in section 20:50:50 are mandatory in nature. He distinguishes the Supreme Court of British Columbia decision in *Teskey v. Law Society of British Columbia*, (1990) 71 D.L.R. (4th) 531, which found a prompt notice requirement in Law Society Rules to be a directory requirement rather than a mandatory requirement. In that case a discipline committee found a lawyer guilty of professional misconduct. The executive committee of the Law Society was dissatisfied with the punishment, and referred the matter to the Benchers for review. The lawyer was notified seven weeks after the referral, whereas the Law Society Rules required the Society to give him "prompt notice in writing" of the referral. The court found that although the prompt notice requirement was not met, the requirement was directory only, considering that the primary objective of the review process was to protect the public. The purpose would be thwarted if the prompt notice rule were interpreted as being

mandatory. The court held that the Benchers did not lose their jurisdiction to conduct a review of the discipline committee's decision.

(40) The workers' adviser distinguishes that case by stating that the primary purpose of the *Workers Compensation Act* is to protect workers from the effects of injuries arising out of and in the course of employment. Further, while the affected lawyer in the *Teskey* case still retained a right to defend his position before the Benchers, in this case the Board's decision to cancel X's P.O.P. coverage leaves him with no recourse.

(41) The workers' adviser says that Manual policy in section 20:50:50 uses wording to ensure that prospective P.O.P. cancellations are subject to a manager's review, with notification of cancellation ensured by sending the notice by registered mail. He states that these requirements ensure that no worker or employer will be working without knowledge that the Board had cancelled their coverage. The adviser notes that, ironically, the job on which X was injured was one where he could easily have said to the primary contractor, "I will have to work under your coverage." He states that it would appear that X could have been covered under the primary contractor's insurance. The adviser says that X had a legitimate and reasonable expectation that the Board would not cancel his P.O.P. coverage until after he was notified of the cancellation. By way of remedy, he requests that the Appeal Division overturn the Board's decision to cancel X's P.O.P. coverage. He requests that X's P.O.P. coverage be reinstated effective January 27, 2000.

Analysis and Findings

(42) The facts are that the Assessment Department did not comply with section 20:50:50's requirement to forward a recommendation for cancellation of X's P.O.P. account to a section manager to authorize. Neither did it send X a letter by registered mail confirming the cancellation of his P.O.P. account.

(43) Therefore X has satisfied the threshold ground for appeal, as there was a breach of policy. But the issue arising from these facts is: what, if any, consequences arise from the department's breach of policy?

Directory or Mandatory Nature of Procedural Requirements

(44) In the *Teskey* decision, the court noted that each case must be decided on the nature of the particular requirement and the statutory and regulatory setting in which it is found. The dominant purpose of the legislation in question, as well as the issue of prejudice to persons, who might be affected by the failure to fulfill the procedural requirement, must be considered. If a person can show that he was deprived of a fair hearing, for example, or otherwise denied natural justice, because of the failure of an administrative agency to comply with a procedural requirement in policy or legislation, it is likely that the procedural requirement is mandatory rather than directory in nature.

(45) In the Federal Court decision of *Leprette v. Canada*, [1992] F.C.J. No. 1023, (the Appeal Division disclosed this case to the workers' adviser as well), the court was dealing with the failure of the Correctional Service's regional transfer board to comply with the time limits set out in a commissioner's directive to approve or deny a recommendation for involuntary transfer to a higher security institution. In that case, the decision to approve the transfer of the inmate was made four months beyond the time limits specified in the directive. The inmate requested the court to find that breach of the procedural requirements caused the regional transfer board to lose its jurisdiction to effect the transfer. Alternatively, he argued a breach of the duty to act fairly and a breach of the principles of natural justice. The court found that the commissioner's directives did not confer rights on inmates. Rather, they were procedural guidelines for the exercise of the administrative process within the penitentiary system, and simple non-compliance with those directives did not warrant an order quashing the decision to transfer. The court found that in the case before it, strict compliance with the time limits would have made no substantial difference to the inmate's rights. The court found that the transgression was of a technical nature, and did not result in a failure to comply with the duty to act fairly.

(46) I find that the procedural requirements in section 20:50:50 are directory rather than mandatory in nature. What this means is that I find that the fact that a section manager didn't approve the P.O.P. cancellation and the fact that a letter of cancellation was not sent by registered mail to X, does not nullify the P.O.P. cancellation.

(47) The Act has many purposes, including paying compensation to workers injured in the course of their employment, prevention of injuries in the workplace, and creating and maintaining an adequate accident fund so that there will be adequate resources to fulfill the other purposes of the Act. It would be difficult for me to find that the purpose of paying compensation to injured workers is a more dominant purpose than that of creating and maintaining an adequate accident fund. This is because without an adequate accident fund, the Board would not be able to pay compensation to injured workers. I agree with the submission of the workers' adviser that P.O.P. cancellation should not take place without adequate procedural safeguards, as the consequences of cancellation are so serious. However, I disagree with his submission that manager approval and registered mail delivery provide such safeguards. My view is that the Assessment Department, by advising P.O.P. applications in the application form of the consequences of non-remittance, and by sending written warnings in advance of cancelling P.O.P., does follow through with adequate procedural safeguards to protect the interests of those whose P.O.P. may be cancelled.

(48) I am satisfied that the procedural requirements at issue are technical requirements only. It makes no substantive difference to X whether a section manager approved the P.O.P. cancellation or whether an E.S.R. finalized the cancellation. As the Assessment Department director pointed out, the section managers were not familiar with the accounts to be cancelled and ended up simply rubber-stamping their approval of recommendations made by department officers who were familiar with the history of the accounts. Section 20:50:50 does not provide a right of hearing before the section manager to account holders, or other substantive right of review. Thus the failure to have a section manager approve the cancellation of X's P.O.P. account did not, in my view, amount to a substantive wrong or miscarriage of justice.

(49) Section 20:50:50 does not require, before cancellation is effective, that the Board first notify an individual with P.O.P. coverage that coverage is going to be cancelled. The policy states that the Board may cancel P.O.P. coverage where an employer fails to pay assessments and the payment is in excess of two months overdue. After the fact of cancellation, the policy stipulates that the Board must immediately send the applicant a registered letter confirming the cancellation and advising that the individual may reapply for P.O.P. when the account is brought to a current status. My characterization of this requirement is that it is a courtesy the policy requires the Board to extend to those individuals whose P.O.P. it has cancelled. It notifies them, after the fact, of the cancellation and tells them how to reapply for coverage. Whether the Board sends this letter by registered mail or regular mail makes no substantive difference to the individual whose P.O.P. coverage has already been cancelled. As the director pointed out, often individuals were neglecting to pick up the registered letters, and therefore the Board made the decision to send the letters by regular mail instead. The advantage to registered mail is an advantage to the Board, as with registered mail it can prove that it has in fact sent the letter. In this case, the Board can't prove that it sent the letter even by regular mail. There is no documentary evidence on any file indicating which E.S.R. may have generated and sent the letter. A copy of the system-generated letter appears in the letter registration system, but that is all.

(50) X argues that the evidence supports a finding that the Board never sent him the letter. He says that this failure prejudiced him as if he had received the letter, he would have taken steps to reinstate his P.O.P. coverage. In my view, it is immaterial whether or not the Board sent the letter in this case. This is because the Board had already fulfilled its duty of fairness to X by (a) notifying him on the P.O.P. application that non-compliance of remittance requirements could result in cancellation of his P.O.P. coverage and (b) sending him two letters, one in November of 1999 and one in January of 2000, warning him that cancellation of his account was imminent, and giving him a deadline to pay. I find that the procedural requirement in section 20:50:50 for the Board to send a letter, post-cancellation, to the individual whose P.O.P. has been cancelled, is not a procedure essential for fairness and justice to the individual, in circumstances where the Board has already given reasonable notice to the individual that P.O.P. cancellation is imminent.

(51) X and W ignored the first letter. This indicates that P.O.P. coverage was not a high priority for them. I understand that they were unsophisticated businesspersons struggling to keep their roofing business afloat while raising a young family. They were overwhelmed by debt and trying to juggle numerous priorities. But the firm's debt to the Board was low on their list of priorities.

(52) W did contact the Assessment Department after receiving the second warning letter, motivated by the very large amount alleged owing to the Board. She was successful in having the account balance revised downward significantly. On the evidence, I find that she led C, the collections officer, to believe that the firm's account, including P.O.P. assessments, would be paid in the very near future, most likely within a day or two. The conversation between C and W dealt with the requirements for the Board to send a clearance letter to the construction company, not with P.O.P. coverage. C did not make any promises or assurances to W that X's P.O.P. coverage would continue even if the expected payment from the firm were not to arrive

in the expected timely way. I find that neither C nor W consciously considered the implications of the firm's failure to pay its assessments for workers and X's P.O.P. They simply did not turn their minds to it at that time.

(53) Further, despite the fact that the construction company refused to pay until November of 2000, and despite the fact that the firm earned money from several other roofing projects between April 11 and May 14, 2000, X and W did not pay the assessments (under $2,000.00) owing to the Board. Their evidence is that they assumed the Board would be satisfied if eventually they paid the Board from the proceeds of the construction company's payments. I find that they may have assumed this from the lucky situation with X's prior claim in 1998, and from the fact that despite two warning letters, as of April 11, 2000, the Board had not yet made good on its stated intent to cancel X's P.O.P. coverage. But the Board's history of fairness to them does not create an estoppel or other legal barrier to the Board having the ultimate right to cancel X's P.O.P. coverage for failure to pay assessments that are over two months' overdue. The Board had given X reasonable notice in writing that it was about to cancel his P.O.P. coverage, and unfortunately, to his detriment, X and W did not take that warning seriously. I find that even if the Board failed to send him the post-cancellation letter in section 20:50:50, in the circumstances of this case, that requirement in policy was of a directory nature only. The Board's failure to comply did not result in a miscarriage of justice such that in this case I would find the P.O.P. cancellation to be a nullity.

The Doctrine of Legitimate Expectations

(54) In Canada, the doctrine of legitimate expectations usually operates to provide a party with a right to make representations prior to the making of a decision where the law would not otherwise require such a right, as a result of some promise, undertaking or action by a decision-maker which leads to a reasonable expectation that the opportunity to make representations would be given before the decision in question was made. As an extension of the rules of natural justice and procedural fairness, courts will apply the doctrine where a party has reasonably been led to believe, by the conduct of a public official, that his or her rights would not be affected without prior consultation. The law is clear that the doctrine only deals with procedural matters and is incapable of creating substantive rights. See Macauley and Sprague, "Practice and Procedure Before Administrative Tribunals," Chapter 40 [Carswell, 2001].

(55) If that were the extent of the doctrine's applicability, I would have no hesitation in finding that it does not apply in this case. X and W say that they had an expectation that the Board would not cancel X's P.O.P. coverage without first giving him formal notice, but section 20:50:50 does not support that as a reasonable assumption to make. The policy does not state that notice to the employer or individual is a pre-condition to cancellation. The policy does not provide an individual with a formal right of internal appeal or review prior to the Board's entitlement to cancel P.O.P. coverage. In any event, as I have earlier described in this decision, the Board had already given X two letters of warning that it was about to cancel his P.O.P. coverage. He had his opportunity to protest or challenge the circumstances upon which the Board was basing its right to cancel his P.O.P. coverage, and did not initiate any challenge or protest. In those circumstances, it was not reasonable for X and W to expect further written notice from the Board prior to cancellation of the P.O.P. coverage.

(56) Further, the case law indicates that an individual who hopes to rely on the principle of legitimate expectations must be able to show that he indeed had an expectation that was not fulfilled. See *Furey v. Conception Bay Centre, Roman Catholic School Board*, (1993), 104 D.L.R. (4th) 455 (Nfld. C.A.), discussed in Macauley and Sprague, *supra*, at p. 40.4. In this case, there is no evidence that X and W were aware of Manual policy in section 20:50:50 requiring either manager approval or confirmation of cancellation, after-the-fact, by registered mail delivery. In fact, the evidence is to the contrary. They were struggling in their small business, intent on getting money owed to them by the construction company. They were not aware of the precise procedural requirements of the Manual and were not relying on them with respect to P.O.P. cancellation procedure. The evidence satisfies me that their minds were not directed to the consequences of failure to pay the Board assessments, but rather to trying to pay their other debt obligations and to keeping their business afloat.

(57) The workers' adviser has relied on the *Baker* decision. That decision suggests that the principle of legitimate expectations can support a right to any procedure (not simply a right to be heard) which may have been promised to a person, whether by an agency's established policy or practice, conduct by a public official, or other manner capable of supporting a legitimate expectation. Macauley and Sprague note that this extension of the doctrine of legitimate expectations, beyond a right to be consulted, to any promised procedure, may have serious implications for public agencies. They state:

> It would appear, however, as a matter of fairness, to require notice of the variation to be given to enable those relying on the previous public statement of procedure to adjust to the demands of the new one prior to the decision which affects them being made and may require that an opportunity be given to the individuals to make representations as to the proposed change.

(58) In this case I find that the doctrine of legitimate expectations does not apply because X and W were not relying on Manual policy in section 20:50:50 as they were not even aware of what it said. I also find that neither the words or conduct of C, the collections officer, nor the Board's prior action in accepting the 1998 claim could give rise to a legitimate expectation that the Board would not cancel X's P.O.P. protection without giving further notice to X. X and W may have had such an expectation, but it was not a reasonable or legitimate one to make in the circumstances.

(59) The workers' adviser submitted that if the Board had sent X a registered letter in April of 2000, advising that his P.O.P. had been cancelled, then X would not have been prejudiced by working under the assumption that his P.O.P. coverage still existed. However, X was already taking the risk of working without P.O.P. coverage, as the Board had already, in writing, given him two deadlines to pay and warned him that his P.O.P. would be cancelled if he didn't pay. He did not heed those warnings to take the steps to protect himself with alternate coverage. Nor did he make it a priority to arrange to pay the Board the assessments, although his firm earned revenue from other projects in April 2000. With those circumstances, I do not find that the failure to send X a registered letter (or any letter) post-cancellation, caused substantial prejudice to X. X was working without P.O.P. coverage not because the Board misled him into thinking that he still had coverage, but rather because he had too many unfulfilled obligations in his life, and his obligation to protect himself with adequate WCB or insurance coverage was not a high priority.

(60) I do agree with the comment in Macauley and Sprague, however, that an agency should not vary its procedural practices or policies without notifying interested parties of the variation. The workers' adviser indicated that its office knew nothing of the Assessment Department's unilateral decision, made some ten years ago, to veer from section 20:50:50's procedural requirements. I have found that the lack of managerial authorization and failure to send the post-cancellation letter by registered mail are technical breaches of policy that do not give rise to a remedy of restoring X's P.O.P. coverage. Nevertheless, it is inappropriate to have published policy that does not reflect the true state of procedures in the Assessment Department. It is doubly inappropriate to have the discord between published policy and actual practice continue for ten years. I recommend that the Panel of Administrators promptly amend section 20:50:50 to make it accurate.

Conclusion

(61) The circumstances in this case are sad. X suffered a serious accident and is unable to benefit from the compensation provisions of the Act. These circumstances emphasize how very important it is to ensure that P.O.P. remittances are paid to the Board in a timely fashion, and that one must heed the Board's letter warnings that cancellation is imminent.

(62) I have found that the Board did contravene Manual policy in section 20:50:50 in that a manager did not approve the cancellation of P.O.P. coverage, and in that post-cancellation, the Board did not send a registered letter to X advising him of the cancellation. However, I have found that these breaches were technical in nature only, and do not give rise to the remedy requested by X. I have found that the procedural requirements at issue in section 20:50:50 were directory in nature, and that the doctrine of legitimate expectations does not arise in this case to justify restoring X's P.O.P. coverage effective January 27, 2000.

(63) Accordingly, for the foregoing reasons, I dismiss X's appeal of the November 3, 2000 decision of the director, Assessment Department, refusing to overturn the earlier Board decision to cancel his P.O.P. coverage.

Editors' Note: The names of the parties have been removed for privacy considerations. The text of the decision is otherwise unchanged.