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Workmen's Compensation -- Pendency of Appeal as Tolling Statute of Limitations

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cases and the standards to which professional people in general are held would seem to belie this construction.

It would seem that the immunity afforded by the statute in the instant case has been extended too far. The privilege (including the usual immunity statutes) traditionally only protect answers which injure in a *penal* sense. The effect of the decision has extended the statutory words "penalty or forfeiture" to an area more civil in nature. "The privilege against self-incrimination is a rule of necessity beyond which it should not be extended; its use should not be considered as affording the witness a certificate of good character."[15] Thus, in the words of Professor Wigmore, "The privilege cannot be enforced without enforcing crime, but that is a necessary evil inseparable from it and not a reason for its existence. We should regret the evil and not magnify it by approval."[16]

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WORKMEN'S COMPENSATION — PENDENCY OF APPEAL AS TOLLING STATUTE OF LIMITATIONS

Petitioner was awarded a workmen's compensation claim, but it was reversed by the full Industrial Commission. The Circuit Court and the Florida Supreme Court[1] affirmed the Commission's order. Thereupon, the petitioner attempted to have the Commission review the cause. *Held*, the Commission had no jurisdiction because of petition for review was filed over one year after entry of the Commission's original reversal.[2] The pendency of the petitioner's appeal from such order did not toll the running of the limitation statute. *Davis v. Combination Awning & Shutter Co.*, 62 So.2d 742 (Fla. 1953).

Since modification and review statutes are based upon statutory rights rather than constitutional rights,[3] the courts generally have interpreted them very strictly.[4] There are two ways in which the courts treat the time limits in the review statutes—as a jurisdictional question[5] or as

15. Scholl v. Bell, 125 Ky. 750, 102 S.W. 248, 261 (1907).
16. WIGMORE, EVIDENCE § 2251 p. 317 (3d ed. 1940).

1. Davis v. Combination Awning & Shutter Co., 487 So.2d 436 (Fla. 1950).
2. FLA. STAT. §§ 440.27, 440.28 (1951).
3. City of Miami v. Saco, 156 Fla. 634, 24 So.2d 115 (1945). See FLA. STAT. §440.27 for the statutory conditions that must be complied with in Florida for review of a compensation award.
4. Winrod v. McFadden Publications, 187 F.2d 180 (7th Cir. 1951); Mitchel v. Town of Niagee, 51 So.2d 198 (Miss. 1951); Thomsen v. Null, 248 S.W.2d 6 (Mo. 1952); Wills v. Stineman Coal & Coke Co., 170 Pa. Super. 446, 87 A.2d 104 (1952); Bucker v. Kapp Bros., 110 Pa. Super. 65, 167 Atl. 652 (1933); *cf.* Mallory v. Pittsburgh Coal Co., 162 Pa. Super. 541, 58 A.2d 804 (1948). See Young v. McKenzie, 46 So.2d 184 (Fla. 1950).
5. Manrose v. Miami Shipbuilding Corp., 156 Fla. 402, 23 So.2d 733 (1945); See Concord Realty Corp. v. Romano, 30 So.2d 485 (Fla. 1947).

a time limitation question.[6] In the former treatment the courts usually determine that if the time limit has run the Commission has lost jurisdiction over the case and cannot even look to the merits involved.[7] In the latter view the defendant-employer must plead the time period as an affirmative defense, thus giving it the character of a statute of limitations.[8] If the time period is treated as a jurisdictional question—such as it is in Florida—the problem arises as to whether an appeal will suspend the time limit.

Generally, if a party is prevented from exercising his legal remedy by the pendency of legal proceedings, *i.e.*, an appeal, the time thus consumed should not be counted against him.[9] However, the opposite result is usually reached when the legal proceeding relied upon to toll the statute was revoked by the party's own acts.[10] Likewise, when the denial of a claim has resulted because of some jurisdictional matter going to the merits of the cause[11] (such as a finding that the injury was not a direct result of the employment)[12] and the time period has run, so that the Commission's order is final, it has been held that there can be no rehearing or review of such order.[13] When there is a choice of remedies, the fact that a party selects one remedy does not toll limitations as against an action based upon another remedy.[14] Some jurisdictions take the view, however, that until the correctness of an award is finally determined by the appellate courts, the limitations period does not begin to run.[15]

The instant case seems to follow the doctrine set down by the New

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6. Sager v. General Electric Co., 269 App. Div. 801, 55 N.Y.S.2d 138 (3rd Dept. 1945); *cf.* Colonial Insurance Co. v. Industrial Acc. Comm'n, 27 Cal.2d 438, 164 P.2d 492 (1945) (the review statute is construed as a statute of limitations which may be waived).

7. See note 5 *supra*.

8. Colonial Ins. Co. v. Industrial Acc. Comm'n, 27 Cal.2d 437, 164 P.2d 490 (1945). To determine the scope of the local review or modification procedures, together with the time when such relief must be sought, the statutes of the various jurisdictions must be consulted.

9. State v. Stein, 133 Fla. 241, 183 So. 753 (1938); Whipps v. Kling Bros. & Co., 191 Okla. 163, 127 P.2d 166 (1942); See Berkstresser v. State Workmen's Ins. Fund 140 Pa. Super. 237, 14 A.2d 225 (1942) (statute was tolled to prevent party guilty of misconduct from setting it up as a bar).

10. Brink v. Kansas City, 217 S.W.2d 507 (Mo. 1949); Ottenad v. Mount Hope Cemetery & Mausoleum Co., 176 S.W.2d 62 (Mo. 1943); *cf.* Broyles v. State Personnel Board, 42 Cal. App.2d 303, 108 P.2d 714 (1941); Bostick v. Heard, 164 S.W. 34 (Tex. 1914).

11. Leeper v. Logan Iron & Steel Co., 131 Pa. Super. 172, 198 Atl. 489 (1938); *cf.* Gleyze v. Hale Coal Co., 149 Pa. Super. 18, 26 A.2d 141 (1942); *see* Davis v. Artley Construction Co., 154 Fla. 481, 487, 18 So.2d 255, 259 (1944). *But see* Hammond-Knowlton v. United States, 121 F.2d 192, 194 (2d Cir. 1941).

12. Stromberg Motor Device Co. v. Industrial Comm'n, 305 Ill. 619, 137 N.E. 462 (1922); *cf.* Weymer v. Industrial Comm'n, 404 Ill. 271, 88 N.E.2d 841 (1949).

13. Lopez v. Kennecott Copper Corp., 71 Ariz. 212, 225 P.2d 702 (1950); Lauderdale v. Industrial Comm'n, 60 Ariz. 443, 139 P.2d 449 (1943). *But cf.* West Cast Fruit Co. v. Hackney, 102 Fla. 1060, 136 So. 699 (1931); Howard v. Murdock, 83 Ga. App. 536, 64 S.E.2d 221 (1951).

14. D'Artenay v. Hauser, 138 Cal. App. 39, 31 P.2d 460 (1934); Brink v. Kansas City, 358 Mo. 845, 217 S.W.2d 507 (1949).

15. Reid v. Department of Labor & Industries, 96 P.2d 492 (Wash. 1939);

Jersey Supreme Court,[16] stating that a party may prosecute an appeal from the Commission's finding or seek a review on a change of conditions or facts, but he is not entitled to both remedies. Although workmen's compensation statutes are to be construed liberally in favor of the workman,[17] the Florida Supreme Court was very reluctant about changing the meaning and intent of the legislative act controlling the procedure by which the benefits are conferred upon injured employees.

This case was one of first impression in Florida. Although the decision may seem harsh, the case is in line with the many others establishing the procedure for appealing decisions of a commission's order. The Florida attorney should take full cognizance of the consequences of not suspending his appeal if he feels he has new facts of a nature sufficient to secure a reversal of the Commission's rejection order.

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Hunter v. Department of Labor & Industries, 68 P.2d 224 (Wash. 1937). *But cf.* Leschner v. Department of Labor & Industries, 185 P.2d 113 (Wash. 1947); State *ex rel* Stone v. Olinger, 108 P.2d 630 (Wash. 1940).

16. C. V. Hill Co. v. Drake, 14 N.J. Misc. 95, 182 Atl. 480 (Sup. Ct. 1936).

17. The Supreme Court of Florida has ruled that the Workmen's Compensation Act should be construed liberally, and all doubts resolved in claimant's favor. See S. H. Kress Co. v. Burkes, 153 Fla. 868, 16 So.2d 106 (1944); Fidelity & Cas. Co. of New York v. Moore, 143 Fla. 103, 196 So. 495 (1940).