WORKMEN'S COMPENSATION: Every employer must pay $100 into the Second Injury Fund in every case of total, permanent loss by his employee of the use of each of the human eyes, totaling $200 for the total, permanent loss of the use of both eyes, even though the loss occurs in the same accident.

SECOND INJURY FUND.

March 12, 1949

FILED
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Honorable Spencer H. Givens
Director
Division of Workmen's Compensation
Jefferson City, Missouri

Dear Director Givens:

This will acknowledge your letter requesting an opinion from this department respecting the construction of the provision in Section 3707, Chapter 29, Laws of Missouri, 1945, page 1998, requiring the payment of $100 by an employer to the Second Injury Fund in case an employee of such employer suffers the total, permanent loss of one eye. Your letter is as follows:

> "We are seeking an opinion from your department as a guide to follow in a circumstance described below:
>
> "The Second Injury Fund (Section 3707 R.S. Mo. 1939) is created by the payment into the Fund of specified amounts in cases of certain injuries and in cases of death where there are no dependents as defined by the law. For injury payments into the Fund the section above cited specifies as follows:
>
> "'Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; . . .'
>
> "This language is explicit as to 'one eye, one foot,' etc., which fact has led us to believe that in the simultaneous loss

> of two such members the payment required still would be $100 and not $200. We have felt that if payment of $200 were required in such an instance, the language of the statute would have been 'each eye, each foot,' etc.
>
> "Our question is, therefore, in those cases of simultaneous loss of two members mentioned in Section 3707 should we ask employer and/or insurer for the payment into the Fund of $100 or $200."

Your request for this opinion is directed to whether, in case such employee suffers the total, permanent use of both eyes in the same accident, the employer shall pay into the Second Injury Fund $100 for the loss of the use of both eyes as a unit, or whether in the alternative, such employer shall pay $200, that is to say, $100 for the loss of the use of each eye under such circumstances, treating each eye in the singular rather than with the other eye as a unit.

The specific sentence in said Section 3707, Chapter 29, Laws of Missouri, 1945, page 1998, on this question is as follows:

> "* * * Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; * * * ."

The language used in the sentence is definite in describing the loss of an eye in the singular. It states: "one eye". A part of the sentence is the provision that every employer in case of total, permanent loss of the use of one eye, in addition to regular compensation provided for in said chapter, shall pay into the Second Injury Fund provided in said Section 3707, the sum of $100 for the total or permanent loss of the use of <u>any such member</u> (underscoring ours.) There is no language used in said Section 3707, as so amended, which may be construed, we believe, as indicating the intent of the Legislature, in

using the singular, "one eye", to mean that the loss of the use of both eyes in the same accident could be construed or determined to include both eyes for the loss of the use of which the payment into the Second Injury Fund would be fixed at $100.

Section 3705, in defining the compensation for various injuries to the several members of the human body in specifications 43 and 44, treat the eyes as single members, and compute the payment of the complete loss of one eye at a certain sum, and the complete loss of the sight of an eye at another sum. The Second Injury Fund statute, Section 3707, is itself a compensation statute and so declared by the terms of the section itself. Here, however, we are not dealing with the question of payments out of the Second Injury Fund as compensation, but rather with payments as contributions to the Second Injury Fund for the loss of the use of members named in the sentence taken from said Section 3707, and hereinabove quoted. We cannot overlook the last phrase of the sentence of the said section we are now considering, and which we have hereinabove underscored. The Legislature, in the language used in considering the human eye as the subject matter and the context of the sentence as fixing the payment for the loss of one eye, and further saying that such payment was for the loss of the use of "any such member", intended to fix the loss for each eye distinct and separate from the other eye and in the singular, we believe.

The Second Injury Fund as a part of our Workmen's Compensation Act is of such recent enactment its terms have not been construed by the higher courts of our State nor the courts of other States where such statutes are in force. We have read like sections to what we call our Second Injury section in the statutes of numerous other States. But after diligent search we have failed to find a decision from any of the courts of other States where such statutes are in operation.

The Supreme Court of the State of Tennessee in a Workmen's Compensation case considered the question whether the organs of sight were to be considered as singular, separately, or as a unit. That case was one of construction of a statute of Tennessee on regular or ordinary compensation, and was not concerned in anywise with a Second Injury statute. The case is Catlett vs. Chattanooga Handle Co., reported in 55 S.W. (2d) 257. In that case the employee

had suffered the loss of vision of one eye by affliction during his infancy. The loss of the other and remaining eye was suffered in later life while he was employed, and subject to the Workmen's Compensation Act of the State of Tennessee. The question was whether he had suffered a total, permanent disability by the loss of the vision of the remaining eye by accident and if the two losses were to be considered together, so as to come within the terms of the statute of that State defining compensation for total, permanent disability as the result of the loss of both eyes. The court held that the loss by the employee of the one eye in infancy by affliction did not constitute an element of total, permanent disability when the loss of the remaining eye was sustained as an employee subject to the Compensation laws of that State so as to merit compensation for total, permanent disability. The Supreme Court of Tennessee in that case, in quoting one of its former decisions, on a similar question, held that the two organs of sight of the human body are not to be taken as a unit. Each stands, the court said, singly and by itself as the subject of compensation, if and when a loss of the member occurs. The Court in so holding, l.c. 258, said:

> "In prescribing compensation for injury to vision the Legislature did not consider the organs of sight as a unit, as of the organs of hearing. See Diamond Coal Co. v. Jackson, 156 Tenn. 182, 299 S.W. 802. Each eye was considered separately, and compensation related to a specific loss; the loss of one constituting permanent partial disability and the loss of both total permanent disability."

The last sentence in the fourth paragraph of your letter states:

> "We have felt that if payment of $200 were required in such an instance, the language of the statute would have been 'each eye, each foot,' etc."

We believe the language used by the Legislature in the enactment of this statute, and this particular

sentence in Section 3707, means that by using the word "one" in describing the human eye it was intended that it should be used interchangeable with "an" eye, "each" eye, "any" eye, or whatever word might bear a relationship to the subject matter and the preceding context of the sentence, and that the Legislature meant to designate each single eye as meriting the payment of $100 if the permanent loss of the use of "each" eye should occur to an employee. We shall endeavor to cite authorities, both text and judicial, to sustain this view by the following:

Section 655, R.S. Mo. 1939, Article 2, Chapter 4, under the subject of construction of statutes, states in the first subdivision of the rules of construction, the following:

> "* * *First, words and phrases shall be taken in their plain or ordinary and usual sense, * * * ."

There are numerous decisions by our Supreme Court affirmatively upholding this statutory rule. The text of 59 C.J., Section 577, pages 974 and 975, states the same rule, citing many Missouri decisions under note 20.

The word "one" as used to name the human eye denotes a noun. 46 C.J., page 1103, states this text in defining the word "one" as a noun:

> "A single person or thing."

The words "an" or "any" are defined in 2 C.J., page 1332, as interchangeable with the word "one". That text states:

> "An. Any; in its most absolute sense, any whatsoever; the. The word originally meant 'one' and is seldom used to denote plurality."

Volume 3, C.J.S., page 1399, gives the further definitive text on the meaning of the word "any", as follows:

> "It has been said that 'any' is derived from the Anglo-Saxon 'Aenig' meaning 'one'; and that in the singular the primary meaning of the word is one definitely, or indifferently, out of a number, although it has been said that strictly the word is applicable only to one of three or more. * * * ."

Volume 3, C.J., pages 231, 232 and 233, states that the word "any" often has the meaning of "each", "each one of all".

In Volume 3, C.J. pages 232, 244, the text states the word "any" is frequently used in its singular sense in numerous phrases, for instance, on page 244 of said work the phrase "any such" is given as the subject of such ususage, and cites under footnote 91 cases construing the meaning of the phrase "any such", some of which we will cite and quote, in part, here. This, we think, will aid in an understanding of the meaning of that part of said Section 3707 where the words previously underscored herein, "any such member" appear, and in determining the meaning of "one eye", as used in said section, to be the same as if it had said "each eye".

The construction of a statute of this State was before our Supreme Court in the case of State ex rel. Power Co. vs. Public Service Commission of Missouri, 84 S.W. (2d) 905. The case involved the definition and construction of the word "any" as used in Missouri Statutes Annotated, Section 5141, now our Section 5597. The statute being construed dealt with the payment of fees for the issuance of bonds or other evidence of indebtedness, taking into consideration the amount of the issue, and had a proviso that fees should not be charged when such issue was made for the purpose of guaranteeing, taking over, refunding, discharging or retiring "any" bond, etc. up to the amount of the issue guaranteed, taken over, refunded, discharged or retired. An attempt was made to collect fees in instances prohibited by the proviso on the ground that the word "any" included all bonds mentioned in said section regardless of the terms of the proviso. The Supreme Court of this State held such fees could not be lawfully collected. In the determination of the case, and in construing said section and defining the word "any", the Court, l.c. 908, said:

> "The statute (Mo. St. Ann. Sec. 5141, p. 6548) is plain and unambiguous. It says that 'No fee shall be charged when such (bond) issue is for the purpose of * * * refunding * * * any bond, note or other evidence of indebtedness up to the amount of the issue * * * refunded, discharged or retired.' (Italics ours.) The word 'any' is so well understood as hardly to require definition. In Shaw v. Lone Star Building & Loan Association, 40 S.W. (2d) 968, the Texas Court of Civil Appeals had under consideration a statute providing how and in what court 'any action' thereunder should be brought. The court said, 40 S.W. (2d) 968, loc. cit. 969 (1,2): 'The word "any" is defined and is used in this statute to mean "every" or "all," or "no matter what one." Webster's New International Dictionary. "Any" is also used as a term synonymous with "either" and is given the full force of "every" or "all." Bouvier Law Dictionary (Rawles 3d Rev.) P. 205; McMurray v. Brown, 91 U.S. (257) 265, 23 L. Ed. 321; People v. Fidelity & Casualty Co. of New York, 153 Ill. 25, 38 N.E. 752, 26 L.R.A. 295.'"

The construction of the definition and the interchangeable use of the word "any" with the words "other", "each" and "every" was before the Court of Appeals of New York in the case of Danziger vs. Simonson, 22 N.E. 570. The case was one where the Court was construing the word "any" with reference to the assertion of a lien as to whether the right was restricted to particular liens or whether the right was extended to the assertion of all liens. The Court in its discussion of the point, and in holding that the right extended to any and all liens, l.c. 571, said:

> "* * * Where a claimant is made a party defendant to any action brought to enforce any other lien, a notice of pendency, etc., must be filed. The word 'other' is preceded by the word 'any'; and, under the rule of Flanagan v. Hollingsworth, we must

> give each word its appropriate meaning. The word 'any' is used in various ways, and may convey different meanings. It may mean one or many, each or every. In some instances it means an indefinite number. The connection in which it is used in the statute under consideration appears to us to indicate each and every, and is the same as if the statute read, 'any action brought to enforce each and every other lien.' It consequently appears to us that the statute is broad enough to include a mortgage lien, and is not confined to mechanics' liens."

The phrase "any such member" as it appears in the sentence hereinabove quoted from said Section 3707, refers to the preceding words of "one eye, one foot, one leg, one arm or one hand." A like phrase, "any such case", was construed as to its meaning by the Supreme Court of Pennsylvania in the case of Commonwealth vs. Burrell, 7 Pennsylvania State Reports 34. On the point, the Court, l.c. 37, held:

> "Now what are we to understand by the words 'any such case?' Upon every principle of grammatical relation and obvious meaning, we must intend that the legislature had in view the cases specified in the same section immediately preceding the final clause. It was of these it had been speaking, and it was of these it was continuing to speak. * * * ."

The word "any" is used interchangeably with, and may have the same meaning as "either", or "any such". It was so held by the District Court of Appeals of Division No. 2, Los Angeles, California, and a review thereof was denied by the Supreme Court of the State of California in the case of Powell vs. Allan et al., reported in 234 Pac. 339. The Court in so holding, l.c. 345, said:

> "It has been held that 'any' should be construed as synonymous with 'either' whenever it is necessary to do so in order to prevent destroying the evident

intention of the Legislature. Fenet v. McCuiston, 105 Tex. 299, 303, 147 S.W. 867; Dowling v. State, 5 Smedes & M. (Miss.) 664; State v. Antonio, 2 Tread, Const. (S.C.) 776, 783; 3 C.J., p. 231; Words and Phrases, vol. 1, p. 414; note to State v. Kansas City, supra, Ann. Cas. 1916E, p. 11.

"We think that the word 'any', as used in the phrase 'in any event' in section 32 of this act, should be construed as synonymous with the word 'either' or as the equivalent of the term 'any such,' and that when the Legislature said that 'in any event' shall be competent for the city to advance money to the special fund in exchange for bonds, it had in mind that if it became necessary for the city to advance money to that fund for the purpose of paying incidental expenses or awards of damages, or both, then and in either of those events, or in any such event, it would be competent for the city to make the advances and to receive bonds in exchange. * * *."

It would thus appear that by the provision in said Section 3707, as amended, Laws of Missouri, 1945, page 1998, it was the intent of the Legislature in its enactment, where it provides "Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member;" that it means the same as if the section read "each eye", "each foot", "each leg", "each arm", or "each hand".

CONCLUSION.

It is, therefore, the opinion of this department that in Section 3707, Chapter 29, as amended, Laws of Missouri,

1945, page 1998, where it is provided that: "* * * Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; * * * " the Legislature intended said Section to mean, and said section does mean, that the sum of one hundred ($100.00) dollars shall be paid for the total, permanent loss of the use of each separate, single eye, even though the total, permanent loss of the use of both eyes may occur in the same accident. The section does not mean, as we view it, that under any circumstances shall the employer pay only the sum of one hundred ($100.00) dollars for the loss of the total, permanent use of both of the human eyes. It does mean that in case of the loss of both of the human eyes, one at a time, or both at the same time, the total payment shall be for the total, permanent loss of the use thereof of two hundred ($200.00) dollars.

Respectfully submitted,

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APPROVED:

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