IN THE SUPREME COURT OF MISSOURI

SC NO: 88618

FLOYD WILCUT (Deceased),
and
SHARON WILCUT,
Appellants,

v.

INNOVATIVE WAREHOUSING,
Respondent,

and

AMERICAN MANUFACTURER'S MUTUAL INSURANCE CO.,
Respondent.

SUBSTITUTE RESPONDENTS' BRIEF OF INNOVATIVE WAREHOUSING AND AMERICAN MANUFACTURER'S MUTUAL INSURANCE COMPANY

EVAN & DIXON, L.L.C.
Mary Anne Lindsey #37314
George T. Floros #32166
515 Olive Street, Suite 1100
St. Louis, MO 63101
(314) 621-7755
(314) 621-3136 FAX
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

In the instant workers' compensation action, Sharon Wilcut sought death benefits for the death of her husband, Floyd Wilcut, following a work related accident occurring

on 4/13/00. After the accident, Floyd Wilcut was taken to a hospital for treatment. Employee's treatment was complicated by his refusal to accept a blood transfusion, based upon his beliefs as a Jehovah's witness. He died on 4/20/00 from cardiac ischemia and severe anemia. On 2/9/05, ALJ Knowlan held a hearing on the Claim. Thereafter, on 5/16/05, ALJ Knowlan issued his Award, ruling that employee's 4/13/00 accident was a substantial factor in causing his injuries and subsequent death, and that employer had failed to satisfy its burden of proof on the issue of unreasonable refusal of medical treatment under Section 287.140.5.

Employer filed a timely Application For Review with the Industrial Commission. On 6/7/06, the Industrial Commission issued its Final Award Denying Compensation, reversing the Award of ALJ Knowlan. Therein, the Industrial Commission held that employee's refusal to accept life-saving blood transfusions was unreasonable and, thus, broke the medical causal link between the work related accident and employee's death. The Industrial Commission concluded that employee's death did not arise out of and in the course of his employment, and that employer was not liable for the payment of death benefits.

On 6/20/06, Sharon Wilcut filed her Notice of Appeal with the Industrial Commission.

On 6/19/07, the Missouri Court of Appeals, Eastern District, issued its Opinion. Therein, the Eastern District reversed the Industrial Commission's Award, finding that the Industrial Commission's decision was not supported by competent and substantial

evidence, in that it did not adequately accommodate employee's religious beliefs. The Court interpreted the Workers' Compensation Act as requiring that religious beliefs be liberally considered. It found that employee invoked his strong and sincerely held religious beliefs against a blood transfusion. Finding that this refusal was not unreasonable in light of the employee's beliefs, the Court held that claimant was owed death benefits. Judge Romines filed a Dissenting Opinion. Therein, Judge Romines concluded that the majority result violated the First Amendment of the United States Constitution, and Sections 5 and 7 of Article I of the Missouri Constitution. Pursuant to Rule 83.03, Judge Romines requested transfer to the Missouri Supreme Court. On 6/19/07, the Supreme Court transferred the instant case from the Court of Appeals.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals, pursuant to Article V, Section 3 and Article V, Section 10 of the Missouri Constitution (1945) (as amended 1982). Therefore, the jurisdiction of this Court is invoked pursuant to Article V, Section 3 and Article V, Section 10 of the Missouri Constitution (1945) (as amended 1982).

STATEMENT OF FACTS

Introduction

Procedural History

On 10/3/01, Sharon Wilcut filed her Claim For Compensation, seeking benefits for the death of her husband, Floyd Wilcut, following a 4/13/00 accident. In its Answer, employer Innovative Warehousing (hereinafter "employer") (L.F.2-3).[1]

On 2/9/05, ALJ Knowlan held a hearing on the Claim. (Tr.1-643). At hearing, the parties stipulated, *inter alia*, that on 4/13/00, Floyd Wilcut sustained an accident that arose out of and in the course of his employment; that employer furnished medical aid, in the amount of $68,785.24; that employer paid temporary total disability benefits totaling $35,956.28 for the 107 week period from 4/14/00 to 5/1/02; that employer paid $5,000.00 for employee's funeral expenses; that claimant was making no claim for additional medical expenses or temporary total disability benefits; and that at some point during employee's treatment following the 4/13/00 accident and prior to employee's death, employee was offered a blood transfusion, but refused to accept the blood transfusion. (Tr.6-10). The issues to be resolved at hearing were: 1) whether employee's dependents were entitled to an award for death benefits and, relatedly, medical causation; 2) if claimant was entitled to an award of death benefits, then the employee's dependents would have to be identified, and a determination made as to the distribution of death

[1] Matters referred to herein that are contained in the Transcript of Hearing shall be designated as (Tr._____). Matters referred to herein that are contained in the Legal File shall be designated as (L.F._____).

benefits; and 3) if claimant was not entitled to an award of death benefits, whether employer would be reimbursed for benefits previously paid. (Tr.8-9).

On 5/16/05, ALJ Knowlan issued his Award. (L.F.6-15). Therein, the ALJ found that employee refused to accept blood transfusions based upon his religious beliefs, and that this decision was made with the understanding that refusal to accept a blood transfusion might lead to employee's death. ALJ Knowlan found that the medical evidence supported a conclusion that if employee had accepted a blood transfusion, it is likely that he would have survived. (L.F.6-15). As the ALJ noted, the issue was whether employee's decision not to accept a blood transfusion constituted an "unreasonable refusal" of medical treatment, within the meaning of Section 287.140.5, that would relieve employer of responsibility for death benefits. ALJ Knowlan found that the facts in the case were relatively straight forward and, for the purpose of legal analysis, could be simplified. Those facts were that: employee sustained a work related injury on 4/13/00 that caused a significant amount of blood loss; employee was a Jehovah's witness and believed that if he accepted a blood transfusion, he would be guilty of a gross sin that would preclude him from inheriting everlasting or eternal life; in accordance with his religious beliefs, employee and his family refused a blood transfusion; this refusal was made with the knowledge and understanding that employee's decision might prevent his treating physicians from saving his life; and if employee had accepted a blood transfusion, it was likely that his physicians would have been successful and employee would not have died on 4/20/00. (L.F.6-15).

ALJ Knowlan found that the "key fact" was employee's belief, as a Jehovah's witness, that if he accepted a blood transfusion, he would be condemned to eternal damnation and forfeit eternal life. Given this belief, the ALJ found that employee's decision did not appear to be unreasonable. To the ALJ, the only question was whether, given employee's beliefs as a Jehovah's witness, his decision was unreasonable. Based on the facts and circumstances underlying employee's decision, the ALJ held that employee's decision not to accept the blood transfusion was not unreasonable and, consequently, the forfeiture provision of Section 287.140.5 was not applicable. Moreover, the ALJ found that since it appeared that employee's decision to refuse a blood transfusion would have been foreseeable, that decision did not qualify as a superceding or intervening event. Based upon these conclusions, ALJ Knowlan ruled that employee' 4/13/00 accident was a substantial factor in causing employee's injuries and subsequent death on 4/20/00. The ALJ held that employer failed to satisfy its burden of proof on the issue of unreasonable refusal of medical treatment under Section 287.140.5, and that employer was liable for death benefits. (L.F.6-15).

On 6/2/05, employer filed an Application For Review with the Industrial Commission, appealing ALJ Knowlan's Award. (L.F.16-17).

On 6/7/06, the Industrial Commission issued its Final Award Denying Compensation, reversing the Award of ALJ Knowlan. (L.F.18-33). Therein, the Industrial Commission adopted the list of undisputed facts and summary of the evidence made by the ALJ. It found that the evidence overwhelmingly supported a conclusion that

employee would have survived his work injuries, if he had accepted a blood transfusion to reverse his anemia. As the Industrial Commission observed, employer had presented uncontroverted evidence that employee, and then his family on his behalf, consistently refused blood transfusions with the full knowledge that employee would live if he accepted them, and employee would die if he refused them. (L.F.18-33).

The issue before the Industrial Commission was whether employee's refusal to accept blood transfusions was unreasonable, such that employer was relieved of liability for the consequences of employee's refusal. As the Industrial Commission observed, the ALJ determined that employee's refusal to accept blood transfusions was reasonable, because a *reasonable Jehovah's witness* in employee's situation would have refused blood transfusions. However, the Industrial Commission declined to follow the ALJ's reasoning. Rather, it was persuaded by the reasoning of the California Court of Appeals in ***Martin v. Industrial Accident Com***., 304 P2d 828, 830 (Cal.App.1956). The ***Martin*** Court recognized that a refusal based upon a reasonable religious belief was not per se, a reasonable refusal. Rather, all of the evidence surrounding the refusal must be considered, including the employee's religious beliefs. (L.F.18-33).

Applying the rationale of ***Martin***, the Industrial Commission considered the reasonableness of employee's refusal to accept blood transfusions, in light of all the evidence, including the employee's religious beliefs. It found the following evidence relevant to its determination:

The physical risk of transfusion was minimal compared to the benefit, i.e., an almost certainty that employee would have survived his injuries;

Employee was 53 years old at the time of his death;

The spiritual risk of the transfusion from the perspective of a Jehovah's witness was the commission of a capital sin, which would hinder prayer and prevent enjoyment of everlasting life; and

Jehovah's witnesses believe that Jehovah forgives, so if employee had lived, employee may have been able to atone for the sin of accepting the blood transfusion. (L.F.18-33). Based upon these facts, the Industrial Commission concluded that employee's refusal to accept the lifesaving blood transfusion was unreasonable and thus, broke the medical causal link between the work accident and employee's death. It held that employee's death did not arise out of and in the course of his employment, and that employer was not liable for the payment of death benefits. (L.F.18-33).

The Industrial Commission rejected claimant's argument that Section 287.140.9 "trumped" the provisions of Section 287.140.5. (L.F.18-33). Section 287.140.9 stated that nothing in the Act shall prevent an employee from being provided treatment for his injuries by prayer or spiritual means, if the employer does not object to the treatment. The Industrial Commission found that under the plain language of the statute, Section 287.140.9 was not applicable to the facts of the instant case. That statutory provision related solely to prayer or spiritual means, the goal of which was treatment of an employee's injuries. Employee's refusal to receive a blood transfusion was not for the

purpose of treating his injuries, it was for the purpose of complying with a religious edict, so that employee could remain free of sin. Finally, the Industrial Commission found that the case before it was not about an individual's freedom to exercise his or her religion. Rather, the case was about who should bear the consequences resultant from the exercise of one's religion. Under the facts, the Industrial Commission found that employee's dependents must bear the consequences of employee's decision to strictly observe the tenets of his religion. (L.F.18-33).

On 6/20/06, claimant Sharon Wilcut filed a Notice of Appeal with the Industrial Commission. (L.F.34-53).

On 6/19/07, the Missouri Court of Appeals, Eastern District issued its Opinion. Therein, the Court reversed the Industrial Commission's Award, finding that the Industrial Commission's decision was not supported by competent and substantial evidence, in that it did not adequately accommodate the employee's religious beliefs. (A.17-A.29).[2] As the Opinion noted, whether an employee's refusal of medical treatment was unreasonable is a question of fact. The Court's review of Missouri caselaw revealed no case where the reasonableness of an employee's decision to forego treatment was based upon religious beliefs. Thus, the Court had to determine the meaning of "unreasonable", as used in Section 287.140.5. Further, the Court found that it had to

[2] Matters referred to herein that are contained in the Appendix, *supra,* shall be designated as (A.____).

determine to what extent the Legislature intended an employee's religious beliefs to be considered when analyzing whether a refusal of medical treatment was unreasonable. Section 287.140.5 did not state that any refusal of a low risk, but beneficial, treatment would result in a denial of compensation. The refusal also had to be unreasonable in some sense. However, the statute did not provide any further guidance to determine what the Legislature might consider to be "unreasonable". (A.17-A.29).

Next, the Court turned to other provisions of the Workers' Compensation Act to interpret what weight to give to employee's religious beliefs in assessing the reasonableness of his refusal. Section 287.140.9 provided some guidance. Claimant could not take sanctuary in this Section, alone, in proving the compensability of her claims, because employee and those directing his care chose medical treatment in lieu of the transfusion, including medicines and supplements intended to stimulate blood production. Nevertheless, the Opinion found that the Section showed that the Legislature contemplated that religious beliefs might impact an employee's decision-making on what treatment to undertake. If Section 287.140.5 was to be read harmoniously and liberally construed, sincerely-held religious beliefs must be considered by the Industrial Commission. Therefore, liberally interpreting the phrase "unreasonable refusal [of].....treatment" in Section 287.140.5, harmoniously with Section 287.140.9 to give effect to the Legislative intent, the Court understood the statute to liberally accommodate an employee's religious beliefs to the extent that those beliefs influenced his decision to pursue, or not to pursue, a course of medical treatment. (A.17-A.29).

The Court found that there was no question that employee's belief was sincere. Further, the Court found that the Industrial Commission failed to adequately accommodate employee's religious belief in its decision. While it cited some of employee's beliefs, those beliefs would receive no deference in the Final Award. Instead, the Industrial Commission followed ***Martin*** and found that employee's decision was a voluntary one, that broke the chain of causation between the accident and his death. The Opinion found the Industrial Commission's reliance on ***Martin*** to be misplaced. In addition to being a case from outside of Missouri, the Court of Appeals found that ***Martin*** was expressly overruled in ***Montgomery v. Bd. of Retirement***, 109 Cal.Reporter 181, 185-186 (Cal.App.1973). In ***Montgomery***, the California Appellate Court found that the Court's reasoning in ***Martin*** was not consistent with the United States Supreme Court and California Courts' interpretations of the constitutional right to freely exercise religion, and the Court of Appeals refused to follow ***Martin***. (A.17-A.29).

Further, the Opinion found that the Industrial Commission believed that a religious reason, no matter how strongly held, would not be enough to justify compensation under Section 287.140.5. "In determining what was unreasonable, they relied not only on the question of whether an employee gravely injured in a work-related accident had refused treatment that likely would have benefitted him, but also on its conclusion that employee could have asked for atonement of his sins." Thus, the Court held that the Industrial Commission's decision was not supported by competent and substantial evidence. It reasoned that the statutory scheme dictated that religious beliefs be liberally construed

and that employee invoked his strong and sincerely held religious beliefs against the transfusion. This refusal was not unreasonable in light of his beliefs, and claimant was owed death benefits. (A.17-A.29).

Judge Romines dissented. In his Dissenting Opinion, Judge Romines stated that the majority opinion confused the manner of the Court's review and imposed an amorphous standard that was not compelled by the Constitution or statute, and was not consistent with the Court's duty to avoid an analysis of another's religious belief. As Judge Romines noted, the testimony was clear-a blood transfusion would have allowed Mr. Wilcut to survive. Employee and his family exercised their religious beliefs freely, and employer did not seek judicial intervention. Nor did the State seek to compel a transfusion. As such, there was no religious conundrum for the Court to tackle. Judge Romines assumed that the workers' compensation statutes were neutral as to religious precepts. The statutory sections at issue-Section 287.140.5 and Section 287.140.9 were clear. Those statutes were not ambiguous and were reconcilable. Section 287.140.5 required the Industrial Commission to determine if a refusal of medical treatment was unreasonable in view of the seriousness of the injury. As was obvious, the injury here was life threatening. The record left no doubt that the medical opinion was unanimous-a transfusion was compelled. The medical opinion was correct. Further, Judge Romines found that the record was likewise clear that the Wilcut family and medical staff were in contact with Jehovah's witness counselors who recommended medical treatment that did not include a transfusion of whole blood. This was the record on which the Industrial

Commission reached the factual conclusion that the refusal was unreasonable, within the meaning of Section 287.140.5. (A.17-A.29).

Judge Romines found that the majority compounded its error by making Section 287.140.9 something more than it was. As interpreted by Judge Romines, Section 287.140.9 was to be read as saying "pray if you wish", or "bring in your Pastor, Priest, Practioner, or Shaman". This Section did not justify the Court straying into a discussion of the principles of a Jehovah's witness. Whatever employee's beliefs were, they were not necessary to a construction by the Industrial Commission as to whether money was to be paid pursuant to Section 287.140. To even engage in this discussion violated clear principles set out by the United States Supreme Court and the Missouri Supreme Court, in both free exercise cases and in establishment cases-that courts were to stay removed from denominational doctrine. To allow a "Jehovah's witness" exception to Section 287.140.5 would violate the First Amendment to the United States Constitution, as well as the Missouri Constitution. Concluding that the majority result violated the First Amendment of the United States Constitution and Sections 5 and 7 of Article I of the Missouri Constitution, and was contrary to cases thereunder, Judge Romines requested transfer to the Missouri Supreme Court under Rule 83.03. (A.17-A.29).

On 6/19/07, the Supreme Court granted transfer.

Relevant Facts

The significant facts are essentially undisputed. While working as a truck driver for Innovative Warehousing, employee Floyd Wilcut was involved in a work related

motor vehicle accident on 4/13/00. (Tr.6). As a result of this accident, employee sustained extensive injuries. (Tr.64). Mr. Wilcut did not die at the scene of the accident. Rather, he was transported by AirEvac Emergency Helicopter to St. Francis Hospital in Cape Girardeau, Missouri (hereinafter "Hospital"). (Tr.64).

At St. Francis Hospital, employee was evaluated in the ER and subsequently admitted under the care of plastic surgeon, Dr. Trenton Jones. (Tr.75-76,81-82). Upon evaluating employee, it became readily apparent that he had sustained multiple injuries. Those injuries included extensive facial and scalp lacerations with a 40% scalp avulsion, a cervical spine fracture, and extensive abrasions over the right shoulder, arm, and bilateral hands. (Tr.81-82,83). Despite these multiple injuries, employee was alert, oriented and responsive at the time he was treated in the ER and admitted to the Hospital. (Tr.75-76). Hospital records demonstrate that employee's vital signs, including blood pressure and heart rate, were normal. (Tr.71,75-76,81). Lab work performed on employee's blood demonstrated that employee's cardiac enzymes were normal. (Tr.167,606). On 4/13/00, claimant underwent an EKG, which was essentially normal. (Tr.442,578). At the time employee was admitted to the Hospital on 4/13/00, his status was normal, from a cardiac standpoint. (Tr.75-76,81-82,470).

On 4/13/00, Dr. Teena Sharrock evaluated the employee. As Dr. Sharrock observed, employee's treatment course was complicated by the fact that he was a Jehovah's witness and refused blood products on admission. Employee's wife and family had continued to refuse blood products. (Tr.87). Dr. Sharrock recommended minimizing

blood draws and using pediatric tubes to decrease blood loss. Additionally, she recommended starting iron therapy. Dr. Sharrock discussed the situation with employee's son, Brian Wilcut. At that time, she noted the grim prognosis and potential death to employee without blood, secondary to his anterolateral ischemia and ongoing anemia. However, the Wilcut family stated their understanding, and still refused blood products at that time. (Tr.89).

Dr. Jones' initial treatment was to clean and debride claimant's multiple facial lacerations and his scalp avulsion injury. (Tr.62). Prior to this procedure, Dr. Terry Cleaver conducted an anesthesia pre-operative consultation. During his pre-operative assessment of employee, while employee was still in the ER Department prior to surgery, employee identified himself as a Jehovah's witness and stated that he refused blood transfusions. Employee was awake and lucid during the pre-operative anesthesia consultation. During that consultation, Dr. Cleaver discussed with employee the risk he was facing in refusing a blood transfusion, including the possibility of death. At that time, employee confirmed that he would not accept blood, or blood products, even if it meant his death. (Tr.94,635).

On 4/13/00, Dr. Jones attempted to perform a debridement of employee's scalp avulsion injury, his left ear laceration, right nose laceration, eyelid lacerations, right lip laceration, and multiple abrasions on his upper extremities. (Tr.101). The abrasions and lacerations had mud, hay, grass and other foreign debris in and on them. Dr. Jones' surgical procedure was limited by blood loss and employee's vascular instability. Despite

aggressive and extensive efforts to completely clean employee's multiple lacerations, Dr. Jones' ability to do so safely with employee's current vascular status with his history of heart disease, extensive blood loss, and refusal of potential blood transfusions necessitated termination of further efforts at cleansing his wounds. (Tr.102).

The next day, on 4/14/00, Dr. Jones spoke with employee and his wife regarding the doctor's plan to again take employee to surgery for debridement of his scalp and facial lacerations. During that conversation, Dr. Jones discussed with employee and his wife the possibility of further blood loss. Sharon Wilcut stated that employee was a Jehovah's witness, and that it was against their religious beliefs to receive blood products. Employee nodded his head no, when asked if he wanted a blood transfusion. (Tr.232). On 4/14/00, employee underwent an anesthesia pre-operative consultation. At that time, employee and his family still did not want blood given under any circumstance. (Tr.94).

Employee's hematocrit had fallen from normal range of greater than 40% to 23% as of 4/15/00. When Dr. Talbert discussed this situation with employee and his family on 4/15/00, they continued to refuse blood transfusions for employee, because of his religious beliefs. For this reason, no blood had been given to employee since he was admitted to the Hospital, despite significant blood loss. (Tr.90). As of 4/15/05, it was Dr. Talbert's opinion that employee required a transfusion to 30% hematocrit, to avoid a possible heart attack and death. (Tr.91).

On multiple occasions over the course of employee's 7-day hospitalization, the employee and his family were advised that a blood transfusion was necessary to replace

red blood cells lost as a result of the 4/13/00 accident. However, on each of these occasions, employee and/or members of his family refused to consent to a blood transfusion.

For example, employee's son, Brian Wilcut, was present in the Hospital during the seven days that employee received treatment. Brian Wilcut was aware that his father refused blood transfusions because of his beliefs as a Jehovah's witness. (Tr.21). As Brian Wilcut admitted, on and off throughout the 7 day period, he spoke with doctors regarding the issue of a blood transfusion. Brian Wilcut talked to a plastic surgeon (Dr. Jones) and to Dr. Sharrock. Those doctors explained to Brian Wilcut that the blood loss was preventing oxygen from getting to his father's heart. The doctors explained that a blood transfusion would replace the lost red blood cells and allow oxygen to get into his father's heart and the remainder of his body. Moreover, the doctors explained to Brian Wilcut and his family that his father was going to die, if he did not receive a transfusion. Employee had adamantly refused a transfusion. Once that choice was made, Brian Wilcut abided by that decision. (Tr.23-24).

Kevin Wilcut provided similar testimony. Like Brian, Kevin Wilcut was present with his father during the week he stayed in the Hospital. He was also aware that Floyd Wilcut declined blood transfusions, based upon his belief as a Jehovah's witness. (Tr.27). One night, Kevin was woken up by Dr. Sharrock. She informed Kevin Wilcut that his father had ischemia, and that if he did not get a blood transfusion, he would not last long. It was Kevin Wilcut's understanding that his father had refused a blood transfusion, and

his family had decided not to change that decision. (Tr.30). This decision was made by employee and his family. As far as Kevin Wilcut was concerned, any medical treatment could have been utilized to save his father, but for blood transfusions. (Tr.31-32).

Sharon Wilcut was married to employee. (Tr.33). Her husband was a Jehovah's witness. (Tr.35-36). As a part of their religious beliefs, Mrs. Wilcut and employee would not accept a blood transfusion. (Tr.36). Mrs. Wilcut testified that to accept a blood transfusion was a sin that would interfere with prayer. (Tr.38). Throughout his hospitalization, employee adamantly refused blood transfusions because of his beliefs as a Jehovah's Witness. (Tr.38). The only form of medical treatment that Mrs. Wilcut would not allow to save her husband was that of a blood transfusion. As she admitted, the doctors made it very clear to Mrs. Wilcut that a blood transfusion was necessary to save employee's life. She was aware of this fact from the date of the accident until the date employee died. There was no change in the family's position that a blood transfusion would not be allowed. (Tr.41). The decision to reject a blood transfusion was made by employee and supported by his entire family. The consensus from all the doctors was that employee needed a blood transfusion. During the course of employee's hospitalization, the nurses asked Mrs. Wilcut to sign a release to allow information to be provided to David Smith. Mr. Smith was a member of the Liaison Committee. One of the church elders contacted the Liaison Committee and they, in turn, asked employee's doctors to use certain blood substitutes. (Tr.44-45). Mrs. Wilcut believed that employee's decision to

reject a blood transfusion was reasonable, based upon his religious beliefs and the existence of blood substitutes that could be used. However, no doctor treating the employee informed Mrs. Wilcut that employee could have been saved by a course of treatment, other than a blood transfusion. (Tr.46-47).

Minister Austin Giffin testified as to the Jehovah's Witnesses' beliefs regarding the acceptance of blood transfusions. (Tr.11). As Mr. Giffin acknowledged, the only thing Jehovah's Witnesses refrain from doing medically was accepting blood. Jehovah's Witnesses believe that the Bible prohibits the use of blood, and that it is a sin to receive blood. This included the receipt of blood transfusions in a hospital situation. (Tr.13-14). If a Jehovah's Witness accepted blood, it could effect the ability of that person to have their prayers answered, and could hinder prayer. (Tr.14-15). Additionally, Jehovah's Witnesses believed that taking blood would keep them from inheriting everlasting life. (Tr.15-16). Jehovah's Witnesses do not refuse medical treatment and chose instead to treat by prayer. Rather, Jehovah's Witnesses fully embrace modern medicine, with the one exception of blood transfusions. (Tr.18-19).

On 4/17/00, Dr. Sharrock found that the employee had ongoing ischemia. (Tr.145). Dr. Sharrock re-evaluated claimant on 4/18/00. At that time, she noted progressive cardiomegaly, as well as ongoing ischemia. The prognosis was grim. However, employee's family continued to refuse a blood transfusion. Dr. Sharrock spoke with employee's wife that morning. While Mrs. Wilcut stated her understanding of

employee's ongoing anemia, blood loss, heart failure and cardiac ischemia, she continued to refuse blood products. (Tr.148).

On 4/19/00, Dr. Sharrock examined the employee, and spoke with employee's family. At that time, employee had ischemia changes on EKG and ongoing anemia. Employee had refused blood products and the family continued to refuse blood transfusions. They stated to Dr. Sharrock their understanding of the consequences of this choice. Employee's family had demanded the initiation of Epogen on 4/18/00, although Dr. Sharrock's research had never documented any significant difference after the use of that product. The Wilcuts refused a blood transfusion, even though they knew that employee's hemaglobin was low. (Tr.151-152). On 4/19/00, employee's lungs were coarse, and required frequent suctioning. Employee's blood pressure dropped to 70/30. (Tr.246).

Employee's condition continued to worsen. On 4/20/00, Dr. Sharrock evaluated claimant and met with his family. At that time, employee's blood pressure and heart rate had decreased. The family refused blood tests, because they understood the grim prognosis. They did not wish a blood transfusion, and realized that employee's course was progressing. (Tr.155).

On 4/20/00, employee's blood pressure dropped, as did his heart rate. (Tr.84). At 6:35 a.m., on the morning of 4/20/00, employee's family was notified of employee's poor condition. By 6:45 a.m., employee had an altered neurological status. At 7:00 a.m.,

employee's family members were at his bedside. (Tr.246-247). While Dopamine temporary increased employee's heart rate, employee's blood pressure dropped, and he did not respond to any pain stimuli. At 8:15 a.m., employee's family told Dr. Sharrock not to perform CPR, or give employee any other medications. (Tr.248,155). Over the next 45 minutes, employee's heart rate and blood pressure continued to drop, until his heart stopped beating. At 8:41 a.m., employee had no blood pressure and was flat line. Employee was pronounced dead at 8:49 a.m. (Tr.248,523).

As Dr. Jones observed, employee sustained a massive blood loss at the scene of the 4/13/00 accident, and blood was also lost during the ensuing medical procedures, which were performed to remove rocks, mud, and debris from Mr. Wilcut's skull and scalp. (Tr.632). The anemia caused by this blood loss produced a significant strain on employee's heart. It was made clear to Mr. Wilcut's next of kin that reducing the workload on his weak heart by infusing red blood cells would be necessary to stabilize his condition and promote his survival from the accident. In Dr. Jones' opinion, the unrelieved anemic state that employee suffered was a significant aggravating factor in the deterioration of employee's condition. (Tr.632).

The medical risks associated with blood transfusions included the transmission of various infectious diseases, allergic reaction to foreign blood components, and a slightly elevated life-time risk of malignancy. Given the end result in this case, which was

employee's death, Dr. Jones was of the opinion that those risks were obviously secondary and less significant than the benefits of a life-saving blood transfusion. (Tr.633-634).

From a medical standpoint, the known risks of blood transfusions were significantly outweighed by the potential life-saving benefit from a transfusion. This information was conveyed to employee's family. (Tr.632). As Dr. Jones observed, it was the "unwavering recommendation of the medical team at the time that blood transfusion be performed with the consequence of refusal of blood transfusion being the imminent death of the patient". (Tr.632). No known risks of transfusion could be considered to outweigh the known benefit that a blood transfusion would have provided to the employee. This opinion was conveyed to employee's family and a blood transfusion was refused on personal religious conviction, and not medical risks. Moreover, employee and his family made this decision with the full understanding of the defined medical risks and the necessity of a blood transfusion. (Tr.632). Employee's family was informed of the risk to his life if his blood volume was not replaced. They understood and accepted that the end result of a refusal of a blood transfusion would be death. (Tr.633-634).

In Dr. Jones' opinion, employee's death was a consequence of the 4/13/00 accident and the sequella of a weakened heart unable to meet the increased physiological demands of a traumatic injury uncompensated by available medical resuscitation, a critical component of which would be a blood transfusion. Dr. Jones believed employee's injuries were survivable, if a blood transfusion had been performed. (Tr.632). Employee

had a reasonable expectation for survival if he had received a blood transfusion, versus imminent death without it. (Tr.634).

Likewise, the testimony of Dr. Schuman demonstrates the severity of employee's condition, the limited risks associated with a blood transfusion, and the substantial benefits of that medical treatment. As Dr. Schuman observed, when employee presented at the ER, he had a descalping injury and multiple lacerations over the forehead and eyes. (Tr.485-486). In the ER, employee had a pulse of 100 and blood pressure of 150 over 87. His hemaglobin was normal, as was his hematocrit. (Tr.486). Employee did not have a heart attack at the scene of the accident. On admission to the Hospital, he had no complaints of chest pain, a normal EKG, and normal cardiac enzymes. At that time, employee was stable from a cardiac standpoint. (Tr.490). The debridement of employee's face and scalp, performed on 4/13/00, was limited in time and scope because of blood loss and employee's beliefs as a Jehovah's witness, which eliminated the possibility for a blood transfusion. (Tr.493). The next day, on 4/14/00, Dr. Jones attempted a further debridement of employee's face and scalp, and performed a repair of employee's open frontal sinus fracture. (Tr.493-494).

When employee was tested while treating in the ER, his hemaglobin and hematocrit were normal. (Tr.493-494). As of 4/15/00, employee's hematocrit was 15.4 and the hemaglobin was 5.4. At these levels, a patient, even with a normal heart, can develop spontaneous heart failure or myocardial ischemia. (Tr.494-495). In Dr.

Schuman's opinion, no reasonable physician would fail to provide a blood transfusion to a patient with hemaglobin and hematocrit levels, such as claimant had on 4/15/00. The purpose of a blood transfusion was to replace the red blood cells. Only red blood cells containing hemaglobin can carry oxygen around the body. (Tr.495-496).

On 4/16/00, employee's hemaglobin was 5.2 and hematocrit was 14.9. Those numbers continued to decrease on 4/17/00. On that date, employee's hemaglobin was 5.0 and his hematocrit was 14.3. Subsequently, on 4/18/00, employee's hemoglobin was 4.8 and his hematocrit was 14.2. (Tr.496).

An EKG taken on 4/15/00 showed ischemia, meaning lack of adequate blood flow, and subendocardial injury, meaning injury to the inner lining of the heart muscle. Subsequent EKGs showed that this ischemia-injury pattern was fluctuating, indicative of a significant ischemia. (Tr.497-498). At this point, employee had very severe anemia. Even though blood was flowing through his arteries, it was not normal blood. Employee's blood was not carrying enough hemaglobin and therefore, was not carrying enough oxygen to the myocardial tissues. The most vulnerable area of the heart muscle, the subendocardium, was being starved of its oxygen supply. (Tr.499-500). This situation was one that would have been remedied by a blood transfusion. This was a situation that was totally reversible. If employee would have received a blood transfusion, he would have had the adequate oxygen-carrying capacity of his blood restored, and adequate blood would have gone to his heart muscle, including the

subendocardium. Had employee's hemaglobin not been allowed to fall to 5 and his hematocrit to approximately 15 and remain there, employee would not have had subendocardial ischemia or injury, as demonstrated by the EKG changes. (Tr.500-501).

As Dr. Schuman explained, anemia is a lack of oxygen carrying capacity in the blood. What carries oxygen in the blood are the red blood cells, specifically the hemaglobin in the red blood cells. (Tr.585-586). A significant decrease in hemaglobin strains the heart. A blood transfusion would have restored employee's hemaglogin back towards normal, and would have significantly eliminated the stress on employee's heart. The result of a transfusion would be almost immediate. Virtual immediately, the oxygen carrying capacity of employee's blood would have dramatically improved, and reverted towards a satisfactory level. (Tr.587-588). This level would have been sufficient to take the strain off employee's heart, and improve blood flow to the organs needing it. In employee's case, since the heart itself needed adequate blood flow and oxygenation, the effect would be nearly immediate. (Tr.588). Employee had a reversible, treatable medical condition. (Tr.501). However, both employee and his family refused a blood transfusion. (Tr.501).

By 4/20/00, employee became acutely hypertensive, meaning a drop in his blood pressure and bradycardic, meaning a slow heart rate. Even though the family was made aware of employee's critical condition and poor prognosis, they declined additional life-saving interventions and employee died on 4/20/00. (Tr.502-503). Employee's cause of

death was cardiac ischemia, duration of 5 days. (Tr.503). The problem was the lack of adequate oxygen to the myocardium. Had employee received adequate oxygen to the myocardium, he would not have had ischemia, and would not have died. (Tr._____).

As Dr. Schuman observed, employee lost a significant amount of blood because of his injuries. He lost half of his blood volume. This blood volume needed to be replaced by fluid and red blood cells. Employee refused the red blood cell transfusion, which would have saved his life. In Dr. Schuman's opinion, employee's injuries were not fatal. If employee had accepted a blood transfusion, he would have lived. (Tr.508). Employee's clinical course, evidenced by his EKG changes, was consistent with myocardial ischemia. This ischema existed because of a lack of oxygen carrying capacity in the blood, specifically a lack of hemaglobin levels in employee's blood. (Tr.508). The cause of employee's death was cardiogenic shock. This referred to severe low blood pressure, due to the failure of the heart to pump adequately, because of cardiac ischemia. In turn, the cardiac ischemia was caused by anemia from blood loss. This anema was chronic. Employee did not bleed out at the scene of the accident. (Tr.508-509). His heart failure was due to anemia from blood loss, which had been going on for 7 days. (Tr.509).

In Dr. Schuman's opinion, employee's refusal to accept a blood transfusion was the sole cause of his death. As Dr. Schuman explained, employee's injuries were not potentially fatal or life threatening. He did not bleed out at the accident scene or in the

ER. On employee's admission, his vital signs were within normal limits and he was not in hemorrhagic shock. (Tr.511-513). Additionally, employee had no significant brain or spinal cord injuries or other medical or surgical conditions that contributed to his death. What employee had was severe anemia, to the point that his hemoglobin and hemotocrit were depressed to lethal levels. This why employee died. If he had accepted hemoglobin, specifically, if employee would have accepted blood transfusions, he would have lived. (Tr.511-513).

As Dr. Schuman acknowledged, there were some risks associated with blood transfusions. Those risks included the rare risk of transmitting the AIDS virus, hepatitis B and hepatitis C, severe allergic or acute transfusion reactions, or febrile transfusion reactions. These were very unusual risks and were not a counter-indication for receiving blood. (Tr.512). The benefits of blood transfusion far outweigh the risks. In the instant case, the risk of employee refusing a blood transfusion was possible death. Employee took that risk and, unfortunately, he died. (Tr.513). In employee's case, the risk of not getting a blood transfusion would be ischemia, lack of adequate blood flow, and hypoxia, lack of oxygen. (Tr.514).

In Dr. Schuman's opinion, employee's refusal to submit to blood transfusions was unreasonable, when comparing the risk of blood transfusions to the benefit of blood transfusions. Dr. Schuman believed that Mr. Wilcut's refusal to accept blood transfusions was unreasonable, since the risk of refusing was almost certain death when his

hemoglobin and hemotocrit were below 5 and 15, respectively. The risk benefit ratio overwhelmingly favored transfusion in this clinical setting. (Tr.515).

As Dr. Schuman observed, there was no other viable treatment option for reversing employee's anemia. Restricted blood sampling, Hespan, and saline infusions would not have rendered a blood transfusion unnecessary. (Tr.524-526). Nor would iron supplements be sufficient to spur employee's hemoglobin production. (Tr.529-530). Blood substitution products were not a viable alternative treatment. (Tr.543-544). Dr. Schuman testified that there is no alternative to blood transfusions when a patient is severely anemic from blood loss. "If they need blood, they need blood. There is no substitute. Despite what some people may say outside of science, there is no substitute for oxygen-carrying hemoglobin in the blood, if that's what you need". (Tr.562). Further, Dr. Schuman testified that the standard of care in medicine is to transfuse blood, or packed red blood cells, when indicated by blood loss or similar indications. The standard of care is give red blood cells for severe anemia, especially with cardiac compromise. (Tr.531).

Dr. Schuman found that employee died of blood loss secondary to his injuries, and that employee's death was totally preventable. Employee's injuries would not have been life threatening, if he would have received a blood transfusion. They were only life threatening without a blood transfusion. (Tr.534). The cause of employee's death was his refusal of blood transfusions. (Tr.541).

Absent the blood loss, and the issues caused by the blood loss, employee's skull fracture and descalping injury, in and of themselves, played no role in employee's death. (Tr.575). Prior to his death, employee had no significant irregularity of heart beat. (Tr.584). The cardiac consequences of diminished hemoglobin increased the longer that the hemoglobin was not replaced. (Tr.589). It was inevitable that without a blood transfusion, employee's heart was eventually going to stop. (Tr.590). If employee had received a blood transfusion, he would not have died of a cardiac adnormality. That is because employee's cardiac abnormality was due to lack of oxygenation in the subendocardium. As soon as you improve the oxygenation by giving packed red blood cells, you reverse the downward spiral almost immediately. (Tr.591). In Dr. Schuman's opinion, if employee had gotten packed red blood cells, his heart would have strengthened and pumped more efficiently, reversing the whole process, and employee would have lived. (Tr.591-592).

Employee did not have fatal accident, given modern medical procedures and techniques. All he had to do to survive was to accept blood transfusions. (Tr.597). Floyd Wilcut had cardiac arrest due to severe subendocardial ischemia, possibly infarction, one week after his hospital admission, which in turn was due to severe anemia, which in turn was due to blood loss, which in turn was due to his motor vehicle accident. Dr. Schuman believed that these links would have been interrupted and the outcome

changed if employee had agreed to a blood transfusion. (Tr.597-598). In Dr. Schuman's opinion, if employee had gotten a blood transfusion, he would not have died. (Tr.598).

Similarly, Dr. Chastian found employee's refusal to accept a blood transfusion to be unreasonable. As Dr. Chastian acknowledged, the major issue during the course of employee's treatment was that he was very anemic and his blood count was low. Despite this fact, employee and his family refused blood transfusions for religious reasons. (Tr.431).

When employee got to the Hospital, his cardiac status on admission was stable. (Tr.441-442). Additionally, an EKG performed on employee at that time was also normal. Thus, when he was admitted to the Hospital, employee had not lost enough blood where he would expire solely as a result of blood loss, or that had triggered any kind of cardiac abnormality. (Tr.442-443).

Dr. Chastian observed that the day following employee's admission to the Hospital, his hemaglobin count dropped significantly and his EKG demonstrated ischemic changes, indicating that employee was not getting enough oxygen to his heart muscle. (Tr.432-434). While employee was in the Hospital, alternative treatment modalities were given to him instead of blood transfusions. Those alternative modalities included Epogen, a stimulant to blood formation. Additionally, employee received Iron, Vitamin C, and Vitamin B. (Tr.434-436).

It is a commonly accepted practice for a patient who needs red blood cells to undergo a blood tranfusion. (Tr.444-445). While there are alternatives used to accelerate the body's normal restorative process, such as Epogen, Iron and Vitamin C, these alternatives do not work immediately. Rather, it takes a considerable period of time for blood to be replaced using these methods. (Tr.444-446).

In employee's situation, the best recommendation and treatment to replace the lost blood was with a transfusion. (Tr.448-449). Dr. Chastian was of the opinion that employee's decision, and that of his family, to refuse blood transfusions was not reasonable. (Tr.436,454). In employee's case, the risk of refusing transfusions was that employee might not survive. From a medical standpoint, the risk from accepting a transfusion was relatively minor. (Tr.455). The risks from receiving a blood transfusion included a very remote chance of getting AIDS or hepatitis. As Dr. Chastian conceded, the risks of receiving a blood transfusion are not normally grievous enough to discourage the use of blood transfusion. (Tr.461). A blood transfusion was something that Dr. Chastian would recommend to a patient who was in the same situation that employee was. (Tr.456).

Had employee undergone a transfusion, there was every expectation that he would have lived. (Tr.459). Replacing employee's lost red blood cells through use of a transfusion would have allowed oxygen to be distributed appropriately to employee's heart, and the rest of his body. (Tr.451,458). In employee's situation, the risk of

receiving a blood transfusion was not nearly as great as the medical risk from refusing the transfusion. (Tr.459-460).

It was Dr. Chastian's opinion that the 4/13/00 accident was a contributing factor to employee's death, because if employee had not had the accident, he would not have suffered a blood loss. However, once employee had the accident and was in the Hospital, the problems resulting to employee from blood loss were susceptible to being treated by a blood transfusion. From a medical standpoint, Dr. Chastian believed that employee's refusal to accept a blood transfusion was unreasonable. (Tr.462). While there were risks in receiving a blood transfusion, in Dr. Chastian's experience, those risks were not sufficient to avoid receiving a blood transfusion under normal circumstances. (Tr.463).

While employee suffered severe injuries, his facial and cervical fractures were not the injuries that killed him. Moreover, employee's lacerations, which caused his initial blood loss, were successfully treated, in that employee did not bleed out and die at the Hospital. (Tr.467-468). Rather, the problem was that employee had lost significant blood, and that blood had not been replaced. However, that blood could have been replaced through the use of a blood transfusion. Employee's chances of survival would have been significantly better had he undergone a transfusion. (Tr.465,467-468). In Dr. Chastian's opinion, employee would have been more likely to survive with blood transfusions, than he was without that treatment. (Tr.471).

POINTS RELIED ON

I

THE INDUSTRIAL COMMISSION DID NOT ERR IN RULING THAT EMPLOYEE'S REFUSAL TO ACCEPT A LIFE-SAVING BLOOD TRANSFUSION WAS AN UNREASONABLE REFUSAL OF MEDICAL TREATMENT WITHIN THE MEANING OF SECTION 287.140.5 OF THE WORKERS' COMPENSATION ACT, BARRING EMPLOYEE'S DEPENDENTS FROM RECOVERING DEATH BENEFITS, AND THE INDUSTRIAL COMMISSION'S AWARD MUST BE AFFIRMED, FOR THE REASONS THAT:

A.

THE UNDISPUTED MEDICAL EVIDENCE AND MEDICAL TESTIMONY DEMONSTRATE THAT WHILE THE INJURIES EMPLOYEE SUSTAINED IN THE 4/13/00 ACCIDENT WERE NOT LIFE THREATENING, EMPLOYEE LOST A SIGNIFICANT AMOUNT OF BLOOD AS A RESULT OF THE ACCIDENT AND TWO SURGICAL PROCEDURES TO TREAT HIS INJURIES; EMPLOYEE REFUSED A BLOOD TRANSFUSION, BASED UPON HIS RELIGIOUS BELIEFS AS A JEHOVAH'S WITNESS; EMPLOYEE DEVELOPED SEVERE ISCHEMIA AND ANEMIA BECAUSE OF THE LOSS OF RED BLOOD CELLS, PLACING A SUBSTANTIAL STRAIN ON HIS HEART; THE ONLY VIABLE MEDICAL TREATMENT FOR THIS

CONDITION WAS A BLOOD TRANSFUSION; THE MINIMAL RISKS POSED TO EMPLOYEE IN RECEIVING A TRANSFUSION WERE GREATLY OUTWEIGHED BY THE BENEFITS OF UNDERGOING THAT MEDICAL TREATMENT; EMPLOYEE REFUSED A BLOOD TRANSFUSION, WITH THE KNOWLEDGE THAT TO DO SO MEANT ALMOST CERTAIN DEATH; AND EMPLOYEE'S REFUSAL TO ACCEPT A BLOOD TRANSFUSION WAS THE CAUSE OF HIS DEATH.

B.

EMPLOYEE'S DECISION NOT TO ACCEPT A BLOOD TRANSFUSION BECAUSE OF HIS RELIGIOUS BELIEFS AS A JEHOVAH'S WITNESS WAS A REFUSAL OF MEDICAL TREATMENT OFFERED BY THE EMPLOYER, AS CONTEMPLATED BY SECTION 287.140.5 OF THE WORKERS' COMPENSATION ACT, AND DID NOT CONSTITUTE TREATMENT OF EMPLOYEE'S INJURIES BY "PRAYER OR SPIRITUAL MEANS", WITHIN THE MEANING OF SECTION 287.140.9 OF THE ACT.

C.

THE INSTANT CASE DOES NOT INVOLVE THE VIOLATION OF AN INDIVIDUAL'S RIGHT TO EXERCISE HIS RELIGIOUS BELIEFS. THERE WAS NO INFRINGEMENT OF EMPLOYEE'S RIGHT TO FREELY EXERCISE HIS RELIGIOUS BELIEFS, AS GUARANTEED BY THE UNITED STATES AND

MISSOURI CONSTITUTIONS, TO REFUSE A BLOOD TRANSFUSION BECAUSE IT WAS CONTRARY TO THE TENETS OF HIS RELIGION. WHILE EMPLOYEE HAD THE RIGHT TO EXERCISE HIS RELIGIOUS BELIEFS, NEITHER EMPLOYEE NOR HIS DEPENDENTS HAVE A CONSTITUTIONAL OR STATUTORY RIGHT TO IMPOSE THE CONSEQUENCE OF EMPLOYEE'S DECISION ON THE EMPLOYER, SO AS TO INCREASE ITS WORKERS' COMPENSATION LIABILITY.

D.

ANY CONSTRUCTION OF SECTION 287.140.5 AS PRECLUDING ITS APPLICATION TO ANY REFUSAL OF MEDICAL TREATMENT WHICH IS BASED UPON AN EMPLOYEE'S RELIGIOUS BELIEFS MUST BE REJECTED, SINCE SUCH A CONSTRUCTION WOULD VIOLATE THE PROVISIONS OF THE MISSOURI AND UNITED STATES CONSTITUTIONS REQUIRING THE SEPARATION OF CHURCH AND STATE AND PROHIBITING THE STATE FROM ADVANCING RELIGION.

Jacobs v. Ryder System/Complete Auto Transit, 789 S.W.2d 233 (Mo.1990)

Martin v. Industrial Accident Com., 304 P2d 828 (Cal.App.1956)

Hester v. Barnett, 723 S.W.2d 544 (Mo.App.W.D.1987)

II

THE INDUSTRIAL COMMISSION DID NOT ERR IN HOLDING THAT EMPLOYEE'S DEATH DID NOT ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT, AND THE INDUSTRIAL COMMISSION'S AWARD MUST BE AFFIRMED, FOR THE REASON THAT THE UNDISPUTED MEDICAL EVIDENCE AND MEDICAL TESTIMONY DEMONSTRATE THAT EMPLOYEE'S DECISION TO REFUSE A BLOOD TRANSFUSION BROKE THE MEDICAL CAUSAL CONNECTION BETWEEN THE 4/30/00 ACCIDENT AND EMPLOYEE'S DEATH ON 4/20/00, AND THAT EMPLOYEE'S DEATH WAS NOT COMPENSABLE AS A LEGITIMATE CONSEQUENCE OF THAT WORK EVENT. ***Manley v. American Packing***, 253 S.W.2d 165 (Mo.1952)

Wilson v. Emery Bird Thayer, 43 S.W.2d 953 (Mo.App.W.D.1966)

Cahall v. Riddle Trucking, 956 S.W.2d 315 (Mo.App.E.D.1997)

Ortel v. John D. Streett, 285 S.W.2d 87 (Mo.App.E.D.1955)

STANDARD OF REVIEW[3]

The Missouri Constitution, Article V Section 18, provides for judicial review of the Industrial Commission's Award to determine whether it is authorized by law and supported by competent and substantial evidence upon the whole record. ***Richard v. Mo. Dept of Corrections***, 162 S.W.3d 35, 37 (Mo.App.W.D.2005). On appeal from a decision

[3] This Standard Of Review applies to the Arguments under Points I and II, *infra*.

in a workers' compensation case, the Supreme Court reviews the Award of the Industrial Commission, pursuant to Section 287.495. The Court may modify, reverse, remand for hearing, or set aside the Award only upon the following grounds: 1) that the Industrial Commission acted without or in excess of its power; 2) that the Award was procured by fraud; 3) that the facts found by the Industrial Commission do not support the Award; or 4) that there was not sufficient, competent evidence in the record to warrant the making of the Award. R.S.Mo. §287.495.1; ***Hampton v. Big Boy Steel Erection,*** 121 S.W.3d 220, 222 (Mo.banc.2003).

The Court must examine the whole record to determine if it contains sufficient, competent and substantial evidence to support the Award, i.e., whether the Award is contrary to the overwhelming weight of the evidence. ***Hampton***, 121 S.W.3d at 223; ***Kuykendall v. Gates Rubber Co.,*** 207 S.W.3d 694, 702 (Mo.App.S.D.2006). Whether the Award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. ***Hampton***, 121 S.W.3d at 223. An Award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence. ***Id***; ***Kuykendall,*** 207 S.W.3d at 702.

While the Court defers to the Industrial Commission on issues of fact, questions of law are reviewed *de novo*. ***Dubose v. City of St. Louis***, 210 S.W.3d 391, 394 (Mo.App.E.D.2006). This Court is not bound by the Industrial Commission's interpretation and application of the law, and no deference is afforded to the Industrial

Commission's interpretation of the law. ***Schoemehl v. Treasurer of the State of Missouri***, 207 S.W.3d 900, 901 (Mo.banc.2007); ***Pierson v. Treasurer of the State of Missouri***, 126 S.W.3d 386, 387 (Mo.banc.2004). The primary issue for the Court's resolution, whether employee's refusal to accept a blood transfusion constituted an unreasonable refusal of medical treatment offered by employer, within the meaning of Section 287.140.5, requires the interpretation of a statute, and therefore, the Court's review of that question is *de novo*. ***Richard***, 162 S.W.3d at 37.

ARGUMENT

I

THE INDUSTRIAL COMMISSION DID NOT ERR IN RULING THAT EMPLOYEE'S REFUSAL TO ACCEPT A LIFE-SAVING BLOOD TRANSFUSION WAS AN UNREASONABLE REFUSAL OF MEDICAL TREATMENT WITHIN THE MEANING OF SECTION 287.140.5 OF THE

WORKERS' COMPENSATION ACT, BARRING EMPLOYEE'S DEPENDENTS FROM RECOVERING DEATH BENEFITS, AND THE INDUSTRIAL COMMISSION'S AWARD MUST BE AFFIRMED, FOR THE REASONS THAT:

A.

THE UNDISPUTED MEDICAL EVIDENCE AND MEDICAL TESTIMONY DEMONSTRATE THAT WHILE THE INJURIES EMPLOYEE SUSTAINED IN THE 4/13/00 ACCIDENT WERE NOT LIFE THREATENING, EMPLOYEE LOST A SIGNIFICANT AMOUNT OF BLOOD AS A RESULT OF THE ACCIDENT AND TWO SURGICAL PROCEDURES TO TREAT HIS INJURIES; EMPLOYEE REFUSED A BLOOD TRANSFUSION, BASED UPON HIS RELIGIOUS BELIEFS AS A JEHOVAH'S WITNESS; EMPLOYEE DEVELOPED SEVERE ISCHEMIA AND ANEMIA BECAUSE OF THE LOSS OF RED BLOOD CELLS, PLACING A SUBSTANTIAL STRAIN ON HIS HEART; THE ONLY VIABLE MEDICAL TREATMENT FOR THIS CONDITION WAS A BLOOD TRANSFUSION; THE MINIMAL RISKS POSED TO EMPLOYEE IN RECEIVING A TRANSFUSION WERE GREATLY OUTWEIGHED BY THE BENEFITS OF UNDERGOING THAT MEDICAL TREATMENT; EMPLOYEE REFUSED A BLOOD TRANSFUSION, WITH THE KNOWLEDGE THAT TO DO SO MEANT ALMOST CERTAIN DEATH; AND

EMPLOYEE'S REFUSAL TO ACCEPT A BLOOD TRANSFUSION WAS THE CAUSE OF HIS DEATH.

The Industrial Commission did not err in ruling that employee's refusal to accept a blood transfusion was unreasonable, within the meaning of Section 287.140.5, and precluded claimant from recovering death benefits. (L.F.18-33). That finding of fact was supported by the overwhelming weight of the competent and substantial evidence, including the undisputed medical evidence and medical testimony. Accordingly, the Industrial Commission's Award must be affirmed. R.S.Mo. §287.495.1(4).

As the overwhelming weight of the undisputed medical evidence demonstrates, employee's death resulted from cardiac ischemia, which was caused by chronic, unrelieved anemia from blood loss. The unwavering recommendation of employee's treating physicians was that employee required a blood transfusion. As the undisputed findings of the treating physicians and the undisputed testimony of the medical experts demonstrate, the minimal risks from a blood transfusion were significantly out weighed by the benefits from a blood transfusion. In employee's case, he faced imminent death without a transfusion. With a transfusion, however, employee would have survived.

Under the Workers' Compensation Act, an employee shall receive and the employer shall provide such medical, surgical and hospital treatment as may be reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. R.S.Mo. §287.140.1; ***Blackwell v. Puritan-Bennett Corp***., 901 S.W.2d 81, 84-

85 (Mo.App.E.D.1995). An employer's duty to provide the statutorily required medical aid to an injured employee is absolute and unqualified. ***Martin v. Town & Country Supermarkets***, 220 S.W.3d 836, 844 (Mo.App.S.D.2007). An injured employee has a concomitant duty. Namely, to accept the medical treatment offered to him by employer, and to cooperate with the proffered medical treatment, so as to limit both employer's liability and employee's injury and disability. When an employee is unreasonable in his treatment program, that employee is excluded from receiving compensation benefits. ***Stawizynski v. J.S. Alberici Constr. Co.***, 936 S.W.2d 159, 163 (Mo.App.E.D.1996). Specifically, Section 287.140.5 states:

> "No compensation shall be payable for the death or disability of an employee, if insofar as the death or disability may be caused, continued or aggravated by any unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the division or the commission, inconsiderable in view of the seriousness of the injury." R.S.Mo. §287.140.5.

An injured employee's refusal to submit to medical treatment bars an award of compensation only when the refusal is unreasonable. ***Jacobs v. Ryder System/Complete Auto Transit***, 789 S.W.2d 233, 235 (Mo.1990). An employee's alleged unreasonable refusal to submit to medical treatment is an affirmative defense in a workers'

compensation proceeding, with the burden of proof resting on the employer. ***Jacobs***, 789 S.W.2d at 235; ***Berry v. Moorman Mfg. Co.***, 675 S.W.2d 131, 134 (Mo.App.W.D.1984); ***Boatwright v. ACF Industries,*** 463 S.W.2d 549, 554 (Mo.App.E.D.1971). To prevail upon the affirmative defense of unreasonable refusal to submit to medical or surgical treatment, the employer must demonstrate that it, in fact, tendered the treatment in question to employee and that employee refused that treatment. ***Berry***, 675 S.W.2d at 134; ***Boatwright***, 463 S.W.2d at 554. Whether an employee's refusal of medical treatment or surgery is reasonable is a question of fact for the Industrial Commission. ***Stawizynski***, 936 S.W.2d at 163; ***Jacobs***, 789 S.W.2d at 235; ***Smiley v. Foremost-McKesson***, 708 S.W.2d 330, 332 (Mo.App.S.D.1986).

When determining whether an employee's refusal of medical or surgical treatment tendered by the employer is unreasonable, for purposes of Section 287.140.5, Missouri Courts review the entire record, weighing the medical evidence regarding the seriousness of the employee's injury, the risks involved in the medical treatment offered, the benefits of the medical treatment offered, whether alternative treatments exist which could cure or relieve employee's work related injury, and the employee's age and general health. See for example, ***Wood v. Wagner Elect. Corp***., 197 S.W.2d 647, 651-652 (Mo.banc.1946); ***Smiley***, 708 S.W.2d at 332-333; ***Payne v. Sullivan County***, 36 S.W.2d 127, 128-129 (Mo.App.W.D.1931). Simply because an injured employee does not follow a more aggressive or radical form of treatment is not sufficient to deem the employee's action

unreasonable, for purposes of Section 287.140.5. ***Stawizynski***, 936 S.W.2d at 163; ***Jacobs***, 789 S.W.2d at 235-236.

Thus, in determining whether an injured employee's refusal of medical or surgical treatment tendered to him by the employer is unreasonable, Missouri Courts undertake a risk-benefit analysis regarding the risk to employee from the proffered medical treatment and the benefits from that treatment. ***Jacobs***, 789 S.W.2d at 235-236; ***Smiley***, 708 S.W.2d at 332-333; ***Wood***, 197 S.W.2d at 651-652. Utilizing this analysis, Missouri Courts have held that where the danger to the life or health of the injured employee from the proffered medical treatment is very small, and the probability of a cure arising from that treatment is very large, an employee's refusal to submit to the proffered treatment is unreasonable. See ***Ritchie v. Rayville Coal Co.***, 33 S.W.2d 154, 156 (Mo.App.W.D.1930). Conversely, if the efficiency of the proposed treatment is disputed by the medical experts, an employee's refusal to participate in that treatment may not be unreasonable. ***Stawizynski***, 936 S.W.2d at 163.

No one factor is dispositive in determining whether an employee's refusal of medical or surgical treatment offered to him by an employer is unreasonable. ***Jacobs***, 789 S.W.2d at 235; ***Smiley***, 708 S.W.2d at 332. However, Missouri Courts faced with an employer's defense under Section 287.140.5 rely upon the medical evidence in the record, in particular, the testimony of the medical experts as to the risks and benefits resulting from the medical treatment offered by the employer. ***Id.***

For example, ***Wood***, 197 S.W.2d at 651-652, ruled that an employee's refusal to submit to a hernia operation was not unreasonable, given the employee's age, high blood pressure, the fact that employee's general health created a greater than average risk related to the surgery, and because employee felt that he could get by with less intrusive treatment for his hernia condition. Similarly, ***Smiley***, 708 S.W.2d at 332-333 held that an injured employee's refusal to undergo further surgery for a urethral stricture arising from a work related accident, that his treating physicians advised against and which could worsen, rather than improve employee's condition, was reasonable, so as not to preclude an award for permanent partial disability benefits.

Conversely, ***Ritchie***, 33 S.W.2d at 156-157, held that an employee unreasonably refused a stabilizing operation offered by his employer to correct a spinal deformity which developed as a result of a work related injury, where the stabilizing operation was successful in a higher percentage of cases than the alternative medical treatment and, if successful, would bring about results in a shorter period of time. The medical testimony demonstrated that the operation in question was not serious and did not pose a high risk of death to employee. Employee's primary reason for refusing the surgical procedure offered by employer was that he was afraid of undergoing surgery. Under these facts, the Court held that the employee's refusal to undergo the stabilizing operation was unreasonable. ***Ritchie***, 33 S.W.2d at 156.

There exists no Missouri appellate decision addressing the issue of the refusal of medical treatment, where the employee's sole reason for refusing the medical treatment tendered to him by the employer was the employee's religious beliefs. Given the existing framework for analyzing the reasonableness of an employee's refusal of medical treatment offered by the employer, as established by ***Wood,*** 197 S.W.2d at 651-652; ***Stawizynski,*** 936 S.W.2d at 163; ***Jacobs,*** 789 S.W.2d at 235-236, and similar cases, the employee's religious beliefs as a Jehovah's Witness are one factor to be considered, along with all of the other evidence in the record.[4]

Weighing the undisputed medical evidence in the record regarding the risk of the treatment offered to employee, the benefit of that treatment, and whether viable treatment alternatives existed, the Industrial Commission properly found that employee's failure to accept a blood transfusion was unreasonable. The medical evidence regarding the severity of employee's injuries from the 4/13/00 accident, the benefit to employee from

---

[4] Employer *presumes* that the employee's religious beliefs are valid and sincerely held, and proceeds from that assumption. For either employer, or the Court to do otherwise, would require the Court to undertake an impermissible analysis as to the validity and sincerity of employee's religious beliefs. ***Penner v. King***, 695 S.W.2d 887, 889 (Mo.banc.1985).

receiving a blood transfusion, and the minimal risks inherent in that treatment, are undisputed. Those facts are as follows:

As a result of the 4/13/00 accident, employee sustained extensive facial and scalp lacerations, and a 40% scalp avulsion injury. (Tr.81-83). These injuries resulted in a massive blood loss at the scene of the accident. (Tr.632,508). On admission to the Hospital, employee refused blood products because he was a Jehovah's Witness. (Tr.87). While Dr. Jones attempted to perform a debridement of employee's scalp avulsion injury and his multiple facial lacerations on 4/13/00, Dr. Jones had to cut that procedure short because of employee's extensive blood loss and his refusal of blood transfusions. (Tr.101-102). On 4/14/00, employee refused a blood transfusion, even though Dr. Jones advised employee that he was to perform additional surgery for debridement of employee's scalp and facial lacerations, which involved the possibility of further blood loss. (Tr.232,94).

At the time employee was admitted to the Hospital on 4/13/00, his status was normal from a cardiac standpoint. (Tr.75-76,81-82,470). Likewise, when employee was tested in the ER on 4/13/00, his hemaglobin and hematocrit were normal. However, as of 4/15/00, employee's hematocrit was 15.4 and his hemaglobin was 5.4. Over the next few days, employee's hemaglobin and hematocrit continued to drop. On 4/16/00, employee's hemaglobin was 5.2 and his hematocrit was 14.9. On 4/17/00, employee's hemaglobin was 5.0 and his hematocrit was 14.3. On 4/18/00, employee's hemaglobin was 4.8 and

his hematocrit was 14.2. (Tr.493-494,495-496). EKGs taken on 4/15/00 and thereafter demonstrate that employee had developed ischemia-a lack of adequate blood flow. Relatedly, employee developed anemia, a lack of oxygen carrying capacity in the blood. (Tr.497-498,585-586). The anemia resulting from the significant decrease in employee's hemaglobin put a substantial strain on employee's heart. (Tr.632,587-588). A blood transfusion would have restored employee's hemaglobin back towards normal levels and, thereby, significantly eliminated the stress on employee's heart. (Tr.587-588,632,451,458). The medical testimony as to the benefits of a blood transfusion was uncontroverted. All the treating and expert physicians agreed that the medical treatment offered to employee, that of a blood transfusion, would stabilize employee's condition, relieve his anemia and related ischemia, and restore the oxygen carrying capacity of employee's blood. (Tr.451,458,500-501,587-588).

Dr. Jones observed that it was the "unwavering recommendation" of the medical team that a blood transfusion be performed to prevent employee's imminent death. (Tr.632). In Dr. Jones' opinion, by infusing red blood cells, employee's condition would be stabilized and his survival from the accident promoted. (Tr.632). Dr. Jones found that the unrelieved anemic state that employee suffered was a significant aggravating factor in the deterioration of employee's condition. (Tr.632).

Likewise, Dr. Schuman testified that employee's situation would have been remedied by a blood transfusion and that the situation was totally reversible. As Dr.

Schuman explained, if employee would have received a blood transfusion, he would have had the adequate oxygen-carrying capacity of his blood restored, and adequate blood would have gone to employee's heart. (Tr.499-501). A blood transfusion would have restored employee's hemaglobin back towards normal, and would have significantly eliminated the stress on employee's heart. The result of a blood transfusion would be nearly immediate. (Tr.585-588). In Dr. Schuman's opinion, employee's injuries were not fatal. If the employee had accepted a blood transfusion, he would have lived. (Tr. 508).

Similarly, Dr. Chastain testified that the major issue during the course of employee's treatment was that he was very anemic and his blood count was low. (Tr. 431). As employee's low hemoglobin count and EKG changes demonstrated, employee was not getting enough oxygen to his heart muscle. (Tr.432-434). Had employee undergone a transfusion, there was every expectation that he would have lived. Dr. Chastain testified that replacing employee's lost blood cells through the use of a transfusion would have allowed oxygen to be distributed appropriately to employee's heart, and the rest of his body. (Tr. 451, 458-459).

Moreover, both the treating and expert physicians agreed that the minimal risks inherent in a blood transfusion were significantly outweighed by the benefits that would inur to employee from that medical treatment. As Dr. Jones observd, the medical risks associated with blood transfusions included the transmission of various infectious diseases, allergic reaction to foreign blood components, and a slightly elevated lifetime

risk of malignancy. Given the end result in the instant case, which was employee's death, Dr. Jones concluded those risks were obviously secondary and less significant than the benefits of a life saving blood transfusion. From a medical standpoint, the known risks of a blood transfusion were significantly outweighed by the potential lifesaving benefit to employee from that course of medical treatment. No known risk of transfusion could be considered to outweigh the known benefit that a blood transfusion would have provided to employee. (Tr. 632-634). Likewise, Dr. Schuman testified that there were minor risks associated with blood transfusions. Those being the rare risk of transmitting the AIDS virus, hepatis B and hepatis C, severe allergic or acute transfusion reactions, or ferbile transfusion reactions. These risks were not a counter indication for receiving blood. The benefits of blood transfusion far outweighed the risks. In employee's case, the risk of Floyd Wilcut refusing a blood transfusion was possible death. Specifically, the risk of not getting a blood transfusion would be ischemia, lack of adequate blood flow, and hypoxia, lack of oxygen. The benefit of accepting a blood transfusion far outweighed any risks that treatment posed to employee. (Tr. 512-514).

In Dr. Schuman's opinion, employee's refusal to submit to a blood transfusion was unreasonable, when comparing the risk of blood transfusions to the benefit of blood transfusions. Since employee's hemagoblin and hematocrit were below 5 and 15, respectively, the risk of refusing a blood transfusion was almost certain death. In this

clinical setting, Dr. Schuman found that the risk benefit ratio overwhelmingly favored transfusion. (Tr. 515).

Claimant's medical expert, Dr. Chastain, was of a similar opinion. As Dr. Chastain acknowledged, it was a commonly accepted practice for a patient who needed red blood cells to undergo a blood transfusion. In employee's situation, the best treatment to replace lost blood cells was with a transfusion. (Tr. 444-446, 448-449). Dr. Chastain concluded that employee's decision, and that of his family, to refuse blood transfusions was not reasonable. From a medical standpoint, the risks from accepting a transfusion were relatively minor. The risks from receiving a blood transfusion included a very remote chance of getting AIDS or hepatis. In employee's case, the risk of refusing transfusion was that he might not survive. (Tr. 436, 454-455). For employee, the risk of receiving a blood transfusion was not nearly as great as the risk in refusing that transfusion. (Tr. 461, 459-460, 462-463).

This undisputed medical evidence clearly demonstrates that the minor risks posed to employee in accepting a blood transfusion were significantly outweighed by the benefits resulting from that treatment. For employee, the risk of refusing a blood transfusion was certain and imminent death. The benefit to the employee from accepting a blood transfusion would be the restoration of the oxygen carrying capacity in his blood, the reversal of his anemia and ischemia, and his nearly certain survival.

It is undisputed that both the employee, and his wife and sons, were advised that a blood transfusion was necessary to replace the red blood cells lost as a result of the 4/13/00 accident and that a blood transfusion was necessary to save employee's life. However, both Floyd Wilcut, and his family, adamantly refused to accept blood or blood products, even if the result of this refusal of medical treatment was the employee's death. (Tr. 87, 89, 94, 635, 232, 90, 21, 23-24, 27, 30-32, 38, 41, 46-47). As is also clear from the testimony of Sharon Wilcut and her sons, Kevin and Brian, the *only* form of medical treatment that the employee and his family refused was that of a blood transfusion. (Tr. 31-32, 41, 44-45). In fact, Mrs. Wilcut insisted that alternative medical treatments be utilized, including the use of blood substitutes. (Tr. 46-47).

The medical experts testified, however, that in the employee's situation, there was no viable alternative medical treatment to a blood transfusion. Dr. Schuman found that there was no other viable treatment option for reversing the employee's anemia, apart from a blood transfusion. Hespan, saline infusions, blood sampling, and iron supplements would not be sufficient to spur the employee's hemaglobin production. Nor were blood substitution products a viable alternative treatment. (Tr. 524-526, 529-530, 543-544). Dr. Schuman testified that there was no alternative to blood transfusions when a patient was severely anemic from blood loss. "If they need blood, they need blood. There is no substitute." (Tr.562). As Dr. Schuman testified, the standard of care in medicine is to give blood for severe anemia, especially with cardiac compromise. (Tr. 562, 531).

Likewise, Dr. Chastain testified that while alternatives existed to accelerate the body's normal restorative process, such as Epogen, iron and Vitamin C, those alternative treatment modalities did not work immediately. Rather, it took a considerable period of time for blood to be replaced using these alternative methods. In the employee's situation, the best recommendation and treatment was to replace the lost blood with a blood transfusion. (Tr. 444-446, 448-449).

The employee, and his family in his stead, did not refuse a blood transfusion based upon any perceived medical risk to the employee from the treatment offered. Rather, employee refused a blood transfusion, based upon his religious beliefs as a Jehovah Witness. (Tr. 21, 23-24, 27, 36). As Sharon Wilcut testified, Jehovah Witnesses believe that to accept a blood transfusion was a sin that would interfere with prayer. (Tr. 38). Minister Austin Griffin testified that Jehovah Witnesses believe that the Bible prohibited the use of blood and that it was a sin to receive blood, including the receipt of the a blood transfusion in a hospital situation. Jehovah Witnesses believed that if they accepted blood, it would affect the ability of that person to have their prayers answered, and would keep that person from inheriting everlasting life. (Tr. 13-16).

Based upon all the evidence in the record, including the undisputed medical evidence, the Industrial Commission properly found that the evidence overwhelmingly supported a conclusion that employee would have survived his work injuries, if he had accepted the blood transfusion to reverse his anemia. As the Industrial Commission

observed, employer presented uncontroverted evidence that employee, and his family on his behalf, consistently refused blood transfusions, with full knowledge that employee would live if he accepted them, and that employee would die if he refused them. (LF 18-33). Employee was hospitalized from 4/13/00 to 4/20/00. During the course of those seven days, employee's treating physicians repeatedly offered blood transfusions to employee, but both employee and his next of kin continually refused that medical treatment. It is undisputed that as a result of employee's refusal to receive a blood transfusion, he died. (Tr.632-634,501-503,509,511-513,462-463).

In concluding that employee's refusal to accept a blood transfusion was unreasonable, within the meaning of Section 287.140.5, the Industrial Commission applied the correct legal analysis, considering all of the evidence in the record, including employee's religious beliefs, and relying on the undisputed medical evidence regarding the risks and benefits of the proposed medical treatment. The Industrial Commission's legal analysis was entirely consistent with that utilized in ***Jacobs***, 789 S.W.2d at 235-236; ***Wood,*** 197 S.W.2d at 651-652; and ***Stawizynski,*** 936 S.W.2d at 163**.**

The legal analysis utilized by the Missouri Courts in these decisions, and employed by the Industrial Commission below, is entirely consistent with that applied by the California Court of Appeals in ***Martin v. Industrial Accident Cmsm***., 304 P2d 828 (Cal.App.2d.1956), upon which the Industrial Commission properly relied. (L.F.18-33).

At issue in ***Martin*** was whether a deceased employee's refusal to accept a blood transfusion that was necessary to save his life was unreasonable, even though the acceptance of that treatment was contrary to the injured employee's religious beliefs. ***Martin***, 304 P2d at 831. Charles Martin and his wife were Jehovah's Witnesses. While in the scope of his employment, Charles Martin sustained serious injuries, when a scaffold he was working on suddenly collapsed. After being taken to a hospital, Martin was diagnosed as have a probable rupture of the spleen and was advised that an operation would be necessary, and that a transfusion of whole blood was necessary and should be administered. Martin's wife was likewise so advised. Employee and his wife told hospital authorities and the attending physician that a transfusion of blood was against their religious beliefs, and that if it was a question of permitting a blood transfusion or dying, Charles Martin would choose death. ***Martin***, 304 P2d at 828-829.

An operation was then performed with the physicians using blood plasma and other substitutes for whole blood. When employee's abdomen was open, the cavity was full of blood. The spleen was surgically removed and about two hours after the operation, employee went into acute shock. The attending physician ordered a blood transfusion in hopes of saving Martin's life, but hospital authorities declined to consent to it being given, because of the refusal of employee and his wife to permit such a transfusion. Shortly thereafter, Martin died. ***Martin***, 304 P2d at 829.

Medical evidence established that the transfusion of substitutes for whole blood would not suffice to prevent shock, that a transfusion of whole blood was the usual procedure in spleen operations, that the risk of such blood transfusions were minimal compared with the benefits thereof, and that a transfusion in adequate amounts during and after surgery would probably have saved Martin's life. ***Id.*** Relying on Section 4056 of the California Labor Code,[5] the California Industrial Accident Commission found that Charles Martin's death was proximately caused by his unreasonable refusal to accept proper medical treatment and that his death was not a proximate result of his work related accident and injury. ***Id.***

Applying Section 4056 of the California Labor Code, the California Court of Appeals affirmed, holding that employee's decision to forego a blood transfusion was unreasonable. As the Court noted, the question of whether Martin's refusal to accept a blood transfusion constituted an unreasonable refusal to submit to medical treatment was

---

[5] That Section stated "No compensation is payable in case of death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the commission, based upon expert or medical or surgical advice, inconsiderable in view of the seriousness of the injury". ***Martin***, 304 P2d at 829, n1.

a question of fact to be determined by the Industrial Accident Commission from all of the evidence before it, and if the Industrial Accident Commission's findings and conclusions upon that issue of fact were supported by substantial evidence, they were not subject to review by the California appellate courts. ***Martin***, 304 P2d at 829. There was no issue as to the reasonableness of employee's beliefs or of his religion. Instead, the question was whether, in light of all the evidence, including Charles Martin's religious beliefs, it was unreasonable for employee to refuse to accept the treatment necessary to save his life. ***Martin***, 304 P2d at 830. The Court found that it was not unreasonable for the Legislature to fix as a condition to employer's liability that the death of an employee must arise out of his employment, and that it should not exist where death is the result of the voluntary act of the employee in refusing medical attention. ***Id***. As the Court reasoned, Charles Martin was not obligated to work in an employment that rendered him subject to the California Workers' Compensation Act and if Martin accepted such employment, he accepted it insofar as his right to compensation was concerned, subject to the conditions imposed by the Legislature upon the right to said compensation. ***Id***.

Plaintiff contented that if Section 4056 was construed as permitting the Industrial Accident Commission to hold that an employee's refusal to accept medical aid was unreasonable where the acceptance of such aid was contrary to an employee's religious beliefs, the statute denied the employee his constitutional right of religious freedom. Finding that there was no merit in this contention, the Court observed that even though

freedom of conscience and the freedom to believe are absolute, the freedom to act is not. ***Martin***, 304 P2d at 830.[6] Under the Workers' Compensation Act, Martin was free to believe and to worship as he chose, and was further free, if he so chose, to practice his beliefs. But if Martin exercised that choice and his death resulted from his choice, plaintiff was not entitled, as a matter of right, to benefits under the workers' compensation laws. ***Id.***

There was nothing in the California Workers' Compensation Act that compelled an employee to accept medical treatment of any kind, and Martin was free to make his choice between the practice of his religion and the acceptance of treatment that might be contrary thereto. But if Martin refused treatment, the Industrial Accident Commission was bound, as a court or jury would be in a tort action, to look at all of the facts and to determine therefrom whether Martin's refusal was reasonable. ***Martin***, 304 P2d at 830-

---

[6] ***Martin's*** ruling in this regard is entirely consistent with Missouri caselaw. Missouri Courts recognize that only the freedom to believe is absolute, and that the freedom to act remains subject to regulation for the protection of society. See ***Hester v. Barnett***, 723 S.W.2d 544, 558 (Mo.App.W.D.1987); ***Penner***, 695 S.W.2d at 889 (a person may not always avoid the impact of statutes which serve an important public purpose, within the Legislative power, by interposing on an individual's religious beliefs).

831. Thus, the Court held that Section 4056 of the California Labor Code did not transgress upon Martin's constitutional rights. ***Martin***, 304 P2d at 831. Therefore, Martin was free to accept the tenets of his church and believe in them, and he was free to exercise his right to practice those beliefs, but that did not give Martin a right to impose, contrary to the California Labor Code, a liability upon his employer for his death resulting from the voluntary practice of his religion. ***Id.***

In its Opinion, the Eastern District erroneously found the Industrial Commission's reliance on ***Martin*** to be misplaced. The Opinion concluded that ***Martin*** was expressly overruled by another California Court of Appeals decision, ***Montgomery v. Bd. of Retirement***, 109 Cal. Rptr. 181, 185-186 (Cal.App.5th.1973). (A.17-A.29).

The Opinion, however, fails to give ***Montgomery*** an appropriate reading, and to consider the factual context in which ***Montgomery*** was rendered. ***Montgomery*** was not a workers' compensation matter, as was ***Martin*** and the case instanter. Rather, ***Montgomery*** involved a public benefit program, namely disability retirement benefits. At issue in ***Montgomery*** was whether the denial of those public benefits to an employee whose religious beliefs prohibited surgery on a tumor which rendered her disabled, placed a burden on the employee's exercise of her religion, and whether that denial was justified by a compelling state interest. ***Montgomery***, 109 Cal. Rptr. at 183. In finding that ***Martin*** was not dispositive on the issue before it, the 5th District Court of Appeals found that the ratio decidendi of ***Martin*** was inconsistent with, and could not reconciled with

the rule laid down in the Supreme Court decision of ***Sherbert v. Verner,*** 374 U.S. 938, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963). ***Montgomer***y found that the principles set forth in ***Martin*** no longer represented the law. ***Montgomery***, 109 Cal. Rptr. at 186.

However, ***Montgomery*** and ***Sherbert***, upon which it principally relied, involve the a public benefit program of unemployment compensation. Conversely, ***Martin*** and the instant case deal with workers' compensation benefits. Workers' compensation benefits are not a public benefit program, as is unemployment compensation. Rather, workers' compensation benefits are paid by private workers' compensation carriers, based on insurance premiums, or by self-insured employers. R.S.Mo. §§287.280, 287.300. Workers' compensation benefits, such as those at issue in ***Martin*** and herein, are creatures of statute. The benefits recoverable, and the conditions precedent to recovering such benefits, are established by statute. See ***Sheets v. Hill Brothers Distributors***, 379 S.W.2d 514, 516 (Mo.1964) (all remedies, claims, or rights accruing to an employee against an employer for compensation for injuries arising out of and in the course of his employment are those provided for in the Act); ***Farmer v. Barlow Truck Lines***, 979 S.W.2d 169, 170 (Mo.banc.1998) (as a creature of statute, workers' compensation law is governed by Chapter 287, R.S.Mo.).

The different context between ***Martin*** and that involved in ***Montgomery*** and ***Sherbert*** is crucial. As the U.S. Supreme Court acknowledged in ***Employment Division***, ***Department of Human Resources v. Smith,*** 494 US 872, 883, 110 S.Ct. 1595, 1602, 108

L.Ed2d 876 (1990), the Supreme Court has never invalidated any governmental action on the basis of the ***Sherbert*** test, outside of the denial of unemployment compensation. Since ***Martin*** addressed workers' compensation benefits, rather than a public program of unemployment compensation, the rulings in ***Sherbert*** and ***Montgomery*** do not, and cannot, serve as an abrogation of the rule of law reached by the California Court of Appeals in ***Martin***.

Additionally, ***Montgomery*** found that ***Martin*** had not been cited in any subsequent decision. ***Montgomery***, 109 Cal. Rptr. at 186. This finding was clearly erroneous. The Supreme Court of Colorado, and that of Oklahoma, have relied upon ***Martin*** in deciding whether an injured employee's refusal to accept medical treatment precluded him from receiving workers' compensation benefits, or reduced the benefits recoverable by that injured employee. That is the precise legal question herein. See, ***Walter Nashert & Sons v. McCann***, 460 P2d 941, 943 (Okla.1969); ***Industrial Commission v. Vigil***, 373 P2d 308, 361-362 (Colo.1962).

In ***Vigil***, the Colorado Supreme Court held that the Colorado Industrial Commission did not err in rating an injured employee's disability at the degree which would have obtained after an operation, had employee consented thereto, where the surgery was necessary to effect recovery, and was free of unusual risk, but the employee refused to undergo the operation, or to accept any surgery in which a blood transfusion was required. As the Colorado Supreme Court noted, there was a question of fact as to

whether the treatment was reasonably essential to promote the injured employee's recovery. It upheld the Industrial Commission's finding that surgery was reasonably essential to effect employee's recovery and that the surgery proposed was such as to be free of unusual risk. All of the physicians involved were in agreement that the surgery was necessary. Under these circumstances, the Colorado Industrial Commission did not err in finding that employee's disability should have been rated at the degree which would have obtained after the operation, had he consented thereto. That the injured employee refused to accept surgery because of his religious convictions did not change the situation. Relying on ***Martin***, the Colorado Supreme Court held that while the injured employee was free to exercise his right to accept the tenets of his church and to exercise the right to practice his beliefs, the employee's choice did not permit him to subject his employer to greater liability than would have obtained had the employee's religious faith permitted him to undergo the type of surgery required. ***Vigil***, 373 P2d at 361.

Similarly, ***Nashert*** ruled that an injured employee could practice his religious beliefs by refusing medical treatment, but that employee would not be permitted to impose unreasonable, additional financial burdens upon his employer by practicing those beliefs. ***Nashert***, 460 P2d at 943. The Court held that an injured employee who, on religious grounds, refused medical treatment for work related heart attacks could not be denied compensation for injuries attributable to his employment, but was not entitled to compensation for disability attributable to his failure to accept medical treatment. As the

Oklahoma Supreme Court observed, in tort cases, it was the duty of an injured plaintiff to timely procure medical treatment and if his condition was rendered worse by his failure, the plaintiff could not recover for the increased damages resulting from that failure, but was entitled only to recover such damages as he would have sustained, had he not failed to obtain medical treatment. ***Nashert,*** 460 P2d at 943.

Citing ***Martin*** and ***Vigil***, the Oklahoma Supreme Court found that while an injured employee may practice his religious beliefs, he will not be permitted to impose additional financial burdens upon his employer in practicing those beliefs. ***Id.*** As the Court observed, the First Amendment provided that Congress shall make no law prohibiting the free exercise of religion. Thus, upon constitutional grounds, an employee should not be penalized for his religious beliefs. If the injured employee was not compensated for his heart injury attributable to the accident, as distinguished from that disability attributable to employee's failure to accept medical treatment, the employee would not be accorded full freedom to exercise his religious views. However, the employee could not recover compensation benefits for any disability attributable to his failure to accept medical treatment. ***Id.***

Since the instant case involves workers' compensation benefits, rather than a public benefit program such as unemployment compensation, and since the Supreme Courts of Oklahoma and Colorado have followed the rule established in ***Martin,*** the Eastern District erred in concluding that ***Martin*** was expressly overruled by the

Montgomery decision. (A.17-A.29). Clearly, ***Martin*** is still viable legal precedent. And, since the analysis in ***Martin*** is entirely consistent with that utilized by Missouri Courts in determining whether an injured employee's refusal of medical treatment is unreasonable, for purposes of Section 287.140.5, the Industrial Commission did not err in relying upon that decision. (L.F.18-33).

Since the Industrial Commission's factual determination that employee unreasonably refused the medical treatment offered to him was supported by the overwhelming weight of the evidence, including the undisputed medical evidence and medical testimony, that finding of fact is conclusive and binding. ***Williams v. DePaul Health Ctr.***, 996 S.W.2d 619, 625 (Mo.App.E.D.1999); ***Hall v. G.W. Fiberglass Inc.,*** 873 S.W.2d 297, 298 (Mo.App.E.D.1994). Therefore, the Industrial Commission's finding, and its Award as a whole, must be affirmed. ***Id***.[7]

---

[7] Claimant did not choose to file a Substitute Brief with the Supreme Court. However, in her Appellant's Brief filed with the Missouri Court of Appeals, claimant did not challenge the Industrial Commission's finding that the employee's refusal of a blood transfusion was unreasonable, within the meaning of Section 287.140.5. Absent in claimant's Appellant's Brief filed with the Eastern District is any attempt to argue that employee's refusal to accept a blood transfusion was reasonable, or otherwise supported by the evidence in the record. Having failed to challenge the Industrial Commission's finding in this regard, claimant has conceded that employee's refusal to accept a blood

B.

EMPLOYEE'S DECISION NOT TO ACCEPT A BLOOD TRANSFUSION BECAUSE OF HIS RELIGIOUS BELIEFS AS A JEHOVAH'S WITNESS WAS A REFUSAL OF MEDICAL TREATMENT OFFERED BY THE EMPLOYER, AS CONTEMPLATED BY SECTION 287.140.5 OF THE WORKERS' COMPENSATION ACT, AND DID NOT CONSTITUTE TREATMENT OF EMPLOYEE'S INJURIES BY "PRAYER OR SPIRITUAL MEANS", WITHIN THE MEANING OF SECTION 287.140.9 OF THE ACT.

The Industrial Commission did not err in ruling that Section 287.140.9 was not applicable to the instant case. In its Award, the Industrial Commission observed that Section 287.140.9 related solely to prayer or spiritual means, the goal of which was treatment of an employee's injuries. Floyd Wilcut's refusal to accept blood transfusions was not treatment by prayer. (L.F.18-33). As the overwhelming weight of the competent and substantial evidence in the record, including the undisputed medical evidence and medical testimony demonstrate, the instant case involves only medical treatment, and does not involve treatment by prayer, within the meaning of Section 287.140.9. That employee refused ***medical treatment*** offered to him because of his religious beliefs, is not the equivalent of choosing to treat his work related injuries by prayer or spiritual means.

---

transfusion was unreasonable, within the meaning of Section 287.140.5.

Section 287.140.9 states:

> "Nothing in this chapter shall prevent an employee being provided treatment for his injuries by prayer or spiritual means if the employer does not object to the treatment". R.S.Mo. §287.140.9.

Neither Section 287.140.9, nor any other provision of the Workers' Compensation Act, defines the phrase "***prayer or spiritual means***", contained therein. In this circumstance, that phrase is to be given its plain and ordinary meaning. ***Richard v. Mo. Dept. of Corrections***, 162 S.W.3d 35, 39 (Mo.App.W.D.2005). Where, as here, a statute does not define a term or phrase, that term will be given its plain meaning, as derived from the dictionary. ***Nunn v. C.C. Midwest***, 151 S.W.3d 388, 396 (Mo.App.W.D.2004); ***State ex rel Hope House v. Merrigan***, 133 S.W.3d 44, 49 (Mo.banc.2004).

As defined by Merriam Webster's Collegiate Dictionary, 10th Edition, "***prayer***" means an address to God or a God in word or thought, or the act or practice of praying to God, or a God. Likewise, Webster defines the term "***spiritual***" as relating, consisting of, or affecting the spirit; of or relating to sacred matters; ecclesiastical rather than lay or temporal; of or relating to supernatural beings or phenomenon. Giving the phrase **"prayer or spiritual means**" its dictionary definition, that phrase cannot reasonably be construed to encompass a medical procedure or form of treatment, such as a blood transfusion. To the contrary, the phrase contemplates the substitution of prayer and

related religious practices instead of medical procedures to bring about relief from a work related injury. This would be the type of activity engaged in by Christian Scientists.

In the instant case, however, employee, and his family members in his stead, did not seek to heal employee's injuries arising from the 4/13/00 accident by praying over employee or engaging in similar conduct. To the contrary, the undisputed evidence in the record demonstrates that employee and his family accepted all forms of medical treatment offered to employee by the Hospital and employee's treating physicians with one exception-that being a blood transfusion. And, as the testimony of Austin Giffin demonstrates, Jehovah's Witnesses do not believe in faith healing, or prayer healing, as those terms are commonly understood.

At St. Francis Hospital, employee was treated in the ER, underwent blood work, lab work, and EKG tests. Additionally, employee underwent surgical procedures on 4/13/00 and 4/14/00. While employee and his family refused to accept blood transfusions, they insisted that alternative medical treatments, such as Epogen, be utilized to replace employee's lost blood volume. At no time did employee's family reject any medical treatment or procedure offered to them, with the exception of a blood transfusion. This is demonstrated by the testimony of Kevin Wilcut and his mother.

Kevin Wilcut testified that any medical treatment could have been used to save his father's life, with the exception of blood transfusions. (Tr.31-32). Similarly, Sharon Wilcut testified that the only form of medical treatment that she would not allow to save

her husband was that of a blood transfusion. (Tr.41). Minister Austin Giffin testified that Jehovah's Witnesses do not refuse medical treatment and choose, instead, to treat by prayer. Rather, Jehovah's Witnesses fully embrace modern medicine, with the one exception of blood transfusions. (Tr.18-19).

The undisputed medical evidence shows that the blood transfusion offered, on numerous occasions, to employee was a form of medical treatment. The testimony of Sharon Wilcut and that of her son, Kevin, likewise recognizes this fact. Given this evidence, the Industrial Commission reasonably concluded that Section 287.140.9 was not applicable to the instant matter. At no time did employee or his family seek to substitute prayer or related spiritual practices for modern medical treatment to cure or relieve employee's work injuries. That being the case, Section 287.140.9 is not applicable and the compensability of employee's injuries must determined under Section 287.140.5.

Absent in the record is any evidence that employee or his family members advised any treating physician or care provider that employee wished to forsake medical treatment and treat his injuries arising from the accident through prayer or spiritual means. Relatedly, neither employee nor his family sought to cure the anemia and ischemia caused by employee's blood loss through prayer or similar spiritual practices. To the contrary, employee's family sought to use alternative medical treatments to alleviate that medical condition.

As the record makes readily apparent, employee and his family refused multiple offers of a blood transfusion. This conduct is merely a refusal of medical treatment. Neither the conduct of employee, nor that of his family, involved an affirmative act in lieu of traditional medical treatment, such as use of a faith healer or following Christian Science doctrine. Far from forsaking modern medical treatment and opting for treatment by prayer, employee and his family utilized every form of medical treatment that modern medicine had to offer, with the exception of a blood transfusion.

The undisputed evidence in the record, both the medical evidence and lay testimony, establishes beyond doubt that employee and his family did not choose to treat employee's injuries through prayer or spiritual means but, instead, chose to treat employee's injuries through use of medical treatment, with one exception. That being the case, Section 287.140.9 is not implicated and has no bearing upon whether employee's dependents can recover death benefits. In its Award, the Industrial Commission specifically found that employee did not choose to pursue treatment by prayer or spiritual means, within the meaning of Section 287.140.9. Since the overwhelming weight of the evidence in the record, including the undisputed medical evidence and undisputed lay testimony supports the Industrial Commission's finding in this regard, that finding must be affirmed. Section 287.495.1(4).

C.

THE INSTANT CASE DOES NOT INVOLVE THE VIOLATION OF AN INDIVIDUAL'S RIGHT TO EXERCISE HIS RELIGIOUS BELIEFS. THERE WAS NO INFRINGEMENT OF EMPLOYEE'S RIGHT TO FREELY EXERCISE HIS RELIGIOUS BELIEFS, AS GUARANTEED BY THE UNITED STATES AND MISSOURI CONSTITUTIONS, TO REFUSE A BLOOD TRANSFUSION BECAUSE IT WAS CONTRARY TO THE TENETS OF HIS RELIGION. WHILE EMPLOYEE HAD THE RIGHT TO EXERCISE HIS RELIGIOUS BELIEFS, NEITHER EMPLOYEE NOR HIS DEPENDENTS HAVE A CONSTITUTIONAL OR STATUTORY RIGHT TO IMPOSE THE CONSEQUENCE OF EMPLOYEE'S DECISION ON THE EMPLOYER, SO AS TO INCREASE ITS WORKERS' COMPENSATION LIABILITY.

As in ***Martin***, ***Vigil***, and ***Nashert,*** the issue herein is not whether an employee's freedom to exercise his religious beliefs was infringed, but rather, who will be responsible for the financial consequences of the employee's free exercise of his religious beliefs, the injured employee or his employer. The Industrial Commission recognized this fact in its Award. It stated: "[C]ontrary to dependent's assertions, this case is not about an individual's freedom to exercise his or her religion. The case is about who should bear the consequences resulting from the exercise of one's religion. Under the facts of this case, the employee's dependents must bear the consequences of employee's decision to strictly observe a tenant of his religion". (L.F.18-33).

The First Amendment to the United States Constitution, which as been made applicable to the States by incorporation into the 14th Amendment, provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. ***Oliver v. State Tax Commission of Missouri***, 37 S.W.3d 243, 248 (Mo.banc.2001); ***Cantwell v. Connecticut***, 310 US 296, 60 S.Ct. 900 (1940). Missouri follows generally the usual pattern of religious guarantees and safeguards in its Constitution. ***Harfst v. Hoegen***, 163 S.W.2d 609, 612 (Mo.1941). Specifically, Article I, Section 5 of the Missouri Constitution provides that Missouri citizens have a natural and indefeasible right to worship God, according to the dictates of their own conscience. Mo. Con. Art. I, § 5.

The Industrial Commission's Award, and its denial of death benefits therein, did not violate either the Missouri or the Federal Constitution. This case does not involve the infringement of the employee's freedom to practice his religious belief as a Jehovah's Witness. The undisputed evidence in the record, including evidence from employee's treating physicians, the medical experts, and employee's family members demonstrates, without question, that employee's decision not to accept a blood transfusion was scrupulously respected and followed.

Absent in the record is **any** evidence that employer sought to prevent employee from freely exercising his religious beliefs as a Jehovah's Witness. It is undisputed that employer did not seek to compel employee to submit to a blood transfusion. Nor did any

of employee's treating physicians, or the Hospital where employee received treatment, seek judicial relief to compel employee to accept a blood transfusion. Despite the fact that it was the "unwavering recommendation" of the medical team that blood transfusions be performed, with the consequence of refusal of blood transfusions being the imminent death of employee (Tr.632), the medical team, as well as employer, respected employee's decision to fully exercise his religious rights as a Jehovah's Witness, to refuse the blood transfusion that was necessary to save his life. (Tr.632).

The instant case does not involve a situation where an individual's religious beliefs were ignored, restricted, or trampled upon. To the contrary, employee was fully allowed to exercise his religious beliefs, even though the result of that decision was his death. The Hospital and employee's treating physicians fully accommodated employee's religious beliefs. In failing to raise any objection to employee's refusal to accept a blood transfusion, employer likewise accommodated employee's religious beliefs as a Jehovah's Witness. Given the undisputed evidence in the record, including the testimony of Sharon, Brian and Kevin Wilcut, that employee's wishes to refuse a blood transfusion were respected, employee's rights, whether they arise under the Missouri or United States Constitution, were fully protected. In being permitted to refuse a blood transfusion, employee was able to fully exercise his religious beliefs, without infringement from any source.[8]

---

[8] As Judge Romines observed in his Dissenting Opinion, employee and his family

What this Court must decide, and what the Industrial Commission properly decided below, was whether employee or his dependents should be permitted to subject employer to a greater liability under the Workers' Compensation Act than employee would have recovered, had his religious beliefs permitted him to accept a blood transfusion. In other words, the instant case involves the issue of who is to bear the financial consequences of an injured employee's free and full exercise of his religious beliefs.

Undoubtedly, Floyd Wilcut had the right to refuse life saving medical treatment, based upon his beliefs as a Jehovah's Witness. However, employee had no constitutionally protected right to be compensated for the consequences of his refusal to accept medical treatment that would have saved his life.

As ***Martin, Nashert***, and ***Vigil*** recognize, an employer is not to be held liable for the consequences resulting from an injured employee's free exercise of his religious convictions in refusing to accept medical treatment. ***Vigil***, 373 P2d at 361-362; ***Nashert***, 460 P2d at 943; ***Martin***, 304 P2d at 831. The same principle has been applied in the tort context. ***Corlett v. Caserta***, 562 NE2d 257, 262 (Ill.App.1st.1990). Therein, the Illinois Court of Appeals held that where a physician's negligent act caused a patient to suffer life

---

exercised their religious beliefs-employer did not seek judicial intervention, nor did the State, to compel a transfusion. As such, there was no religious conumdrum for the Court to tackle. (A.17-A.29).

threatening injuries, and the patient exercised his fundamental religious right to refuse a reasonable, life saving medical procedure and subsequently died, the patient's estate had to bear a proportionate share of tort liability for the patient's wrongful death, to the extent that the patient's death was proximately caused by the patient's refusal of reasonable life saving treatment. ***Id.***

As the Illinois Court of Appeals observed, in the tort context, a plaintiff has a duty to mitigate damages resulting from a defendant's negligence. Under mitigation of damages principles, a plaintiff's award of damages is reduced to the extent that plaintiff's injuries were caused by his voluntary refusal of reasonable medical treatment. Similarly, under the principle of assumption of the risk, a plaintiff's award is offset by the degree to which the plaintiff assumed the risk of a defendant's negligence, in that the plaintiff knew of the risks and nevertheless, voluntarily and unreasonable proceeded to encounter them. ***Id.***

Whether based upon principles relating to mitigation of damages, comparative fault, or assumption of the risk, a patient's refusal to accept reasonable medical treatment, suggested in an effort to alleviate the consequences of a physician's negligence, should not serve to completely defeat the patient's recovery for those injuries proximately caused by the physician's negligent acts. Nor did Illinois tort rules regarding mitigation of damages, comparative fault, or assumption of the risk dictate that a patient who, for religious reasons, refuses medical treatment necessitated by a physician's negligence,

should be denied compensation for those injuries attributable to the physician's tortious conduct. However, a physician who committed a tortious act should not be totally liable for all subsequent injuries to the patient when the patient's injuries were attributable, in part, to his refusal of reasonable medical treatment. The Court declined to create, for a patient who refused reasonable life saving medical treatment because of that patient's religious convictions, an exemption from the tort principles governing mitigation of damages, comparative fault, and assumption of the risk. ***Id***.

As the Court recognized, the decedent had a constitutional right to refuse the suggested blood transfusion, because of his religious beliefs. That right derived from both the United States Constitution and Illinois common law. Nevertheless, there was a marked distinction between a patient's exercise of his fundamental religious right to refuse life saving medical treatment and a patient's attempt to impose the consequences of his religious decision upon a physician who has committed a tort against him. The freedom to act upon one's religious convictions does not encompass the privilege of imposing tort liability on another for injuries resulting, not from the other's tortious conduct, but rather from the voluntary practice of one's religions convictions. ***Id***.[9] Allocation of proportionate liability to a patient for the consequences of that patient's

---

[9] In so ruling, the Illinois Court of Appeals relied upon ***Nashert, Vigil***, and ***Martin***. ***Corlett***, 562 NE2d at 262-263.

exercise of his religious convictions did not violate the patient's religious or fundamental rights. ***Corlett***, 562 NE2d at 263.

The reasoning applied by the Illinois Court of Appeals in ***Corlett*** applies with equal force in the instant case. While Floyd Wilcut had a right under both the Missouri and United States Constitutions to refuse the blood transfusions offered to him because of his religious beliefs, neither employee, nor his dependents, have the right or privilege of imposing upon employer increased workers' compensation liability for injuries or death resulting not from the 4/13/00 accident, but from employee's free and voluntary practice of his religious convictions. ***Corlett***, 562 NE2d at 262. The medical evidence is clear and undisputed. If employee would have accepted a blood transfusion, he would have lived. The sole cause of employee's death was his failure to accept a blood transfusion. That being the case, employee's dependents must bear the consequence of employee's decision to exercise his religious beliefs and, therefore, they may not recover death benefits. ***Corlett***, 562 NE2d at 26-263.

As the record demonstrates, employee freely exercised his religious beliefs as a Jehovah's Witness in refusing a blood transfusion. Employee having freely made that decision, and having died as a result, his dependents are not entitled to receive increased workers' compensation benefits, simply because the employee's refusal of medical treatment was based upon his religious beliefs. To do so would allow employee and his

dependents to impose, through employee's religion, a liability on employer that would not otherwise exist. ***Martin***, 304 P2d at 831.

D.

ANY CONSTRUCTION OF SECTION 287.140.5 AS PRECLUDING ITS APPLICATION TO ANY REFUSAL OF MEDICAL TREATMENT WHICH IS BASED UPON AN EMPLOYEE'S RELIGIOUS BELIEFS MUST BE REJECTED, SINCE SUCH A CONSTRUCTION WOULD VIOLATE THE PROVISIONS OF THE MISSOURI AND UNITED STATES CONSTITUTIONS REQUIRING THE SEPARATION OF CHURCH AND STATE AND PROHIBITING THE STATE FROM ADVANCING RELIGION.

To find, as did the Eastern District, that employee's refusal of medical treatment was not unreasonable, in light of his beliefs as a Jehovah's Witness, violates those provisions of the Federal and Missouri Constitution, declaring that there must be a separation of church and State. The result reached by the Eastern District essentially created a "Jehovah's Witness" exception to Section 287.140.5.

An example will suffice to demonstrate this fact. Assume that Floyd Wilcut refused a blood transfusion not on religious grounds, but based upon a personal belief that such a transfusion would expose him to the AIDS virus. Given the undisputed medical evidence in the record regarding the minimal risks arising from blood transfusions and the fact that employee required a blood transfusion to save his life, there can be little doubt

that the Eastern District would find Mr. Wilcut's refusal of a blood transfusion based upon his fear of exposure to the AIDS virus to be unreasonable.

However, the Eastern District found employee's refusal of a blood transfusion to be reasonable, since that refusal was based upon his "sincerely held religious beliefs". (A.17-A.29). In so holding, the Eastern District ignored the undisputed medical evidence in the record and instead, focused upon employee's religious beliefs and the sincerity of those beliefs. (A.17-A.29). The Opinion essentially found that employee's religious beliefs rendered all other facts and evidence in the record irrelevant. In doing so, the Eastern District ignored the overwhelming weight of the competent, substantial, and undisputed medical evidence and medical testmony, demonstrating that, given employee's medical condition, his refusal to accept a blood transfusion was unreasonable.

Essentially, the Opinion finds an employee's refusal of medical treatment based upon that employee's "sincerely held" religious beliefs to be per se reasonable, for purposes of Section 287.140.5. The Opinion's finding in this regard is not supported by the express terms of that statutory provision. Moreover, it required the Court to determine whether the employee's religious beliefs were sincere.

The First Amendment, which has been made applicable to the States by incorporation into the 14th Amendment, provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. ***Oliver v. State Tax Commission***, 37 S.W.3d 243, 248 (Mo.banc.2001). Sections 5 to 7 of Article I

of the Missouri Constitution erect a greater wall separating church and State than that created by the First Amendment. ***Oliver***, 37 S.W.3d at 250; ***Gibson v. Brewer***, 952 S.W.2d 239, 246 (Mo.banc.1997). As does the U.S. Supreme Court, Missouri Courts recognize that the free exercise clause of the First Amendment forbids them from evaluating the correctness of religious doctrine or religious practice. ***Hester***, 723 S.W.2d at 558 (where the truth or false validity of religious belief becomes the object of judicial redress, the inquiry enters a forbidden domain); ***United States v. Ballard***, 322 US 78, 87, 64 S.Ct. 882, 886, 88 L.Ed2d 1148 (1944); ***Gibson***, 952 S.W.2d at 246-247.

In evaluating the sincerity[10] of employee's religious beliefs as Jehovah's Witness in determining whether employee's refusal of a blood transfusion was unreasonable, the Eastern District engaged in this forbidden line of inquiry. ***Id.*** By engaging in this inquiry, the Court of Appeals violated the Establishment and Free Exercise Clauses of the First Amendment, as well as Sections 5 and 7 of Article I of the Missouri Constitution,

---

[10] It was not necessary for the Eastern District to engage in an inquiry as to the sincerity of employee's beliefs as a Jehovah's Witness, in order to determine whether his refusal of a blood transfusion was unreasonable, for purposes of Section 287.140.5. Rather, the Court should have *presumed* that employee's religious beliefs were sincere, as did the Industrial Commission, and consider that fact, along with all the other evidence in the record.

since the Court necessarily undertook a discussion of religious doctrine, and based its legal decision on such doctrine. "Governmental scrutiny of the sincerity of one's religious belief is offensive to our tradition of individual rights". ***Penner***, 695 S.W.2d at 889. See also, ***Hester,*** 723 S.W.2d at 558; Ballard, 322 U.S. at 87, 64 S.Ct. at 886. The effect of the Eastern District's decision is to advance a particular religion, that of the Jehovah's Witnesses. As such, it violates both the First Amendment and the Missouri Constitution. ***Tony & Susan Alamo Foundation v. Secretary of Labor***, 471 US 290, 305, 105 S.Ct.1953, 1963, 85 L.Ed.2d 278 (1985).

The result reached by the Eastern District violates Article I, § 7 of the Missouri Constitution, since it compels preferential treatment based upon employee's status as a Jehovah's Witness. Article I, Section 7 of the Missouri Constitution prohibits the State from carving out a religiously based distinction in the application of the Workers' Compensation Act, that would benefit the members of one faith over another, or over injured workers whose actions are not faith based. The ruling of the Eastern District would allow an injured employee, or their dependents, to receive workers' compensation benefits where that injured employee refused medical treatment on religious grounds, but would deny workers' compensation benefits to an injured employee or their dependents, who refused medical treatment based on secular grounds.

In effect, the Opinion creates an exception to Section 287.140.5 for those injured employees who refuse medical treatment, based upon their religious convictions. Under

this judicially created exception, the State must single out and compel benefits for those injured employees whose behavior is religiously motivated, while denying benefits to injured employees whose identical behavior is not based on religion. Such a result not only violates Article I, Section 7 of the Missouri Constitution, it also violates the Establishment Clause of the First Amendment.

Courts utilize the ***Lemon*** test in determining whether the Establishment clause has been violated. Under that three-part test, the statute in question must serve a secular purpose, it must have a primary effect that neither advances nor inhibits religion, and it must prevent the State from excessive entanglement with religion. ***Lemon v. Kurtzman***, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

To adhere to the construction of Section 287.140.5 utilized by the Eastern District, would clearly violate the Establishment clause. As a whole, the Workers' Compensation Act serves a secular purpose, namely to provide benefits to employees who sustain work related injuries. However, to construe Section 287.140.5 to require payment of compensation benefits to injured employees who refuse medical treatment for religious reasons would only serve a religious purpose, in that it would compel the payment of compensation benefits for the sole purpose of accommodating religious beliefs. Relatedly, such a construction of Section 287.140.5 would directly advance religion, in this case, that of the Jehovah's Witnesses. Finally, the Opinion's construction of Section 287.140.5 would involve significant state entanglement, as the State, through the

Industrial Commission and the Courts would be required to engage in a prohibited determination as to whether an employee's religious beliefs were sincerely held. To adopt the construction of Section 287.140.5 utilized by the Eastern District below, would clearly violate the Establishment Clause of the First Amendment. ***Lemon***, 403 U.S. at 612-613, 91 S.Ct. at 2111. Consequently, that construction of the Act cannot, and must not, be followed. ***Id.***

II

THE INDUSTRIAL COMMISSION DID NOT ERR IN HOLDING THAT EMPLOYEE'S DEATH DID NOT ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT, AND THE INDUSTRIAL COMMISSION'S AWARD MUST BE AFFIRMED, FOR THE REASON THAT THE UNDISPUTED MEDICAL EVIDENCE AND MEDICAL TESTIMONY DEMONSTRATE THAT EMPLOYEE'S DECISION TO REFUSE A BLOOD TRANSFUSION BROKE THE MEDICAL CAUSAL CONNECTION BETWEEN THE 4/30/00 ACCIDENT AND EMPLOYEE'S DEATH ON 4/20/00, AND THAT EMPLOYEE'S DEATH WAS NOT COMPENSABLE AS A LEGITIMATE CONSEQUENCE OF THAT WORK EVENT.

This Court may affirm the Industrial Commission's Award, denying death benefits to employee's dependents, without consideration of Section 287.140.5. To do so, the Court need only look at the medical evidence in the record, the provisions of the Workers'

Compensation Act regarding a compensable injury, and determine whether employee's intentional decision to refuse a blood transfusion constituted a superceding, intervening event, that broke the chain of medical causation between employee's 4/13/00 accident and employee's death on 4/20/00. The Industrial Commission found that the employee's refusal to accept a blood transfusion broke the medical causal link between the work related accident and his death, and therefore, employee's death did not arise out of and in the course of his employment. (L.F.18-33). Since the Industrial Commission's finding is supported by the undisputed medical evidence, it must be affirmed. R.S.Mo. §287.495.1(4).

Pursuant to the Workers' Compensation Act, an injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. R.S.Mo. §287.020.2. Pursuant to Section 287.020.3, an injury shall be deemed to arise out of the employment only if it is reasonably apparent, upon consideration of all the circumstances, that the employment was a substantial factor in causing the injury; it can be seen to have followed as a natural incident of the work; it can be fairly traced to the employment as a proximate cause; and it does not come from a hazard or risk unrelated to the employment, to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life. R.S.Mo. §287.020.3. As used within Section 287.020.3, "**proximate cause**" is such cause as operates to produce a particular consequence, without

the intervention of an independent or superceding cause. ***Cook v. St. Mary's Hospital***, 939 S.W.2d 934, 939 (Mo.App.W.D.1997); ***Williford v. Lester E. Cox Med***. Ctr., 3 S.W.3d 872, 877 (Mo.App.S.D.1999). In workers' compensation cases, a cause is proximate if it is a substantial factor in bringing about the result. ***Id.***

Where the primary injury is shown to have arisen out of and in the course of the employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause. ***Manley v. American Packing***, 253 S.W.2d 165, 169 (Mo.1952); ***Wilson v. Emery Bird Thayer***, 43 S.W.2d 953, 958 (Mo.App.W.D.1966); ***Lahue v. Treasurer***, 820 S.W.2d 561, 563 (Mo.App.W.D.1991). When an employee seeks to establish that a second injury is a legitimate consequence of a compensable accident, he has the burden of showing, by a preponderance of the evidence, that his incapacity subsequent to the second injury resulted from his original injury. ***Ortel v. John D. Streett***, 285 S.W.2d 87, 97-98 (Mo.App.E.D.1955). A second injury following an accident may be the legitimate consequence of the accident if it results from or is contributed to by a condition brought about by the accident, and whether this is so must be determined from all the facts and circumstances in the case. ***Ortel***, 285 S.W.2d at 96. There must be no intervening, independent cause to break the chain of causation between the new injury or aggravation and the original injury, in order that liability be imposed upon employer for consequential results. ***Wilson***, 403 S.W.2d at 958. The "**chain of causation**" means the original force

and every subsequent force which it puts in motion, so that where the accident causes an injury and the injury moves forward, causing a series of other injuries, each injury accounting for the one following, until a final result is reached, the accident that sets the first injury or force in motion is responsible for the final result. ***Ortel***, 285 S.W.2d at 96.

Every natural consequence that flows from the injury likewise arises out of employment, unless it is the result of an independent, intervening cause attributable to an employee's own intentional conduct. ***Cahall v. Riddle Trucking***, 956 S.W.2d 315, 322 (Mo.App.E.D.1997). That is the precise situation herein.

The undisputed evidence demonstrates that even though employee lost a significant amount of blood on the day of the accident, he did not die from blood loss at the accident scene. Nor did he die in the ER or during surgery on 4/13/00 and 4/14/00. (Tr.632,511-513,442-443). Even though employee's injuries were severe-extensive lacerations to employee's face and scalp, a 40% scalp avulsion injury, and a cervical fracture-those injuries were not fatal. Rather, employee's injuries would have been survivable, if he had received a blood transfusion. (Tr.81-83,511-513,462-463,467-468,632-634).

From a cardiac standpoint, employee's status was normal at the time he was admitted to the Hospital on 4/13/00. (Tr.75-76,81-82,870). However, over the ensuing week, employee developed ischemia (lack of adequate blood flow) and anemia (lack of oxygen carrying capacity in the blood). These conditions were reflected by EKG

changes, as well as employee's decreasing hematocrit and hemaglobin levels. (Tr.90,145,148,155,84,246-248). At the time employee was admitted to the Hospital, his hematocrit and hemaglobin were normal. As of 4/15/00, employee's hematocrit had fallen from the normal range of greater than 40% to 23%. (Tr.90). On that date, employee's hematocrit was 15.4 and his hemaglobin was 5.4. Those numbers decreased substantially over the next few days. As of 4/18/00, employee's hemaglobin was 4.8 and his hematocrit was 14.2. (Tr.493-496). As of 4/18/00, employee had severe anemia and ischemia. The significant decrease in employee's hemaglobin level was straining his heart. (Tr.499-500,587-588,501).

The medical evidence is clear and undisputed. The only medical treatment that could remedy employee's situation by restoring the adequate oxygen carrying capacity of his blood and allowing adequate blood to go to his heart muscle was that of a blood transfusion. (Tr.494-496,499-501,586-588,508,534,448-449,462). The results of a blood transfusion would be nearly immediate, and would have almost instantaneously reversed the employee's downward spiral. (Tr.591).

The medical evidence demonstrates that it was employee's intentional choice to refuse a blood transfusion that caused his death. As Dr. Jones found, employee's injuries were survivable, if a blood transfusion had been performed. (Tr.632). Likewise, Dr. Schuman testified that employee's situation was one that was totally reversible, and would have been remedied by a blood transfusion. (Tr.499-501). A blood transfusion

would have restored employee's hemaglobin back towards normal levels, and significantly eliminated the stress on employee's heart. (Tr.587-588). Dr. Schuman found that employee's injuries were not fatal and that employee would have lived if he had accepted a blood transfusion. (Tr.508). As Dr. Schuman explained, employee's injuries were not life threatening. He did not bleed out at the accident scene or in the ER. On admission, employee's vital signs were within normal limits. Employee had no significant brain or spinal cord injuries or other medical conditions that contributed to his death. Rather, employee had severe anemia, to the point that his hemaglobin and hematocrit were decreased to lethal levels. This is why employee died. If employee had accepted hemaglobin, specifically, if he would have accepted blood transfusions, employee would have lived. (Tr.511-513).

Employee did not have a fatal accident, given modern medical procedures and techniques. As Dr. Schuman found, all employee had to do to survive was to accept blood transfusions. (Tr.591-592,597). The doctor clarified the series of events in this manner: Floyd Wilcut had cardiac arrest due to severe subendocardial ischemia, one week after hospital admission. This ischemia was due to severe anemia, which in turn was due to blood loss, which in turn was due to employee's motor vehicle accident. Dr. Schuman found that these links would have been interrupted and the outcome changed if employee had agreed to a blood transfusion. In Dr. Schuman's opinion, if employee had received a

transfusion, he would not have died. (Tr.597-598). The employee's refusal to accept a blood transfusion was the sole cause of his death. (Tr.511-513).

Similarly, Dr. Chastian found that while employee suffered severe injuries, his facial and cervical fractures were not the injuries that killed him. Rather, the problem was that employee had lost significant blood, and that blood had not been replaced. However, employee's lost blood could have been replaced through the use of a blood transfusion. In Dr. Chastian's opinion, employee would have been more likely to survive with a transfusion, than he was without that medical treatment. (Tr.465,467-468,471).

The medical records demonstrate that both employee, and his family, were repeatedly advised of the severity of employee's medical condition, his grim prognosis, the need for a blood transfusion, and the fact that employee faced imminent death, without that medical treatment. It is clear from the record that employee, and his family in his stead, made the decision to refuse a blood transfusion, even though the refusal of that medical treatment was nearly certain to bring about employee's death. (Tr.87,89,94,635,232,90,21-24,30-32,41). This undisputed evidence clearly demonstrates that employee would have survived the injuries arising from his work accident, had he accepted a blood transfusion, and that it was employee's refusal to accept a blood transfusion that broke the causal connection between employee's 4/13/00 accident and the injuries he sustained therein, and employee's death on 4/20/00. Employee's refusal to accept a blood transfusion constituted an intervening, superceding cause, that

broke the chain of causation between employee's accident and his subsequent death. ***Manle***y, 253 S.W. 2d at 169; ***Ortel***, 285 S.W.2d at 97-98; ***Cahall***, 956 S.W.2d at 322. The undisputed medical evidence demonstrates that employee's death was not a legitimate consequence of the facial lacerations, scalp avulsion, facial fracture, and cervical fracture that employee sustained from the 4/13/00 accident. Rather, employee's death resulted from his refusal to accept a blood transfusion. That refusal constituted an independent, intervening cause, that served to break the chain of causation between the 4/13/00 fall and employee's death on 4/20/00. Consequently, liability for death benefits cannot be placed on the employer. ***Id.***

It necessarily follows that the Industrial Commission did not err in finding that employee's refusal to accept a blood transfusion broke the medical causal link between the work related accident on 4/13/00 and employee's death. (L.F.18-33). Accordingly, that finding, and the Industrial Commission's Award as a whole, must be affirmed. R.S.Mo. §287.495.1(4).

CONCLUSION

The Industrial Commission's Award must be affirmed. As the undisputed medical evidence and medical testimony demonstrate, employee's refusal to accept a blood transfusion was unreasonable, within the meaning of Section 287.140.5, thereby precluding employee's dependents from recovering death benefits. Employee's refusal of a blood transfusion was an intervening, superceding event, which served to break the chain of causation between the 4/13/00 accident and employee's death on 4/20/00.

Respectfully Submitted,
EVANS & DIXON, L.L.C.

By: _____

Mary Anne Lindsey #37314
George T. Floros #32166
515 Olive Street, Suite 1100
St. Louis, MO 63101
(314) 621-7755
(314) 621-3136 Fax

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 28th day of September, 2007, to: Gary G. Matheny, Attorney for Appellant, at 212-B West Columbia, Farmington, MO 63640; and to Keturah A. Dunne, Attorney for Amicus Curiae, at Watchtower Bible & Tract Society, 100 Watchtower Drive, Patterson, NY 12563.

_____
Mary Anne Lindsey

CERTIFICATE OF COMPLIANCE

This Brief complies with Rule 84.06(b) and contains 20,770 words. To the best of my knowledge and belief, the enclosed disc has been scanned and is virus-free.

_____

Mary Anne Lindsey

APPENDIX