

its order finding that decedent Diane Sharp's minor daughter, Angel Lee A. Sharp ("Angel"), was wholly dependent upon her mother for support at the time of decedent's death, and to enter an order finding that Angel was not wholly dependent.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. On June 23, 2010, the magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Relying on *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 1998-Ohio-366, the magistrate concluded that because of relator's pending appeal in the Franklin County Court of Common Pleas, which challenges the commission's allowance of the death claim against relator, the mandamus action fails to present a controversy ripe for our review. As a result, the magistrate recommended that we deny relator's request for a writ of mandamus. Relator timely filed objections to the magistrate's decision, which are now before the court. For the following reasons, we overrule relator's objections.

{¶3} In its objections, relator argues the magistrate erroneously relied upon *Elyria Foundry Co.* We disagree. As in *Elyria Foundry Co.*, the pending R.C. 4123.512 appeal renders issues concerning the propriety of the death benefit award premature until the right to participate is finalized. Relator attempts to distinguish this case from *Elyria Foundry Co.* by arguing that it seeks relief from the commission's refusal to hear relator's appeal of the death benefit award and calculation of the death benefit's weekly rate, but any such issues will be rendered moot if the common pleas court finds that relator is not the employer responsible for this death claim. As noted by the magistrate, these issues remain abstract and hypothetical until the employment relationship issue is resolved on

appeal pursuant to R.C. 4123.512. While we are sympathetic to relator's argument that it will be unable to recoup payments made to Angel should the common pleas court determine that the commission improperly allowed the death claim against relator, relator's argument should be directed to the General Assembly and not this court.

{¶4} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law to those facts. We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, relator's objections to the magistrate's decision are overruled, and the requested writ of mandamus is hereby denied.

*Objections overruled;
writ of mandamus denied.*

TYACK, P.J., and FRENCH, J., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. City of Hilliard,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-893
	:	
Aaron M. Sharp, Surviving Spouse of	:	(REGULAR CALENDAR)
of Diane Sharp, Aaron M. Sharp, Guardian	:	
of Angel Lee A. Sharp, a minor and	:	
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on June 23, 2010

Critchfield, Critchfield & Johnston, Ltd., and Maribeth Deavers, for relator.

Agee, Clymer, Mitchell & Laret, and Eric B. Cameron, for respondent, Aaron M. Sharp, Surviving Spouse of Diane Sharp and Guardian of Angel Lee A. Sharp, a minor.

Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶5} On April 10, 2008, Diane Sharp ("decedent") was killed while working as a school crossing guard. Decedent is survived by her husband Aaron M. Sharp ("Aaron") and her minor daughter, Angel Lee A. Sharp ("Angel").

{¶6} In this original action, relator, City of Hilliard ("relator" or "City of Hilliard"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order finding that Angel was wholly dependent upon her mother for support at the time of death, and to enter an order finding that Angel was not wholly dependent.

Findings of Fact:

{¶7} 1. On April 10, 2008, decedent was killed while working as a school crossing guard at an elementary school located in the Hilliard City School District.

{¶8} 2. Pursuant to R.C. 4123.59, a death claim was filed (No. 08-882939) against relator.

{¶9} 3. Initially, on April 13, 2009, the Ohio Bureau of Workers' Compensation ("bureau") issued an order adjudicating the death claim. Relator administratively appealed the bureau's order.

{¶10} 4. Following a May 22, 2009 hearing, a district hearing officer ("DHO") issued an order finding that decedent was an employee of the City of Hilliard at the time of her fatal injury. The DHO also found that both Aaron and Angel were wholly dependent upon decedent at the time of death. The DHO awarded weekly benefits to Aaron in the amount of \$375.50 and to Angel in the amount of \$125.17.

{¶11} 5. Relator administratively appealed the DHO's order of May 22, 2009.

{¶12} 6. Following a June 23, 2009 hearing, a staff hearing officer ("SHO") mailed an order on July 11, 2009 that affirms the DHO's finding that the City of Hilliard was decedent's employer at the time of her fatal injury and affirms the finding that Angel was wholly dependent upon her mother for support at the time of death.

{¶13} However, contrary to the finding of the DHO, the SHO determined that Aaron was not wholly dependent upon decedent.

{¶14} The SHO's order awards to Angel weekly benefits in the amount of \$500.67.

{¶15} 7. Relator administratively appealed the SHO's order of June 23, 2009 to the three-member commission.

{¶16} 8. On August 4, 2009, an SHO mailed an order refusing the appeal to the commission.

{¶17} 9. On September 22, 2009, pursuant to R.C. 4123.512, relator filed in the Franklin County Court of Common Pleas ("common pleas court") its notice of appeal from the SHO's order of June 23, 2009 (mailed July 11, 2009). By its notice of appeal, relator challenges the commission's allowance of the death claim against relator.

{¶18} 10. On November 12, 2009, pursuant to R.C. 4123.512, a complaint was filed in the common pleas court seeking to continue to participate in the state insurance fund.

{¶19} 11. On December 1, 2009, relator answered the complaint filed in the common pleas court.

{¶20} 12. On December 10, 2009, the bureau answered the complaint filed in the common pleas court.

{¶21} 13. The common pleas court action remains pending.

Conclusions of Law:

{¶22} Because this mandamus action is rendered premature by the pendency of the common pleas court action, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶23} The disposition of this action is controlled by *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 1998-Ohio-366. In *Elyria Foundry*, the employer, Elyria Foundry Co. ("EFC"), commenced a mandamus action challenging the commission's award of TTD compensation in an industrial claim that the commission had allowed for silicosis. EFC appealed the allowance of the claim to the Lorain County Court of Common Pleas pursuant to R.C. 4123.512. The common pleas court action was pending while EFC was challenging the TTD award in the mandamus action. The Supreme Court of Ohio found that the controversy presented in the mandamus action lacked ripeness. The *Elyria Foundry* court stated:

We find that the controversy presented by EFC's mandamus action lacks ripeness. Ripeness "is peculiarly a question of timing." *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, 140, 95 S.Ct. 335, 357 * * *. The ripeness doctrine is motivated in part by the desire "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies * * *." *Abbott Laboratories v. Gardner* (1967), 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 * * *. As one writer has observed:

"The basic principle of ripeness may be derived from the conclusion that 'judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.' * * * [T]he prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as

regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff." Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum. L.Rev. 867, 876.

EFC is asking us to address the abstract and the hypothetical. The allowance of claimant's entire workers' compensation claim is in dispute, as are the medical conditions allegedly related to it. Therefore, EFC is effectively asking us to answer the question, *if* the claim is allowed, and *if* it is allowed only for silicosis, is claimant entitled to temporary total disability compensation? This is an in-appropriate question for review.

(Emphasis sic.) Id. at 89.

{¶24} If relator ultimately obtains a common pleas court judgment disallowing the death claim, neither Angel nor Aaron would be entitled to R.C. 4123.59 death benefits. Thus, in this mandamus action, relator is asking this court to address the abstract and hypothetical.

{¶25} Based upon *Elyria Foundry*, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).