

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0222 CAF**

**KIMBERLY GLYNN,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Kimberly Glynn (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2014 Chevrolet Impala LTZ. Complainant asserts that the vehicle is defective due the check engine light coming on and the vehicle suffering engine damage. Complainant argues that the issue is a safety hazard. General Motors LLC (Respondent) argues that the vehicle has been repaired and does not have any defects. The hearings examiner concludes that the vehicle has been repaired and does not have any defects. Complainant is thus not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on July 29, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Kimberly Glynn, represented herself at the hearing. Kettline Louis-Jeune appeared to offer testimony on behalf of Complainant. Respondent was represented by Kevin Phillips, Business Resource Manager. Casey Whitson, District Manager, and Bruce Morris, Field Service Engineer, appeared to offer testimony on behalf of Respondent. The record closed on July 31, 2015, when the Office of Administrative Hearings received Respondent's exhibits three, four, and five.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, Section 2301.605 of the Occupation Code specifies that there are three tests which can establish a rebuttable presumption that a reasonable number of attempts have been undertaken by a Respondent to conform a motor vehicle to an applicable express warranty. The first test provides that if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt, then Complainant has established that Respondent has been provided with a reasonable number of attempts to repair the vehicle.⁵ The second test applies to a nonconformity that creates a serious safety hazard as defined in Section 2301.601(4) of the Texas Occupation Code. The third test provides that Complainant can establish a rebuttable presumption that a reasonable number of attempts to conform a motor vehicle to an applicable express warranty if a nonconformity continues to exist which substantially impairs the vehicle's use or market value and (1) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner and (2) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁶ However, the Occupations Code also provides that the 30 day period described by this section does not include any period during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.⁷

B. Complainant's Evidence and Arguments

On March 8, 2014, Complainant purchased a 2014 Chevrolet Impala LTZ from Lone Star Chevrolet (Lone Star) of Houston, Texas. The vehicle's mileage at the time of purchase was 24.⁸ The vehicle's New Vehicle Limited Warranty provides bumper-to-bumper coverage for the first three years or 36,000 miles, whichever comes first.⁹ Respondent's basic warranty for the vehicle is still in effect. On the date of hearing the vehicle's mileage was 12,271.

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(c).

⁸ Complainant Ex. 1, Purchase Order dated March 8, 2014.

⁹ Complainant Ex. 11, New Vehicle Limited Warranty.

Complainant testified that she feels that the vehicle has engine problems. She's taken the vehicle to the dealer for repairs five times. She feels that there has been engine damage to the vehicle. She does not feel safe in the vehicle and won't drive it.

Complainant experienced a problem with the vehicle in June of 2014. She took the vehicle to Lone Star Chevrolet on June 19, 2014, for repair. The vehicle's visor clip had come out, so the sunshade support was replaced. Complainant also indicated that the vehicle's Trac light was illuminating.¹⁰ No repairs were performed on the Trac light issue. The vehicle's mileage at the time was 3,292.¹¹

On December 17, 2014, Complainant experienced an engine issue with the vehicle. The Service Engine Soon (SES) light started flashing while Complainant was driving. Complainant pulled over to the side of the road and called Parkway Chevrolet (Parkway) of Tomball, Texas to inform them of the issue. She was told by the Parkway representative to turn the vehicle off, since the light was flashing. When Complainant turned the vehicle back on the SES light was no longer flashing, but was illuminated a solid color. Complainant was informed by the Parkway representative that so long as the SES light remained solid, the vehicle was safe to drive, so Complainant drove the vehicle to Parkway. The vehicle ran rough and the engine was misfiring. After verifying Complainant's concern, the dealer's service technician cleaned the vehicle's fuel injector.¹² The vehicle registered no misfires after the cleaning.¹³ The vehicle's mileage was 8,696 on this occasion.¹⁴ The vehicle was in Parkland's possession overnight. Complainant was provided with a rental vehicle while her vehicle was being repaired.

Complainant experienced a similar problem on January 26, 2015. The SES light flashed while she was driving the vehicle. Complainant pulled the vehicle over to the side of the road. When the SES light went solid, Complainant proceeded to drive the vehicle to Parkway. The dealer's service technician discovered a "slight misfire" in cylinder #6.¹⁵ The technician then used GM top engine cleaner to clean the engine.¹⁶ This cleared up the misfiring problem. The vehicle started cold the next morning without misfiring.¹⁷ The vehicle's mileage on this occasion was 10,143.¹⁸ The vehicle was in the dealer's possession overnight. Complainant was provided with a rental vehicle while her vehicle was being repaired.

¹⁰ Complainant Ex. 2, Service Invoice dated June 19, 2014.

¹¹ *Id.*

¹² Complainant Ex. 3, Service Invoice dated December 17, 2014.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 4, Service Invoice dated January 26, 2015.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

During the January 26, 2015, repair visit, Complainant was told by a dealer representative that she should not use E85 fuel in the vehicle in Houston's climate. Instead, she was informed that she should put 87 octane unleaded fuel for the vehicle. Complainant testified that she started using 87 octane fuel, but the vehicle continued to misfire and started riding rough after a few days.

Complainant returned the vehicle for repair to Parkway on February 23, 2015. The SES and Stabilitrac lights had both illuminated. The dealer's service technician noted that Complainant was still using E85 gas and recommended that she switch to using a top tier fuel, i.e., a fuel from a well-known fuel producer.¹⁹ In addition, the technician inspected the mechanical components in the vehicle's valve train and performed an injector balance.²⁰ The vehicle's mileage on this occasion was 10,864.²¹ The vehicle was in the dealer's possession until February 27, 2015. Complainant was provided with a rental vehicle while her vehicle was being repaired.

On March 23, 2015, Complainant returned the vehicle to Parkway because the SES light illuminated. The vehicle was misfiring when Complainant took it to Parkway. The dealer's service technician measured the compression on cylinders 2, 5, and 6 as below specifications.²² A leakage test was performed and the technician found that the aforementioned cylinders had exhaust valve leaks.²³ The exhaust valves had excessive carbon deposits, so they were replaced along with the related seals, gaskets, and bolts.²⁴ The cooling system was filled and bled.²⁵ An oil change was conducted, as well.²⁶ There were no misfires recorded after these repairs. The vehicle's mileage was 11,493 on this occasion.²⁷ The vehicle was in the dealer's possession until April 1, 2015. Complainant was provided with a rental vehicle while her vehicle was being repaired.

Complainant retrieved the vehicle on April 1, 2015. Complainant testified that she drove the vehicle about three miles from the dealership when it died in the middle of traffic. Complainant was stuck in traffic and her vehicle was almost struck by a semi-trailer truck. She was forced to call a tow truck to have the vehicle towed back to Parkway for further repair. The dealer's service technician replaced the front head, camshaft, and valves in the vehicle's engine.²⁸ Bruce Morris, Field Service Engineer, and Casey Whitson, District Manager, inspected the vehicle and approved it for pickup.²⁹ Complainant returned to pick up the vehicle on April 20, 2015. She had

¹⁹ Complainant Ex. 5, Service Invoice dated February 23, 2015.

²⁰ *Id.*

²¹ *Id.*

²² Complainant Ex. 6, Service Invoice dated March 23, 2015.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Complainant Ex. 7, Service Invoice dated April 1, 2015.

²⁹ *Id.*

been provided with a rental vehicle while her vehicle was being repaired. Complainant testified that when she picked up the vehicle, there were signs of hail damage and water on the seats. The vehicle's mileage on this occasion was 11,497.³⁰

On April 6, 2015, Complainant mailed written notice of the issues she was experiencing to Respondent.³¹ She mailed in her Lemon Law complaint the same day. It was received by the Texas Department of Motor Vehicles (TxDMV) on April 9, 2015.³²

Respondent was provided with a final repair attempt on the vehicle on May 18, 2015. The final repair attempt occurred at Parkway. Mr. Morris performed an inspection of the vehicle and test drove it for 11 miles. Mr. Morris concluded that the vehicle was operating as designed.³³ The vehicle's mileage on this occasion was 11,737.³⁴ Complainant was provided with a rental vehicle while the final repair attempt was taking place.

Complainant had the vehicle towed to the hearing because she does not feel safe driving it long distances. She has been driving the vehicle intermittently on side streets to go to a store located less than a mile away because she wanted to keep the battery charged.

During cross examination, Complainant testified that she is the primary driver of the vehicle. She has not had any accidents nor filed any vehicle insurance claims for the vehicle. The vehicle has not had any flood damage. However, the vehicle's body suffered hail damage when it was in Parkland's possession for the period from April 1, 2015 through April 20, 2015. There is a small star in the windshield that has been repaired. Complainant suffered one flat tire in the vehicle. There is no interior damage to the vehicle and no undercarriage damage.

Ms. Louis-Jeune testified that she has been driving the car to work five days per week since May 4, 2015. Her place of employment is less than one mile away from her home. She testified that the vehicle sometimes rides rough, but has not died or flashed the SES light since April 20, 2015. She also testified that she was present on each occasion the SES light activated for Complainant and added that on the second occurrence, the car began smoking.

C. Respondent's Evidence and Arguments

Bruce Morris, Field Service Engineer, testified on behalf of Respondent. Mr. Morris has worked for 29 years in the automotive industry. He is a World Class General Motors (GM) Certified

³⁰ *Id.*

³¹ Complainant Ex. 9, Letter to Manufacturer dated April 6, 2015.

³² Complainant Ex. 8, Lemon Law Complaint Form dated April 9, 2015. Although the complaint was mailed to TxDMV on April 6, 2015, the effective date of the complaint is the day it was received, April 9, 2015.

³³ Complainant Ex. 10, Service Invoice dated May 18, 2015.

³⁴ *Id.*

Technician and holds 10 GM certifications. In addition, he has 24 Automotive Service Excellence (ASE) certifications. He has also taught at Universal Technical Instituted (UTI). Mr. Morris has been a field service engineer for Respondent for six years.

Mr. Morris testified that he was at Parkway on April 1, 2015, when Complainant took her vehicle in for repair. He saw the original cylinder heads that were replaced on March 23, 2015. They were replaced because of leaking valve seals. The valves are supposed to seal against the head to keep the compression within the cylinder and they were not doing so. The valves had excessive carbon deposits because of the fuel that was being used in the vehicle. Mr. Morris feels that E85 fuel was causing problems with the vehicle, although the vehicle is designed to use such fuel. Mr. Morris did not know why the E85 fuel was causing problems, although he conjectured that it might be because of where the fuel was purchased. He also explained that because E85 is alcohol based, it burns leaner, which is why Complainant's vehicle was only getting 13 miles per gallon instead of the advertised 19 miles per gallon. Mr. Morris also offered a reason for why the vehicle was using more fuel than needed. Once a vehicle is filled up with more than four gallons of a new fuel type, i.e. being filled up with regular unleaded despite having five gallons of E85 still in the tank, the driver needs to drive it more than seven miles in order for vehicle's computer to reset its drive map based on the new combined alcohol content.

One of the cylinder heads had to be replaced again during the repair visit on April 1, 2015.³⁵ Mr. Morris testified that a bolt was not torqued on a previous visit, so the cam gear came off. This damaged the camshaft and timing chains, which needed to be replaced, as well as the head.

Mr. Morris also performed a final repair attempt on the vehicle on May 19, 2015. During the final repair attempt, Mr. Morris pulled all of the diagnostic trouble codes (DTC's) from the vehicle's computers. There were no trouble codes at the time. Mr. Morris test drove the vehicle about 11 miles. The vehicle was not riding rough, nor misfiring. He did not notice any driveability concerns with the vehicle. He noted that the vehicle rode like any other Impala and that the SES light never illuminated during the repair attempt. He also measured the vehicle's fuel content. It was 60% alcohol, meaning that E85 had been mixed with regular unleaded gasoline from Shell. Mr. Morris, at the end of his inspection, concluded that Complainant's vehicle was "operating as designed."³⁶

Mr. Morris testified that the SES light illuminating could be caused by any one of several different issues: a loose gas cap, fuel system issues, engine issues. A flashing SES light is usually caused by an emissions related issue. It's usually something that can cause catastrophic damage to a vehicle's catalytic converters, misfires being the most common.

³⁵ Complainant Ex. 7, Service Invoice dated April 1, 2015.

³⁶ *Id.*

Mr. Morris drove the vehicle during the test drive conducted at the hearing. He testified that the ride felt smooth and there were no misfires. The SES light did not illuminate. According to Mr. Morris, there was no need to tow the vehicle to the hearing. He does not feel that anything is wrong with the vehicle. The vehicle's mileage at the time of the hearing was 12,271.

Casey Whitson, District Manager, has been a GM district manager for 11 years. He discussed the vehicle in question with the dealer's service manager and technicians to ensure that the vehicle was repaired as efficiently as possible. Mr. Whitson testified that the repairs performed to the vehicle on April 1, 2015, were paid by the dealer, since the damage to the engine was caused by the dealer's service technician. When the repairs were completed, Mr. Whitson made sure that the vehicle was driven at least 25 miles before returning the vehicle to Complainant. He believes that the vehicle was repaired during the April 1, 2015, repair visit.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

In order to be eligible for repurchase or replacement relief, a complainant must prove that the manufacturer is unable to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.³⁷ Complainant in the present case has failed to show that the problem persists and that it has not been repaired. Testimony from both Complainant and Ms. Louis-Jeune indicate that the SES light has not illuminated since the last repair attempt. Moreover, there has been no engine failure. The engine failure that occurred on April 1, 2015, was the result of careless workmanship, not a defect. If Complainant is still experiencing a rough ride when driving the vehicle, Respondent has explained that the mixing of different fuels may be the cause. From the evidence presented at the hearing, the hearings examiner must hold that Complainant has not met the burden of proof to establish the vehicle has a defect or nonconformity that has not been repaired by Respondent.

Given the evidence provided in the hearing, the hearings examiner must hold that repurchase or replacement relief for Complainant is not warranted.

³⁷ Tex. Occ. Code § 2301.604(a).

Respondent's express warranty applicable to Complainant's vehicle provides coverage for 3 years or 36,000 miles, whichever comes first. On the date of the hearing, the vehicle's mileage was 12,271. The vehicle's basic express warranty is still in effect. Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. On March 8, 2014, Kimberly Glynn (Complainant) purchased a 2014 Chevrolet Impala LTZ from Lone Star Chevrolet of Houston, Texas. The vehicle's mileage at the time of purchase was 24.
2. The manufacturer of the vehicle, General Motors LLC (Respondent), issued an express warranty for the vehicle for three (3) years or 36,000 miles.
3. The vehicle's mileage on the date of hearing was 12,271.
4. At the time of hearing the warranty for the vehicle was still in effect.
5. The vehicle's Service Engine Soon light (SES) illuminated while Complainant was driving the vehicle on December 17, 2014.
6. Complainant took the vehicle to Parkway Chevrolet (Parkway) of Tomball, Texas, on the following dates in order to address her concerns with the engine and the SES illuminating:
 - a. December 17, 2014, at 8,696 miles;
 - b. January 26, 2015, at 10,143 miles;
 - c. February 23, 2015, at 10,864 miles;
 - d. March 23, 2015, at 11,493 miles; and
 - e. April 1, 2015, at 11,497 miles.
7. On December 17, 2014, Parkway's service technician cleaned the engine's fuel injectors to repair the problem with the engine misfiring which had caused the SES light to illuminate.
8. On January 26, 2015, the dealer's service technician introduced a cleaner into the engine to address a misfire in the engine. At this time, Complainant was advised to only

purchase regular unleaded fuel for the vehicle, although the vehicle was designed to use E85 fuel also.

9. On February 23, 2015, the dealer's service technician inspected the vehicle valve train, injectors, and electrical components. No repairs were done, but Complainant was advised to use only top tier fuel for the vehicle.
10. On March 23, 2015, the dealer's service technician determined that the vehicle's compression reading on three engine cylinders were low and they had exhaust valve leaks. As a result, the heads, seals, and gaskets were replaced.
11. On April 1, 2015, the vehicle was returned to Parkway because it had died three miles from the dealership after Complainant picked it up after the March 23, 2015, repair.
12. During the April 1, 2014, repair visit, the dealer's service technician determined that the damage to the engine was caused by an error by the technician which resulted in a bolt coming out of the camshaft and damaging the engine's front head. As a result, the head had to be replaced again.
13. On April 6, 2015, Complainant mailed written notice of the defect to Respondent.
14. On April 9, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
15. Respondent performed a final repair attempt on the vehicle on May 19, 2015. No repairs were performed because Respondent's representative determined that the vehicle was operating as designed.
16. On May 5, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
17. The hearing in this case convened on July 29, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Kimberly Glynn, represented herself at the hearing. Kettle Louis-Jeune appeared to offer testimony on behalf of Complainant. Respondent was represented by Kevin Phillips, Business Resource Manager. Casey Whitson, District Manager, and Bruce Morris, Field Service Engineer, appeared to offer

testimony on behalf of Respondent. The record closed on July 31, 2015, when the Office of Administrative Hearings received Respondent's exhibits three, four, and five.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant failed to prove that the vehicle has an existing warrantable defect. Tex. Occ. Code § 2301.604(a).
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED August 10, 2015

A handwritten signature in black ink, appearing to read 'Edward Sandoval', is written over a horizontal line.

**EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES**