TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0318 CAF

HOUTAN ALAYAN,	§	**BEFORE THE OFFICE**
Complainant	§	
	§	
v.	§	**OF**
	§	
GENERAL MOTORS LLC,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Houtan Alayan (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his 2015 GMC Yukon XL Denali manufactured by General Motors LLC (Respondent). The hearings examiner concludes that the memory seat issue does not substantially impair the use or value of the vehicle and the Complainant failed to mail written notice of the power failure issue to the manufacturer. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement. However, the vehicle has existing warrantable defects and therefore qualifies for warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 November 12, 2015, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainant represented himself. Deborah Alayan, the Complainant's spouse, also appeared and testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Ron Novak, District Manager Aftersales, testified for the Respondent.

[1] TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot "conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts."[2] In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a "reasonable number of attempts" at repair.[3] In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines "serious safety hazard" as a life threatening malfunction or nonconformity that: (1) substantially impedes a person's ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.[4]

b. Substantial Impairment

The Department applies a reasonable prospective purchaser standard for determining whether a defect substantially impairs the value of a vehicle.[5]

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[2] TEX. OCC. CODE § 2301.604(a).

[3] TEX. OCC. CODE § 2301.604(a).

[4] TEX. OCC. CODE § 2301.601(4).

[5] "[F]actfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle." *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

c. Reasonable Number of Repair Attempts

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.[6] The first applies generally,[7] the second applies to serious safety hazards,[8] and the third applies to vehicles out of service for repair for at least 30 days.[9]

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

> [T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.[10]

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

> [T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.[11]

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.[12]

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[6] TEX. OCC. CODE § 2301.605(a).

[7] TEX. OCC. CODE § 2301.605(a)(1).

[8] TEX. OCC. CODE § 2301.605(a)(2).

[9] TEX. OCC. CODE § 2301.605(a)(3).

[10] TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

[11] TEX. OCC. CODE § 2301.605(a)(2).

[12] "[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite 'reasonable number of attempts.'" *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.[13]

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;[14] (2) the manufacturer was given an opportunity to cure the defect or nonconformity;[15] and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.[16]

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."[17]

3. Burden of Proof

The law places the burden of proof on the Complainant.[18] The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present enough evidence to show that all of the required facts are more likely than not true.[19] For example, the Complainant must show that a warrantable defect more likely than not exists. For any required

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[13] "[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute." *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

[14] TEX. OCC. CODE § 2301.606(c)(1).

[15] TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

[16] TEX. OCC. CODE § 2301.606(d)(2).

[17] TEX. OCC. CODE § 2301.204.

[18] 43 TEX. ADMIN. CODE § 215.206.66(d).

[19] *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

B. Complainant's Evidence and Arguments

On July 25, 2014, the Complainant, purchased a new 2015 GMC Yukon XL Denali from Nyle Maxwell Pontiac GMC, a franchised dealer of the Respondent, in Round Rock, Texas.[20] The vehicle had 10 miles on the odometer at the time of purchase. The vehicle's limited warranty provides Bumper-to-Bumper coverage for three years or 36,000 miles, whichever occurs first.[21] The Complainant took the vehicle to a dealer for the memory seat and power failure issues on the following dates and miles as shown below:

Date	Miles	Issue
January 31, 2015	4,249	Memory seat[22]
March 26, 2015	6,521	Memory seat[23]
May 5, 2015	7,376	Memory seat[24]
August 26, 2015	10,319	Memory seat, power failure[25]

The Respondent's final repair attempt occurred on August 26, 2015.

The Complainant mailed a written notice of defect, dated July 10, 2015, and delivered on July 14, 2015, to the Respondent. The notice stated that the Complainant had "trouble with several things one of which was the memory seat."[26] On July 13, 2015, the Complainant filed a Lemon Law complaint (Complaint) alleging that the vehicle's memory seat malfunctioned and also listing "electrical" parenthetically.[27] The Complainant faxed an amended complaint to Bob Swarts of the Department's Enforcement Division - Lemon Law Section on September 3, 2015, as shown on the fax transmission verification report.[28] The Complainant testified that he e-mailed Mr. Novak, as

[20] Complainant's Ex. 10, Purchase Order.

[21] Complainant's Ex. 1, Warranty.

[22] Complainant's Ex. 16, Invoice No. 131532.

[23] Complainant's Ex. 17, Invoice No. 133767.

[24] Complainant's Ex. 18, Invoice No. 135377; Complainant's Ex. 19, Invoice No. 135377.

[25] Complainant's Ex. 21, Invoice No. 140310.

[26] Complainant's Ex. 8, Complainant's written notice of defect mailed to the Respondent.

[27] Respondent's Ex. 3, Lemon Law Complaint.

[28] Complainant's Ex. 27, fax of amended complaint.

well as John Garza, about the amended complaint. The Complainant identified various issues including problems with the: memory seat, voice commands, lifter in the engine, side step, and information display. The Complainant and Mrs. Alayan provided testimony and video evidence of multiple memory seat malfunctions. Significantly, Mrs. Alayan testified about two instances where the vehicle lost all electrical power. One of those electrical power failures contributed to a collision in a parking lot.

C. Respondent's Evidence and Arguments

Mr. Novak, District Manager Aftersales, initially testified that the memory seats did not have any issues. He also testified that a rental vehicle was provided to the Complainant each time the vehicle came in for service. Mr. Novak stated that he scanned all modules but found no codes stored. He also checked all power and grounds under the hood. He also noted that the side step had been repaired by replacing a latch. Mr. Novak testified that electrical problems typically show up but not always depending on the module. He added that the vehicle only had one visit for the electrical shut down issue. After the inspection of the vehicle, Mr. Novak acknowledged that the memory seat did not work as designed. However, Mr. Novak testified that he would not deduct any value from the vehicle because of the memory seat. In closing, the Respondent stated that they did not receive an amended notice.

D. Inspection at Hearing

The vehicle's driver memory seat malfunctioned during the inspection at the hearing. Specifically, the driver memory seat would not correctly reposition the seat. The vehicle's odometer displayed 12,227 miles at the time of the inspection.

E. Analysis

1. Memory Seat

The evidence shows that the vehicle's memory seat has a warrantable defect. The record also reflects four attempts to repair the memory seat issue. In this case, repurchase/replacement hinges on whether the defect substantially impairs the use or market value of the vehicle.

a. No Substantial Impairment of Use

Although the defect does prevent automatically changing seat positions, the seats apparently could still be adjusted manually. Although impairment does exist and makes the vehicle's use less convenient, the evidence does not show that the defect rises to the level of substantially impairing the vehicle's use. If a driver of the vehicle had a physical handicap making manual seat adjustments more of a necessity, then the defect may have constituted a substantial impairment of use. However, the evidence in this case shows no such handicaps.

b. No Substantial Impairment of Value

Mr. Novak testified that, in his opinion, the malfunctioning memory seat would not reduce the value of the vehicle. However, the Department applies a "reasonable prospective purchaser" standard for determining impairment of market value. Under this approach, the factfinder considers whether the defect would: (1) deter a reasonable prospective buyer from purchasing the vehicle, or (2) substantially reduce the amount the buyer would pay for the vehicle. From a reasonably buyer prospective, the memory seat defect would reduce the market value of the vehicle, but not to the level of substantial impairment. Although the memory seat function does not operate properly, the driver apparently can still adjust the setting manually.

2. Power Failure

The evidence shows that the vehicle has a defect that causes the vehicle to lose electrical power. With regard to this power failure issue, the Complainant provided a sufficient complaint for warranty repair relief but did not provide mailed written notice required for repurchase or replacement relief. Moreover, the record only shows one repair attempt for the power failure issue, whereas the statutory presumption for reasonable repairs requires at least two repair attempts for a serious safety hazard.

a. Complaint Sufficient for Warranty Repair Relief

The complaint limits the scope of this proceeding.[29] Section 2301.204(b) of the Occupations Code provides that "[t]he complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered

[29] The complaint identifies the issues to be addressed in this proceeding. *See* TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

by the warranty."[30] Further, Section 215.202(a)(2) of the Department's rules states that "[c]omplaints should state sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."[31] Additionally, Section 215.49 of the Department's rules requires that:

> A copy of every document filed in any adjudicative proceeding, after appearances have been entered, shall be served upon all other parties in interest or their lead counsel, and upon the appropriate department office by sending a copy properly addressed to each party by first class United States mail, postage prepaid, by actual delivery, or by electronic document transfer to a facsimile number, e-mail address, or website designated for the receipt of those filings. A certificate of such fact shall accompany the document.[32]

However, the Respondent's representatives asserted that they never received the amended complaint. A review of the e-mail correspondence shows that the Complainant never attached a copy of the amended complaint to any of the e-mails to the Respondent's representatives.[33] Instead, the Complainant e-mailed Mr. Novak and Mr. Garza to notify them that the Complainant intended to file an amended complaint.[34] However, the Complainant did explain the subject matter of the amended complaint in a subsequent e-mail to Mr. Novak.[35] Accordingly, for purposes of warranty repair relief under Section 2301.204 of the Occupations Code, the Complainant has provided adequate notice of the amended complaint to the Respondent.

b. No Mailed Written Notice of Power Failure Issue

A Complainant cannot qualify for a refund or replacement unless a mailed written notice identifies the alleged defect or nonconformity. The Lemon Law specifies that:

> An order issued under this subchapter may not require a manufacturer, converter, or distributor to make a refund or to replace a motor vehicle unless: (1) the owner or a person on behalf of the owner has mailed written notice of the alleged defect

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[30] TEX. OCC. CODE § 2301.204.

[31] 43 TEX. ADMIN. CODE § 215.202(a)(2).

[32] 43 TEX. ADMIN. CODE § 215.49.

[33] Complainant's Ex. 3, e-mail correspondence between the Complainant and the Respondent's representatives.

[34] Complainant's Ex. 3, e-mail to Ron Novak dated August 28, 2015.

[35] Complainant's Ex. 3, e-mail to Ron Novak dated August 14, 2015.

> or nonconformity to the manufacturer, converter, or distributor; and (2) the manufacturer, converter, or distributor has been given an opportunity to cure the alleged defect or nonconformity.[36]

In this case, the Complainant's July 10, 2015, mailed written notice stated that "[a]pproximately 6 months I began having trouble with several things one of which was the memory seat." The written notice specified the memory seat problem but never identified the power failure issue. Although e-mailing notice might suffice for purposes of warranty repair relief, the Lemon Law specifically requires mailing notice of the defect for replacement or repurchase relief. Because the Complainant did not mail notice of the power failure issue, this order cannot grant replacement or repair relief based on the power failure issue.

c. Reasonable Number of Repair Attempts for Serious Safety Hazard

The power failure issue fits Lemon Law's definition of "serious safety hazard" since the power failure substantially impedes a person's ability to control or operate a vehicle for ordinary use or intended purposes.[37] The statutory presumption for reasonable repairs of a serious safety hazard requires at least two repair attempts.[38] In this case, the vehicle only had one repair for the power failure issue.

III. Findings of Fact

1. On July 25, 2014, the Complainant, Houtan Alayan, purchased a new 2015 GMC Yukon XL Denali from Nyle Maxwell Pontiac GMC, a franchised dealer of the Respondent, in Round Rock, Texas. The vehicle had 10 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides Bumper-to-Bumper coverage for three years or 36,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle to a dealer to address the memory seat and power failure issues as follows:

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[36] TEX. OCC. CODE § 2301.606(c) (emphasis added).

[37] TEX. OCC. CODE § 2301.601(4).

[38] TEX. OCC. CODE § 2301.605(a)(2).

Date	Miles	Issue
1/31/2015	4,249	Memory seat
3/26/2015	6,521	Memory seat
5/5/2015	7,376	Memory seat
8/26/15	10,319	Memory seat, power failure

5. The Complainant mailed a written notice of defect to the Respondent, dated July 10, 2015, and delivered on July 14, 2015.

6. The notice of defect specified the memory seat problem as an issue but never identified power failure as an issue.

7. On July 13, 2015, the Complainant filed a Lemon Law complaint alleging a memory seat malfunction and an "electrical" issue.

8. The vehicle experienced two electrical power failures, one of which contributed to a collision in a parking lot.

9. The vehicle's memory seat malfunctioned on various occasions.

10. On September 16, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, General Motors LLC, 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.

11. The hearing in this case convened on November 12, 2015, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainant represented himself. Deborah Alayan, the Complainant's spouse, also appeared and testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Ron Novak, District Manager Aftersales, testified for the Respondent.

12. The vehicle's odometer had 12,227 miles at the time of the hearing.

13. The vehicle' driver memory seat malfunctioned during the inspection at the hearing.

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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).

6. The Complainant showed that the vehicle has defects covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).

7. The Complainant did not show that the memory seat issue substantially impairs the use or value of the Complainant's vehicle. TEX. OCC. CODE §§ 2301.604(a).

8. The Complainant's vehicle did not meet the statutory presumption for a reasonable number of repair attempts with respect to the power failure issue. TEX. OCC. CODE § 2301.605(a).

9. The Complainant did not comply with the statutory requirement to mail written notice with regard to the power failure issue. § 2301.606(c)(1).

10. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.604(a), 2301.606(c)(1).

11. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.

12. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expires. TEX. OCC. CODE §§ 2301.204, 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall repair the vehicle's memory seat and electrical power failure issues. The Complainant shall deliver the subject vehicle to the Respondent within 15 days after the date this Decision and Order becomes final under Texas Government Code § 2001.144.[39] Within 15 days after receiving the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED January 11, 2016

ANDREW KANG
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES

[39] (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.