

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0334 CAF**

**JUAN RAMIREZ, JR.,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Juan Ramirez, Jr. (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 vehicle manufactured by General Motors LLC (Respondent). The hearings examiner concludes that the vehicle has an existing warrantable defect, but the defect does not substantially impair the use or value of the vehicle. Consequently, the vehicle does not qualify for repurchase/replacement but does qualify for warranty repair relief.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 December 3, 2015, in Laredo, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainant represented himself. Rose Crookston, District Manager Aftersales, represented the Respondent. In addition, Kevin Brown, Field Service Engineer, and Guillermo Galindo, Service Manager, 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 of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders 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.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *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 In this case, the general presumption is the most applicable. 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

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.¹¹ 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.¹²

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). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

¹¹ “[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).

¹² “[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).

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;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ 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.¹⁵

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."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁷ 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.¹⁸ For example, the Complainant must show that a warrantable defect more likely than not exists. For any required 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.

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ 43 TEX. ADMIN. CODE § 215.206.66(d).

¹⁸ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

A. Complainant's Evidence and Arguments

On January 12, 2015, the Complainant, purchased a new Chevrolet Colorado from Gunn Chevrolet a franchised dealer of the Respondent, in Selma, Texas. The vehicle had 95 miles on the odometer at the time of purchase.¹⁹ The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for three years or 36,000 miles, whichever comes first. The Complainant testified that his complaint showed all relevant repairs except for the final repair attempt. The Complaint reflects four repair attempts for the hood shaking, three attempts for the air conditioning and blower, four attempts for the buzzing noise on the right side, and four attempts for unbalanced wheels. The Respondent's final opportunity to repair the vehicle occurred on September 17, 2015. On July 6, 2015, the Complainant mailed a written notice of defect to the Respondent. On July 17, 2015, the Complainant filed a Lemon Law complaint (Complaint) alleging that the vehicle's hood shakes; the air conditioner and blower are unresponsive and the temperatures are incorrect; the vehicle makes a buzzing noise on the right side; and the wheels become unbalanced.

The Complainant explained that at speeds above 55 to 60 mph, the hood shakes and somewhat lifts up. The Complainant testified that the climate control's blower had an excessive delay (about eight seconds to reach the desired speed). The Complainant also found that the climate control may blow warm air with the climate control set to a cool temperature and blow cold air when set to a warm temperature. The Complainant also stated that his vehicle produced a buzzing/rattling sound, most often about 25 mph. Finally, the Complainant stated the steering wheel shakes (apparently due to unbalanced wheels). When asked if the repairs resolved any of the issues, the Complainant responded that repairs improved the hood issue temporarily, at the most three days, and the blower responded more quickly. The Complainant also stated that a seat was successfully repaired under a recall. In sum, the Complainant confirmed that, other than the seat issue, all other issues still existed, except that the blower issue was not a bad. The Complainant also noted that the dealership applied foam as part of a repair. The Complainant provided photographs showing the foam in various locations on the vehicle.

¹⁹ Complainant's Ex. 1, Buyer's Order.

B. Respondent's Evidence and Arguments

Kevin Brown, Field Service Engineer, testified that at the September 17, 2015, vehicle inspection, he duplicated the hood flutter and buzzing noise, and the blower had a delay of about five seconds. Mr. Brown did not experience any abnormal vibration of the vehicle. Additionally he could not duplicate a concern regarding the climate control backlight going out (the complaint did not include this issue). Mr. Brown testified that a service bulletin, PIT5340, now PIT5340A, addressed the hood fluttering concerns. PIT5340/5340A, issued after the last service visit but before the final opportunity for repair, prescribed foam to prevent hood flutter. Mr. Brown explained that the foam was only intended for the hood flutter issue and any other foam application was accidental and should have been cleaned. Mr. Brown found that the buzzing/rattling noise originated from an out of position wheel liner, corresponding to body damage, in the front right fender, which was removed and reinstalled properly and insulated. The noise did not recur after reinstalling the wheel liner. The Complainant explained that a dealer had caused the body damage during a repair visit. Mr. Brown explained that the vehicle's climate control used a brushless blower which normally takes time to build up speed. The Complainant commented that a friend's GMC Canyon had the same blower delay. Mr. Brown stated that the tires were slightly out of balance and that they balanced the tires out of goodwill. Mr. Brown explained that the climate control will blow hot air if the ambient temperature is cooler than the climate control setting and vice versa (so the temperature of the air out of the vents may not be the same as the temperature set on the climate control). Mr. Brown also stated that they applied the repairs for any outstanding campaigns because they cannot release a vehicle with an outstanding safety campaign to a customer unless the customer agrees to such release. With respect to the hood, Mr. Brown testified that the hood latch striker consists of a two latch system so that if one fails, a second catches as a safety feature. Mr. Galindo added that other vehicles also have some fluttering issues because of the material used for the hood (as a weight saving measure). Ms. Crookston stated that a rental or loaner vehicle was provided to the Complainant for 15 days by the Respondent and 26 days by Gunn Chevrolet.

C. Inspection and Test Drive

The vehicle had 12,721 miles on the odometer on the day of the hearing. During the test drive at the hearing, the hood fluttered at highway speeds, and some buzzing noise appeared to

originate from the center console. An inspection under the hood showed that the hood bumpers supporting the hood had sunken. The vehicle otherwise performed normally, including the air blower reaching the selected fan speed four to five seconds after being turned on.

D. Analysis

The complaint limits the scope of this proceeding.²⁰ Accordingly, this proceeding only addresses those issues listed in the complaint. The complaint identified the following issues for resolution: hood shaking, incorrect climate control temperatures and an unresponsive blower, buzzing noise from the right side of the vehicle, and unbalanced wheels. Of these issues, the evidence shows that only the hood vibration currently exists. The unresponsive blower and buzzing noise from the right side of the vehicle have been successfully repaired. At the test drive, the blower reached the set speed within four to five seconds, which is normal. The vehicle did not exhibit any buzzing noise after the reinstallation and insulation of the front right wheel well liner. The seemingly incorrect climate control temperatures resulted from the climate control system's normal operation, which may produce air hotter or cooler at the vents than the temperature set on the climate control to compensate for ambient air temperatures. With regard to unbalanced wheels, the vehicle did not exhibit any signs of such condition currently existing.

The record shows that the hood vibration issue constitutes a warrantable defect. However, the hood vibration issue is not a serious safety hazard. Although the hood does move up and down, the hood does not appear to be at risk of opening as to block the forward view. The evidence showed that a double latch system secures the hood and both parts of the latch would need to fail for the hood to actually open. Instead the excessive play in the hood appears to result from the hood bumpers sinking down, thereby allowing the hood to travel further down, not up. Moreover, the hood vibration does not substantially impair the use of value of the vehicle. The evidence shows that the hood vibration did not affect the performance of the vehicle. Although the hood vibration may cause some reduction in value of the vehicle from a reasonable prospective purchaser viewpoint, the vibration does not appear significant enough to cause a substantial reduction in value. Accordingly, the vehicle does not qualify for repurchase or replacement but nevertheless qualifies for warranty repair.

²⁰ 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.

III. Findings of Fact

1. On January 12, 2015, the Complainant, purchased a new Chevrolet Colorado from Gunn Chevrolet a franchised dealer of the Respondent, in Selma, Texas. The vehicle had 95 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for three years or 36,000 miles, whichever comes first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. On July 6, 2015, the Complainant mailed a written notice of defect to the Respondent.
5. On July 17, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) alleging that the vehicle's hood shakes; the air conditioner and blower are unresponsive and the temperatures are incorrect; the vehicle makes a buzzing noise on the right side; and the wheels become unbalanced.
6. On October 6, 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.
7. The hearing in this case convened on December 3, 2015, in Laredo, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainant represented himself. Rose Crookston, District Manager Aftersales, represented the Respondent. In addition, Kevin Brown, Field Service Engineer, and Guillermo Galindo, Service Manager, testified for the Respondent.
8. The vehicle's odometer displayed 12,721 miles at the time of the hearing.
9. During the test drive at the hearing, the vehicle's hood vibrated, and some buzzing noise appeared to originate from the center console. The vehicle otherwise operated normally. The vehicle did not appear to have any existing vibration from unbalanced tires.
10. The hood vibration did not affect the performance of the vehicle.

11. The complaint did not include the issue of noise from the center console.
12. Inspection of the vehicle at the hearing revealed that the bumpers supporting the hood had sunken in.
13. Reinstalling and insulating the wheel well liner successfully resolved the buzzing noise at the right of the vehicle.
14. The repair of the blower reduced the blower's delay to within a normal duration.
15. The temperature of the air from the vents varies depending on the ambient air temperature and the temperature set on the climate control system, so the air temperature at the vents may normally be hotter or cooler than the temperature set on the climate control system.

IV. Conclusions of Law

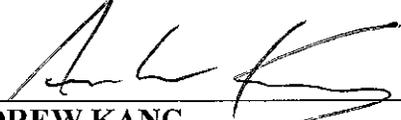
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant met the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE § 2301.605(a)(1).

8. The Complainant's vehicle does not qualify for replacement or repurchase. A warrantable defect does not substantially impair the use or market value of the vehicle. TEX. OCC. CODE § 2301.604.
9. 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 expired. 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 vibrating hood issue. 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 § 2001.144.²¹ 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 February 1, 2016



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

²¹ (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.