

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0142 CAF**

CHRISTOPHER J. SCISM,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
VOLKSWAGEN OF AMERICA, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Christopher J. Scism (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Volkswagen Touareg. Complainant asserts that the vehicle is defective because the vehicle's steering wheel shakes when driving at highway speeds. Volkswagen of America, Inc. (Respondent) argues that the vehicle does not have a defect and is performing as designed. The hearings examiner concludes that the vehicle has an existing warrantable defect. Therefore, Complainant is eligible for repurchase 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 and the record closed on May 24, 2016, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant was represented by Aaron Haas, attorney with Salmon and Haas. Christopher J. Scism, Complainant, and Christina Galligan, Complainant's wife, testified in the hearing. Respondent was represented telephonically by Adrian Guerrero, Arbitration Specialist.

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

Complainant purchased a new 2014 Volkswagen Touareg from North Park Volkswagen of Dominion (North Park) in San Antonio, Texas, on September 17, 2014.⁸ The vehicle's mileage at the time of delivery was 668.⁹ Respondent provided a limited bumper-to-bumper warranty for the first three (3) years of ownership or 36,000 miles, whichever comes first.¹⁰ In addition,

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, Cash Retail Purchase Order dated September 17, 2014.

⁹ Complainant Ex. 2, Odometer Disclosure Statement dated September 17, 2014.

¹⁰ Complainant Ex. 11, USA Warranty and Maintenance—Touareg—Model Year 2014, p. 3.

Respondent provided a ten (10) year or 100,000 mile powertrain warranty for the vehicle.¹¹ The vehicle's mileage on the date of hearing was 23,880.

Complainant testified that he first felt the vehicle's steering wheel shake excessively at highway speeds about two weeks after purchasing the vehicle. He stated that the shaking starts when the vehicle is driven at 62 mph and gets worse as the vehicle's speed increases

On October 28, 2014, Complainant took the vehicle to North Park for repair. North Park's service technician verified the concern and confirmed that there was excessive shaking in the steering wheel at highway speeds.¹² The technician rebalanced and rotated the vehicle's tires to address the issue.¹³ The vehicle's mileage at the time of the repair visit was 2,187.¹⁴ The vehicle was in the dealer's possession for three days. Complainant was provided with a loaner vehicle while his vehicle was being repaired. This repair seemed to address the issue for a few weeks. However, the problem soon returned.

On December 5, 2014, Complainant took the vehicle to North Park for repair due to the shaking issue. North Park's service technician checked the vehicle's tires and performed a four wheel balance.¹⁵ The technician determined that the front tires had flat spots and replaced those tires.¹⁶ Complainant picked up the vehicle from North Park on December 10, 2014. While driving away from the dealership, Complainant felt the vehicle's steering wheel start shaking again. So, Complainant returned the vehicle to North Park immediately. The vehicle was at North Park until December 16, 2014. The service technician changed out the vehicle's tires to see if the problem persisted. The only actual repair performed during the additional six days was that the tires were inflated to the proper level. The vehicle was in North Park's possession for a total of eleven (11) days while the vehicle was being repaired. Complainant was provided with a loaner vehicle while his vehicle was being repaired. The mileage on the vehicle at the time of this repair was 3,928.¹⁷

After picking up the vehicle from North Park on December 16, 2014, Complainant and his wife drove it to Virginia. They both still felt the steering wheel shaking when driving at highway speeds, but it was not as bad as in the past and it was more intermittent. However, Complainant testified that the more he drove the vehicle, the more constant the shaking became. So, he returned the vehicle to North Park for repair on February 25, 2015. North Park's service technician performed a road force balance on the tires and found that the road force on the two

¹¹ *Id.*

¹² Complainant Ex. 3, Repair Order dated October 28, 2014.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 4, Repair Order dated December 5, 2014.

¹⁶ *Id.*

¹⁷ *Id.*

rear tires was high.¹⁸ As a result, the technician replaced the rear tires. The mileage on the vehicle at the time of the repair was 9,969.¹⁹ The vehicle was in North Park's possession for three days on this occasion. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that the vehicle seemed fine for a while, but the shaking in the steering wheel returned after a few weeks. Complainant then took the vehicle to North Park on March 27, 2015, to address the issue. North Park's service technician verified that vehicle's steering wheel had excessive vibration when driving at highway speeds.²⁰ The technician performed a road force balance of the tires, but the shaking in the steering wheel remained.²¹ As a result, the decision was made to replace all four (4) of the vehicle's tires.²² The vehicle was in North Park's possession until April 1, 2015.²³ Complainant was provided with a rental vehicle while his vehicle was in the dealer's possession. The mileage on the vehicle when it was taken to North Park for repair on this occasion was 11,265.²⁴

Complainant thought that the issue had been repaired. However, the problem soon returned. Complainant took the vehicle to North Park on May 13, 2015, for repair. The service technician determined that the vehicle's steering wheel did shake somewhat, but was not different from how a comparable vehicle's steering wheel shook.²⁵ In addition, the technician determined that the road surfaces on which Complainant was driving the vehicle on was likely causing the shaking.²⁶ No repairs were performed at the time. The vehicle was in the dealer's possession for thirteen (13) days on this visit. Complainant was provided a loaner vehicle during the entire length of the repair visit. The vehicle's mileage on this occasion was 13,653.²⁷

After the May 13, 2015, repair visit, Complainant decided to consult with an attorney regarding his options with the vehicle. The attorney then wrote a Deceptive Trade Practices Act (DTPA) and Lemon Law notice letter to Respondent. The letter was mailed to Respondent on September 6, 2015.²⁸

¹⁸ Complainant Ex. 5, Repair Order dated February 25, 2015.

¹⁹ *Id.*

²⁰ Complainant Ex. 6, Repair Order dated March 27, 2015.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Complainant Ex. 7, Repair Order dated May 13, 2015.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Complainant Ex. 9, Letter to Volkswagen Group of America dated September 6, 2015.

On January 8, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).²⁹

Complainant testified that Respondent was provided with a final repair attempt on the vehicle. The final repair attempt took place on March 8, 2016, at North Park.³⁰ Respondent's representative determined that the vehicle was operating as designed and did not perform any repairs at the time.³¹

Complainant stated that he still feels the vehicle's steering wheel shake when he's driving at highway speeds. The severity of the shaking varies. Sometimes it's like a light tapping and other times it's strong enough to radiate up the driver's arms. The shaking has become more intermittent, but still occurs about half the time that the vehicle is driven. Complainant does not feel that the condition is normal.

Christina Galligan, Complainant's wife, testified that she has noticed excessive shaking in the vehicle's steering wheel when she's driven the vehicle at highway speeds. She took the vehicle to North Park on May 15, 2015, and took a test drive in a comparable vehicle with the dealer's service department representative. Ms. Galligan testified that she did feel a different vibration or shaking in the comparable vehicle than in Complainant's vehicle. The feeling was not the same as in Complainant's vehicle.

On March 16, 2016, Ms. Galligan picked up the vehicle from North Park after the conclusion of the final repair attempt. Respondent's representative informed Ms. Galligan that the shaking in the steering wheel was a normal condition of the vehicle. During the drive home from North Park, Ms. Galligan felt the steering wheel shaking severely.

Ms. Galligan stated that the shaking occurs most of the time that she drives the vehicle. She's concerned with the vehicle's longevity. Ms. Galligan stated that she does not drive the vehicle very often because she's concerned with the safety of the vehicle. She's also concerned that the vehicle's market value has suffered as a result of the issues with the steering wheel shaking.

C. Respondent's Evidence and Arguments

Adrian Guerrero, Arbitration Specialist, testified for Respondent. He stated that he first became involved with this complaint in September of 2015, after Respondent received a DTPA and

²⁹ Complainant Ex. 8, Lemon Law Complaint dated January 8, 2016. Although the complaint was signed by Complainant on November 23, 2015, it was not received by the Department until January 8, 2016, which is the effective date of the complaint.

³⁰ Complainant Ex. 10, Repair Order dated March 8, 2016.

³¹ *Id.*

Lemon Law notice letter from Complainant's attorney. Mr. Guerrero attempted to negotiate a settlement with Complainants, but they were unable to agree to a settlement. In February of 2016, Mr. Guerrero scheduled a final repair attempt on the vehicle to be performed by Ralph Rickey, Field Operations Manager.

Mr. Rickey performed a final repair attempt on the vehicle on March 8, 2016, at North Park. He test drove the vehicle for nine (9) miles during the final repair attempt.³² Mr. Rickey indicated that the concern did not manifest itself during the test drive.³³ He determined that the vehicle was operating as designed.³⁴ No repairs were performed on the vehicle at the time.

Mr. Guerrero feels that the vehicle does not have a defect at this time. He feels that the vehicle has been repaired and that no relief is warranted for Complainant.

D. Analysis

Under Texas' 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 a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the 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, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on September 17, 2014, and presented the vehicle for repair to an authorized dealer of Respondent due to his concerns with the vehicle's steering wheel shaking excessively at high speeds on October 28, 2014; December 5, 2014; February 25, 2015; March 27, 2015; and May 13, 2015. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(1) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more 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 two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt." Complainant has met the requirements of this test and Respondent has been

³² *Id.*

³³ *Id.*

³⁴ *Id.*

provided a reasonable number of attempts to conform Complainant's vehicle to the applicable express warranty.

Respondent argues that the vehicle has been repaired and has no defect at this time. However, the evidence reveals that the dealers' various service technicians were able to verify that the vehicle's steering wheel would shake excessively when driving at high speeds on at least two occasions. In addition, the service technicians replaced all four of the tires on at least two occasions. On December 5, 2014, the two front tires were replaced when the vehicle had been driven just 3,928 miles. Then the two back tires were replaced on February 25, 2015, when the vehicle had been driven 9,969 miles. Then all four tires were replaced when the vehicle had been driven 11,265 miles. It appears that the North Park's technicians keyed on the tires as causing the excessive shaking of the steering wheel and did not investigate to see if there could be another cause for it. It stretches the imagination to think that the vehicle could have had so many bad tires installed on it within approximately six months.

The evidence further demonstrates that the defect (excessive shaking of the vehicle's steering wheel at high speeds) in Complainant's vehicle creates a serious safety hazard. The nature of the condition increases the safety risk and substantially impedes Complainant's ability to control or operate the vehicle for ordinary use or intended purposes. Complainant has met his burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

Moreover, the defect in Complainant's vehicle substantially impairs its use and market value. An unimpaired vehicle with similar mileage should not behave in such a manner. Complainant cannot rely on the vehicle on long distance drives, as he cannot be aware when it may start acting up.

Finally, Complainant did serve written notice of his dissatisfaction with the vehicle to Respondent when his attorney mailed a DTPA and Lemon Law notice letter to Respondent on September 6, 2015. Respondent was provided with a final opportunity to repair the vehicle on March 8, 2016.

When a complainant establishes that relief under the Lemon Law is appropriate, the manufacturer may be required to repurchase the motor vehicle, or replace the motor vehicle with a comparable motor vehicle. Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case.

Based on the above analysis, the hearings examiner orders Respondent to repurchase Complainant's vehicle as further detailed in the Findings of Fact and Conclusions of Law.

III. FINDINGS OF FACT

1. Christopher J. Scism (Complainant) purchased a new 2014 Volkswagen Touareg from North Park Volkswagen of Dominion (North Park) in San Antonio, Texas, on September 17, 2014. The vehicle's mileage was 668 at the time of delivery.
2. The manufacturer of the vehicle, Volkswagen of America, Inc. (Respondent), issued a bumper-to-bumper limited warranty for the vehicle for the first three (3) years of ownership or 36,000 miles driven, whichever comes first.
3. The vehicle's mileage on the date of hearing was 23,880.
4. At the time of hearing the vehicle's bumper-to-bumper warranty was still in effect.
5. Complainant feels that the vehicle's steering wheel shakes inordinately at high speeds.
6. Complainant took the vehicle to Respondent's authorized dealers on the following dates in order to address the steering wheel shaking issue:
 - a. October 28, 2014, at 2,187 miles;
 - b. December 5, 2014, at 3,928 miles;
 - c. February 25, 2015, at 9,969 miles;
 - d. March 27, 2015, at 11,265 miles; and
 - e. May 13, 2015, at 13,653 miles.
7. On October 28, 2014, North Park's service technician verified that the vehicle's steering wheel shook excessively and performed a road force balance on the vehicle and balanced and rotated all four (4) tires on the vehicle.
8. On December 5, 2014, North Park's service technician found flat spots on the front tires and replaced them, after balancing and rotating the tires.
9. On February 25, 2015, North Park's service technician road force balanced the vehicle's tires and replaced the vehicle's rear tires since the road force was high on them.
10. On March 27, 2015, North Park's service technician verified Complainant's concern regarding excessive shaking of the steering wheel. The technician replaced all four (4) of the vehicle's tires to address the concern.

11. On May 13, 2015, North Park's service technician determined that any shaking in the steering wheel was due to the road surface on which the vehicle was being driven.
12. On January 8, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On March 8, 2016, Ralph Rickey, Field Operations Manager, performed a final repair attempt and inspection on the vehicle.
14. During Respondent's final repair attempt, Mr. Rickey determined that the vehicle was operating as designed and that no repairs were required.
15. On March 21, 2016, 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.
16. The hearing in this case convened and the record closed on May 24, 2016, in San Antonio, Texas, before Hearings Examiner Edward Sandoval. Complainant was represented by Aaron Haas, attorney with Salmon and Haas. Christopher J. Scism, Complainant, and Christina Galligan, Complainant's wife, testified in the hearing. Respondent was represented telephonically by Adrian Guerrero, Arbitration Specialist.

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's vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
10. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2014 Volkswagen Touareg. Tex. Occ. Code § 2301.604(a)(1).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in this final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$50,950.47**. In addition, Complainant is entitled to reimbursement of the Lemon Law filing fee in the amount of **\$35.00**. The total refund of **\$50,985.47** shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;

Purchase price, including tax, title, license and registration	\$56,803.87				
Delivery mileage	668				
Mileage at first report of defective condition	2,187				
Mileage on hearing date	23,880				
Useful life determination	120,000				
Purchase price, including tax, title, license and registration			\$56,803.87		
Mileage at first report of defective condition	2,187				
Less mileage at delivery	<u>-668</u>				
Unimpaired miles	1,519				
Mileage on hearing date	23,880				
Less mileage at first report of defective condition	<u>-2,187</u>				
Impaired miles	21,693				
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
	<u>1,519</u>				
	120,000	X	\$56,803.87	=	\$719.04
Impaired miles					
	<u>21,693</u>				
	120,000	X	\$56,803.87	X .5	= <u>\$5,134.36</u>
Total reasonable allowance for use deduction:					\$5,853.40
Purchase price, including tax, title, license and registration			\$56,803.87		
Less reasonable allowance for use deduction			-\$5,853.40		
Plus filing fee refund			<u>\$35.00</u>		
TOTAL REPURCHASE AMOUNT			\$50,985.47		

- Within twenty (20) calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);.

4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department;³⁵
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

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-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED June 3, 2016



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

³⁵ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, Phone (512) 465-4076.