

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0213 CAF**

**WILLIAM J. BETHEL, JR.,
Complainant**

v.

**VOLKSWAGEN OF AMERICA, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

William J. Bethel (Complainant) filed a complaint (Complaint) with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Volkswagen of North America, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

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 and the record closed on August 17, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. Mark Aschermann, attorney, represented the Complainant. The Complainant testified for himself. Steve Fogle, attorney, represented the Respondent. Neal Palmer, Product Liaison Engineer, 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 Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”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).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, 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.”⁶

c. Reasonable Number of Repair Attempts

For vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle’s use or market value and: (A) 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 occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁷

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.⁸ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.⁹

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(3).

⁸ “[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).

⁹ “[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 or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹⁰ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹¹ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹²

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle."¹³ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁴

¹⁰ TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words "mailed" or "mail", so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines "mail" as "to send by mail; place in a post office or mailbox for transmission" or "to transmit by email." mail. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that "[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor." The Department's notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

¹¹ TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹² TEX. OCC. CODE § 2301.606(d)(2).

¹³ TEX. OCC. CODE § 2301.204.

¹⁴ TEX. OCC. CODE § 2301.603(a).

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁵ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present evidence showing that every required fact is more likely than not true.¹⁶

A. Summary of Complainant's Evidence and Arguments

On October 3, 2015, the Complainant, purchased a new 2015 Audi A8 from Audi North Houston, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 157 miles on the odometer at the time of purchase.¹⁷ The vehicle's limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.

On January 8, 2016, the Complainant's attorney mailed a written notice of defect to the Respondent. On March 18, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle vibrated and made noise at all speeds.

The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
December 1, 2015	2,934	Metal on metal noise from right front when braking; rotor appears grooved; vibration at idle ¹⁸
February 19, 2016	4,978	Vibration in gear at idle ¹⁹

The Complainant testified that when he originally test drove the vehicle, it was very quiet, with no vibration. But at 1,400 to 1,700 miles, he started to hear the engine. He explained that he felt a wobble type vibration and that he noticed that the left front brake rotors had deep grooves and that he could hear metal to metal grinding. After replacement of the rotors and brake pads, the vibration seemed to get worse, with the vibration noticeable in the seat, steering wheel and elsewhere. When he took the engine cover off, he observed a serpentine belt wobbling. At the February 19, 2016 service visit, the vehicle had its harmonic balancer, belt, tensioner replaced. The vehicle also received its 5,000 mile service. However, the vehicle continued to vibrate in the

¹⁵ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁶ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁷ Complainant's Ex. 1, Retail Purchase Agreement.

¹⁸ Complainant's Ex. 3, Invoice 104127.

¹⁹ Complainant's Ex. 4, Invoice 110199.

engine area, engine cover, center console, steering wheel, and elsewhere. With regard to vibration measurement of the vehicle,²⁰ the Complainant explained that decibels (dB) was not a linear measure, but a logarithmic measurement. He pointed out that every 3dB increase represented a doubling of intensity.

B. Summary of Respondent's Evidence and Arguments

Mr. Palmer testified that he could find nothing to tie the balancer and pulley to vibration in the engine. When measuring the subject vehicle and a new exemplar vehicle (with less than 100 miles), he confirmed that the exemplar vehicle exhibited greater vibration than the subject vehicle in most cases and significantly greater in some cases. The exemplar had greater vibration in five out of nine measurements. Mr. Palmer opined that both the subject and exemplar vehicles operated within design. He noted that the vehicle would vibrate more at idle in gear than when traveling down the road. Mr. Palmer explained that engines naturally vibrate, especially diesel engines, since diesel engines use compression to ignite fuel, unlike gas engines. Mr. Palmer also noted that diesel engines run hotter. A modern TDI (turbocharged direct injection) engine has different functions/adjustments occurring, making comparison between even the same engines virtually impossible. The TDI engine makes adjustments based on engine temperature, fuel temperature, which will vary and alter vibration. To isolate the vehicle from the engine, the vehicle uses motor mounts with fluid that changes viscosity. The motor mounts did not exhibit any leaking or malfunction.

C. Inspection

The Respondent provided a new, same-model exemplar vehicle to compare with the subject vehicle at the inspection during the hearing. The exemplar vehicle's temperature gauge was at the midpoint. The hearings examiner inspected the exemplar vehicle with the vehicle in drive and reverse with the brake pedal depressed. The hearings examiner observed the exemplar vehicle's vibration in the seat, steering wheel, brake pedal and left arm rest. The subject vehicle had 10,189 miles on the odometer. The subject vehicle was idled until the temperature gauge reached the midpoint. As with the exemplar vehicle, the subject vehicle's vibration was observed in park and reverse. The hearings examiner observed the vibration in the seat, steering wheel, brake pedal and

²⁰ Complainant's Ex. 5b, Vibration Readings from the Bethel Inspection.

left arm rest. The Complainant suggested observing the vibration in the headrest, which the hearings examiner did. The vibration through the headrest appeared more prominent to the touch by hand as opposed to when resting the head on the headrest. The hearings examiner then reexamined the exemplar vehicle to observe the vibrations in the headrest. The Complainant stated that he could not tell a difference in the vibration between the exemplar and his vehicle but he thought greater engine noise in his vehicle added to the perception of vibration. The vibration at the various corresponding areas of the exemplar and subject vehicles appeared indistinguishable. The subject vehicle did appear to make more, but not substantially more, noise than the exemplar vehicle.

D. Analysis

A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. During the inspection at the hearing, the vehicle exhibited no noticeable difference in vibration from a new, same-model exemplar, regardless of whether in park or reverse, and regardless of whether observing the vibration at the seat, steering wheel, brake pedal, arm rest, or headrest. The vibration readings of the vehicle (in Complainant's Ex. 5b) showed mixed results. The readings showed that the subject vehicle had significantly more passenger side engine vibration (3.5 dB higher) than an exemplar vehicle but the exemplar vehicle had significantly more vibration (8.9 dB higher) at the center console. Overall, the readings provide equivocal evidence as to the existence of a nonconformity. The record as a whole, does not show that a defect more likely than not exists. Accordingly, the vehicle does not qualify for relief.

III. Findings of Fact

1. On October 3, 2015, the Complainant, purchased a new 2015 Audi A8 from Audi North Houston, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 157 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
December 1, 2015	2,934	Metal on metal noise from right front when braking; rotor appears grooved; vibration at idle
February 19, 2016	4,978	Vibration in gear at idle

4. On January 8, 2016, the Complainant's attorney mailed a written notice of defect to the Respondent.
5. On March 18, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle vibrated and made noise at all speeds.
6. On June 16, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the 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.
7. The hearing in this case convened and the record closed on August 17, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. Mark Aschermann, attorney, represented the Complainant. The Complainant testified for himself. Steve Fogle, attorney, represented the Respondent. Neal Palmer, Product Liaison Engineer, testified for the Respondent.
8. The vehicle's odometer displayed 10,189 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vibration readings of the vehicle compared to an exemplar vehicle provided mixed results, with the subject vehicle having significantly more vibration in one area but the exemplar vehicle having significantly more vibration in another area.
11. At the inspection during the hearing, the vehicle did not exhibit any discernable vibration different from that of a new, same-model exemplar vehicle.

IV. Conclusions of Law

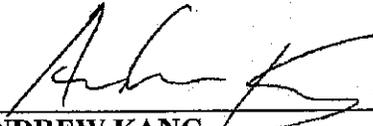
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613.

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 § 206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.603 and 2301.204.
9. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. TEX. OCC. CODE §§ 2301.603 and 2301.204.

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**.

SIGNED October 14, 2016



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