

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0237 CAF**

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| DAVID SMITH, | § | BEFORE THE OFFICE |
| Complainant | § | |
| v. | § | |
| | § | OF |
| HYUNDAI MOTOR AMERICA, | § | |
| Respondent | § | |
| | § | ADMINISTRATIVE HEARINGS |

DECISION AND ORDER

David Smith (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2015 Hyundai Sonata. Complainant asserts that the vehicle is defective because the check engine light (CEL) illuminates while he's driving and the vehicle concurrently loses power. Hyundai Motor America (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle has been repaired, does not have an existing warrantable defect, and Complainant is not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record was closed on August 2, 2016, in Fort Worth, Texas, before Hearings Examiner Edward Sandoval. Complainant, David Smith, represented himself at the hearing. In addition, his wife, Mitzi D. Smith, was present as an observer. Respondent was represented telephonically by David Whittington, Arbitration Advocate.

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 manufacturer has been given a reasonable number of attempts to

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty 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.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2015 Hyundai Sonata from Southside Hyundai in Fort Worth, Texas on November 1, 2014, with mileage of 25 at the time of delivery.^{7,8} Respondent provided a bumper-to-bumper warranty for the vehicle for five (5) years or 60,000 miles, whichever comes first. In addition, Respondent's powertrain warranty provides coverage for the vehicle's powertrain for ten (10) years or 100,000 miles. On the date of hearing the vehicle's mileage was 37,623 and the vehicle's warranties were still in effect.

Complainant testified that he was driving the vehicle in traffic on September 28, 2015, when the vehicle's check engine light (CEL) illuminated and the vehicle lost power. It seemed as if the vehicle's transmission was in neutral, as the RPM's would increase when Complainant stepped on the accelerator, but the vehicle would not increase speed. Complainant was able to drive the vehicle out of traffic and took it to Allen Samuels Hyundai (Samuels) in Fort Worth, Texas for repair. Samuels' service technician determined that the problem was caused because the vehicle's variable charge motion (VCM) actuator assembly was not operating which was causing the CEL to illuminate.⁹ The technician replaced the VCM assembly and test drove the vehicle to ensure

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only 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.

⁷ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated November 1, 2014.

⁸ Respondent Ex. 3, Hyundai Motors America Position Statement dated July 13, 2016.

⁹ Complainant Ex. 2, Repair Order dated September 28, 2015.

that it was working properly.¹⁰ The vehicle's mileage on this occasion was 14,934.¹¹ The vehicle was in Samuels' possession overnight during this repair. Complainant was not provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that he got the vehicle back from Samuels on September 29, 2015. The following day, September 30, 2015, the vehicle's CEL turned on again and the vehicle began stalling. Complainant immediately took the vehicle to Samuels in order to have the issues addressed. Samuels' technician determined that the vehicle's intake manifold was not working properly, so he replaced the manifold assembly.¹² The vehicle's mileage on this occasion was 14,998.¹³ The vehicle was in Samuels' possession for two (2) days. Complainant was provided with a loaner while his vehicle was being repaired.

A few months later the vehicle's CEL turned on again and the vehicle began losing power and stalling. Complainant took the vehicle to Samuels for repair on December 22, 2015. The service technician determined that the VCM was not working and replaced the assembly.¹⁴ In addition, the technician adjusted the divider on the engine block because the VCM motor was making a loud grinding noise.¹⁵ The vehicle's mileage at the time was 19,625.¹⁶ The vehicle was in the dealer's possession for seven (7) days on this occasion. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that the vehicle drove fine for a few months after the December 2015 repair. However, In April of 2016, the vehicle's CEL illuminated and the vehicle lost power. Complainant had the vehicle towed to Hiley Hyundai of Burleson, Texas (Hiley) for repair on April 6, 2016. Hiley's service technician determined that the vehicle's VCM needed replacement again, so he replaced it.¹⁷ The vehicle's mileage on this occasion was 24,100.¹⁸ Complainant testified that the vehicle was in Hiley's possession for one day and that he was not provided a loaner vehicle.

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 3, Repair Order dated September 30, 2015.

¹³ *Id.*

¹⁴ Complainant Ex. 4, Repair Order dated December 22, 2015.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 5, Repair Order dated April 6, 2016.

¹⁸ *Id.*

On April 14, 2016, Complainant wrote a letter to Respondent advising them of his dissatisfaction with the vehicle.¹⁹ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on April 19, 2016.²⁰

Complainant stated that he has not taken the vehicle to any of Respondent's authorized dealers since April of 2016 because he has not had any additional issues with it. Complainant stated that in the past he was told on three (3) occasions by dealers' representatives that the vehicle was repaired, but the work was not done correctly. He was not contacted by Hyundai for an opportunity to perform a final repair attempt. Complainant stated that as far as he knows the vehicle works fine, but he doesn't trust that it will not have a similar problem in the future.

C. Respondent's Evidence and Arguments

David Whittington, Arbitration Advocate, testified for Respondent. He was assigned the case on May 3, 2016. He reviewed the case file and spoke to Respondent's representatives in the regional field offices to find out more about the complaint. Mr. Whittington had never spoken to Complainant prior to the hearing. Respondent opted not to request for an opportunity for a final repair attempt on the vehicle, because they felt it was operating as designed.

Mr. Whittington testified that the VCM is an air tumble device. Its primary purpose is to ensure that the vehicle's engine maintains a proper gas/oxygen mixture to allow the engine to operate correctly. The device is similar to a turbocharger. The VCM was replaced on three different occasions and the intake manifold assembly was replaced once. Mr. Whittington pointed out that the VCM was replaced twice within a few weeks after Complainant had taken the vehicle to National Tire and Battery for maintenance work.

Mr. Whittington believes that the vehicle has been repaired and is operating as designed.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is

¹⁹ Complainant Ex. 7, Letter to Hyundai Motor America dated April 14, 2016.

²⁰ Complainant Ex. 6, Lemon Law Complaint dated April 19, 2016. Complainant signed and dated the complaint on April 13, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until April 19, 2016, which is the effective date of the complaint.

required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant filed the Lemon Law complaint because the vehicle's CEL illuminated and the vehicle would lose power, stall and/or die in traffic.

Complainant purchased the vehicle on November 1, 2014, and presented the vehicle to Respondent's authorized dealers for repair on the following dates: September 28, 2015; September 30, 2015; December 22, 2015; and April 6, 2016. The vehicle's variable control motion (VCM) actuator assembly was replaced by the dealers' service technician three (3) times, with the final replacement being performed on April 6, 2016, and the vehicle's intake manifold assembly was replaced once in order to address Complainant's concerns. Complainant testified that the vehicle's CEL has not turned on and the vehicle has not died or stalled since the April 2016 repair.

Occupations Code § 2301.603 provides that "a manufacturer, converter, or distributor shall make repairs necessary to conform a new motor vehicle to an applicable manufacturer's converter's or distributor's express warranty." Relief under the Lemon Law can only be granted if the manufacturer of a vehicle has been unable to conform a vehicle to the manufacturer's warranty. If a vehicle has been repaired then no relief can be possible. A loss of confidence in the vehicle when a defect has been cured does not warrant relief under the Lemon Law. The Lemon Law requires that in order for a vehicle to be determined to be a "lemon" the "nonconformity continues to exist" after the manufacturer has made repeated repair attempts.²¹ In the present case, the evidence reveals that the vehicle has been repaired and that it currently conforms to the manufacturer's warranty. Therefore, the hearings examiner finds that there is no defect with the vehicle that has not been repaired and, as such, repurchase or replacement relief for Complainant is not warranted.

Respondent's express warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for five (5) years or 60,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for ten (10) years or 100,000 miles. On the date of hearing, the vehicle's mileage was 37,623 and it remains under the warranties. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

²¹ Tex. Occ. Code § 2301.605.

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

FINDINGS OF FACT

1. David Smith (Complainant) purchased a new 2015 Hyundai Sonata on November 1, 2014, from Southside Hyundai in Fort Worth, Texas, with mileage of 25 at the time of delivery.
2. The manufacturer of the vehicle, Hyundai Motor America (Respondent), issued a bumper-to-bumper warranty for five (5) years or 60,000 miles, whichever occurs first and a separate powertrain warranty for ten (10) years or 100,000 miles.
3. The vehicle's mileage on the date of hearing was 37,623.
4. At the time of hearing the vehicle was still under warranty.
5. The vehicle's check engine light (CEL) turns on periodically, concurrently the engine loses power, and the vehicle will stall and/or die.
6. Complainant took the vehicle to Respondent's authorized dealers for repair of the issues cited in Finding of Fact #5 on the following dates:
 - a. September 28, 2015, at 14,934 miles;
 - b. September 30, 2015, at 14,998 miles;
 - c. December 22, 2015, at 19,625 miles; and
 - d. April 6, 2016, at 24,001 miles.
7. On September 28, 2015, Allen Samuels Hyundai's (Samuels) service technician replaced the vehicle's defective variable charge motion (VCM) actuator assembly to address Complainant's concerns.
8. On September 30, 2015, Samuels' service technician replaced the vehicle's defective intake manifold in order to address the issues of the CEL illuminating and the vehicle stalling or dying.
9. On December 22, 2015, Samuels' service technician replaced the vehicle's VCM assembly to address the issues of the CEL illuminating and the vehicle stalling or dying.

10. On April 6, 2016, Hiley Hyundai's service technician replaced the vehicle's VCM assembly to address the issues of the CEL illuminating and the vehicle stalling or dying.
11. The vehicle has been repaired and the vehicle's CEL is no longer illuminating and the vehicle has not stalled or died since prior to the final repair on April 6, 2016.
12. On April 19, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On May 27, 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.
14. The hearing in this case convened and the record was closed on August 2, 2016, in Fort Worth, Texas, before Hearings Examiner Edward Sandoval. Complainant, Davis Smith, represented himself at the hearing. In addition, his wife, Mitzi D. Smith, was present as an observer. Respondent was represented telephonically by David Whittington, Arbitration Advocate.

III. CONCLUSIONS OF LAW


1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.

6. Complainant failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

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

SIGNED August 16, 2016.


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