

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0271 CAF**

**VALERIANO E. CADENA, JR.,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Valeriano E. Cadena, Jr. (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2015 Ford F-350 diesel truck. Complainant asserts that the vehicle has slow acceleration, that it shakes and shimmies, that the engine makes a loud knocking noise, and that the check engine light (CEL) has illuminated. Ford Motor Company (Respondent) argued that Complainant has not met the repurchase requirements set forth in the Occupations Code and that no relief is warranted. The Hearings Examiner concludes that the vehicle does not have a currently existing warrantable defect, and that Complainant is not eligible for repurchase or replacement relief since he did not meet the presumption that Respondent was provided a reasonable number of repair attempts to conform the vehicle to its warranty which is required for such relief under the Texas Lemon Law.

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 August 17, 2016, in Del Rio, Texas before Hearings Examiner Edward Sandoval. Complainant, Valeriano E. Cadena, Jr., represented himself at the hearing. Respondent was represented telephonically by Maria Diaz, Legal Analyst for Consumer Affairs.

II. DISCUSSION

A. Applicable Law

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the

vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

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.⁴

B. Complainant's Evidence and Arguments

Complainant purchased a 2015 Ford F-350 pickup truck from Del Rio Ford Lincoln, in Del Rio, Texas on July 13, 2015, with mileage of 78 at the time of delivery.⁵ Respondent provided Complainant with a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent provided a powertrain warranty for the vehicle for five (5) years or 60,000 miles. On the date of hearing the vehicle's mileage was 10,045. At this time, Respondent's warranties for the vehicle are still in effect.

Complainant testified that the vehicle has slow acceleration. It also sometimes shakes and shimmies when he's driving it. In addition, the CEL has illuminated and then turned off on its own. The engine knocks badly and it feels as if a piston is coming out of the engine.

Sometime around December 15, 2015, Complainant was driving the vehicle to a local lake and was going up a slight incline. The vehicle began shuddering and shaking and the engine began knocking. The vehicle also seemed to lose power. Complainant pulled over to the side of the road

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ 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.

⁵ Complainant Ex. 1, Purchase Order dated July 13, 2015.

to clear the problem and then drove the vehicle to Del Rio Ford. Complainant testified that he informed the dealer's service advisor of the problems, but that there was no documentation made of the visit. Complainant could not recall the exact date when this occurred.

When Complainant had a similar experience a few weeks later, he took the vehicle to Del Rio Ford on January 25, 2016, in order to have his concerns addressed. The dealer's service technician reset the vehicle's power control module (PCM) and transmission control module (TCM).⁶ In addition, the technician cleaned the vehicle's exhaust gas recirculation (EGR) system.⁷ However, Complainant was notified that the technician was not able to recreate the shaking, shuddering, and knocking. The vehicle's mileage on this occasion was 5,177.⁸ The vehicle was in the dealer's possession for two (2) days. Complainant was not provided with a loaner or rental vehicle while his vehicle was being repaired.

The problems with the vehicle occurred twice again in March of 2016 and two or three times in April. Also, in April of 2016, the vehicle's CEL illuminated. On May 3, 2016, Complainant took the vehicle to Cecil Atkisson Ford Lincoln (Atkisson) for repair. Atkisson's service technician removed the engine's left cylinder head and replaced all eight (8) exhaust valves in order to address the issues.⁹ The vehicle's mileage when it was taken to the dealership on this occasion was 7,759.¹⁰ The vehicle was in Atkisson's possession for 17 days. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

On May 10, 2016, Complainant mailed a letter to Respondent advising them of Complainant's dissatisfaction with the vehicle.¹¹ In addition, on the same date, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).¹²

Complainant testified that the vehicle started shuddering and shaking twice after the repairs were completed on the vehicle in May of 2016. In addition, the CEL illuminated. So, Complainant took the vehicle to Atkisson on July 27, 2016. Atkisson's technician found a trouble code indicating a loss of communication and cleared the code.¹³ The technician did not perform any other repair to the vehicle. The mileage on the vehicle on this occasion was 9,512.¹⁴ The vehicle was in Atkisson's possession for four (4) days. Complainant was not provided with a loaner vehicle while his vehicle was being repaired.

⁶ Complainant Ex. 2, Repair Order dated January 25, 2016.

⁷ *Id.*

⁸ *Id.*

⁹ Complainant Ex. 3, Repair Order dated May 3, 2016.

¹⁰ *Id.*

¹¹ Complainant Ex. 7, Letter to Ford Motor Company dated May 10, 2016.

¹² Complainant Ex. 6, Lemon Law complaint dated May 13, 2016. Although the complaint is signed on May 10, 2016, the effective date of the complaint is the date that it was received by the Texas Department of Motor Vehicles which was May 13, 2016.

¹³ Complainant Ex. 4, Repair Order dated July 27, 2016.

¹⁴ *Id.*

Complainant stated that the CEL illuminated again and the engine started knocking and running rough. He contacted Atkisson's service advisor on August 3, 2016, to have him make a record of the problem. However, Complainant did not take the vehicle for repair on this occasion.

Complainant testified that the vehicle's problems are intermittent. He has experienced a slow acceleration in the vehicle while going up a slight incline at about 25 to 30 mph often. The clattering noise and the CEL illuminating occur intermittently. Complainant tries to avoid stopping and starting the vehicle too often. He doesn't leave the engine idling. Complainant doesn't feel that he can rely on the vehicle.

C. Respondent's Evidence and Arguments

Maria Diaz, Legal Analyst for Consumer Affairs, testified for Respondent. She stated that she first became aware of Complainant's concerns with the vehicle when she received Complainant's letter dated May 10, 2016, in which Complainant indicated his unhappiness with the vehicle. Ms. Diaz contacted Complainant on May 13, 2016, to arrange for Respondent to perform a final repair attempt on the vehicle. The final repair attempt was performed on May 20, 2016, at Cecil Atkisson Ford Lincoln in Del Rio, Texas. Kurt Kindler, Field Service Engineer, performed the final repair attempt. Mr. Kindler was unable to duplicate Complainant's concerns and determined that the vehicle was operating as designed.¹⁵

Ms. Diaz testified that Complainant's concerns with the vehicle could be a result of the engine's diesel particulate filter (DPF) regeneration process which can cause a vehicle to run rough when the vehicle's drive cycle is insufficient for the DPF regeneration to complete.¹⁶ Ms. Diaz feels that the vehicle has been repaired.

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.

¹⁵ Respondent Ex. 1, FSE Vehicle Inspection Report dated May 20, 2016.

¹⁶ Respondent Ex. 3, Manufacturer Response Form, undated.

Complainant purchased the vehicle on July 13, 2015, and presented the vehicle to an authorized dealer of Respondent due to his concerns with the transmission on the following dates: January 25, 2016 and May 3, 2016.¹⁷ 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 not met the requirements of this test. Complainant did not present the vehicle for repairs to an authorized dealer for Respondent four times prior to filing the Lemon Law complaint. As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent. In order to grant repurchase or replacement relief, Complainant must have provided Respondent with a reasonable number of repair attempts to conform the vehicle to its warranty. Since Respondent was not provided an adequate opportunity to repair the vehicle, the hearings examiner cannot award repurchase or replacement relief.

Respondent’s express warranty applicable to Complainant’s vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 60,000 miles. On the date of hearing, the vehicle’s mileage was 10,045 and the warranties are still in effect. As such, Respondent is under an obligation to repair the vehicle whenever there is any other problem covered by the vehicle’s warranties.

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

III. FINDINGS OF FACT

1. Valeriano E. Cadena, Jr. (Complainant) purchased a new 2015 Ford F-350 pickup truck on July 13, 2015, from Del Rio Ford Lincoln, in Del Rio, Texas, with mileage of 78 at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent) issued a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 60,000 miles.

¹⁷ Complainant testified that he took the vehicle on one other occasion to the dealer for repair in December of 2016, but could not recall the exact date and never received an invoice or repair order for the visit.

3. The vehicle's mileage on the date of hearing was 10,045.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainant states that the vehicle will sometimes accelerate slowly, will shake and shimmy, the engine will knock badly, and the check engine light (CEL) will illuminate.
6. Complainant took the vehicle to Respondent's authorized dealers in order to address his concerns with the vehicle, on the following dates:
 - a. January 25, 2016, at 5,177 miles; and
 - b. May 3, 2016, at 7,759 miles.
7. On January 25, 2016, Del Rio Ford's service technician reset the vehicle's power control module (PCM) and transmission control module (TCM) and cleaned the vehicle's exhaust gas recirculation (EGR) system in order to address Complainant's concerns.
8. On May 3, 2016, Cecil Atkisson Ford's (Atkisson) service technician replaced eight (8) exhaust valves in the vehicle's engine to address the issue of the vehicle running rough.
9. On May 13, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On June 17, 2016, Respondent's field service engineer performed a final repair attempt on the vehicle. The engineer was unable to duplicate Complainant's concerns and determined that the vehicle was operating as designed.
11. On July 27, 2016, Atkisson's technician cleared a loss of communication code from the vehicle's computer in order to address Complainant's concern that the vehicle's engine was clattering and running rough and that the CEL had illuminated.
12. On June 10, 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.
13. The hearing in this case convened and the record closed on August 17, 2016, in Del Rio, Texas before Hearings Examiner Edward Sandoval. Complainant, Valeriano E. Cadena, Jr., represented himself at the hearing. Respondent was represented telephonically by Maria Diaz, Legal Analyst for Consumer Affairs.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.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 did not prove by a preponderance of the evidence that the vehicle has a verifiable 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. Complainant did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a)(1).
8. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
9. 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-.613 is hereby **DISMISSED**.

SIGNED September 14, 2016.



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