

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0299 CAF**

ROBERT J. HAGGARD,
Complainant

v.

GENERAL MOTORS LLC,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Robert J. Haggard (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged defects in his 2015 Yukon Denali. Complainant asserts that the vehicle's transmission intermittently shudders and slips and can't decide which gear to select. General Motors LLC (Respondent) argued that the vehicle has been repaired and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect, and Complainant is eligible for replacement 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 on August 31, 2016 in Amarillo, Texas before Hearings Examiner Edward Sandoval and closed that same day. Complainant, Robert J. Haggard, represented himself at the hearing. In addition, Tawna Haggard, spouse, testified for Complainant. Respondent was represented by Kevin Phillips, Business Resource Manager. David Piper, Field Service Engineer, testified for Respondent.

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

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).

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, Robert J. Haggard purchased a 2015 Yukon Denali from Brown Buick GMC (Brown) in Amarillo, Texas on January 2, 2015, with mileage of 20 at the time of delivery.^{5,6} Respondent provided a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles, whichever comes first.⁷ In addition, Respondent's powertrain warranty provides for coverage for the vehicle's powertrain for five (5) years or 100,000 miles.⁸ On the date of hearing the vehicle's mileage was 28,589. At this time, Respondent's warranty coverage for the vehicle is still in effect.

Complainant testified that soon after purchasing the vehicle he noticed that he would hear a whining noise whenever he or his wife was driving the vehicle and they were coming to a stop. He took the vehicle to Brown on June 15, 2015. The dealer's service technician verified the concern after taking a test drive in the vehicle.⁹ The technician contacted Respondent's technical assistance center (TAC) and Respondent's product quality center (PQC) to obtain guidance regarding what action to take to repair the vehicle.¹⁰ It was suggested to the technician that the vehicle's transmission be replaced.¹¹ The technician replaced the transmission and performed a transmission shift adapt learn.¹² The vehicle's mileage when it was taken to the dealership on this occasion was 7,819.¹³ The vehicle was returned to Complainant on July 13, 2015. Complainant was not provided with a loaner or rental vehicle while his vehicle was being repaired.

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, Motor Vehicle Retail Installment Sales Contract dated January 2, 2015.

⁶ Complainant Ex. 2, Odometer Disclosure Statement dated January 2, 2015.

⁷ Respondent Ex. 6, New Vehicle Limited Warranty.

⁸ *Id.*

⁹ Complainant Ex. 3, Repair Order dated June 15, 2015.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Complainant testified that the vehicle seemed to drive fine for about a week after he received the vehicle back. However, the vehicle soon started shuddering when it was driven. On September 28, 2015, Complainant took the vehicle to Brown because he felt the vehicle's transmission was not shifting properly. Complainant informed the service adviser that the vehicle's transmission felt like it was slipping. Brown's service technician reprogrammed the vehicle's transmission control module (TCM) and performed a transmission shift adapt reset.¹⁴ The mileage on the vehicle when Complainant took it to the dealership on this occasion was 13,192.¹⁵ The vehicle was returned to Complainant on September 30, 2015.¹⁶ Complainant was not provided with a loaner or rental vehicle while his vehicle was being repaired.

On December 3, 2015, Complainant again took the vehicle to Brown because of the transmission issues. Complainant informed Brown's service advisor that the transmission was shuddering and it acted as if it was having trouble deciding which gear it should be in.¹⁷ The service technician checked the vehicle's transmission and could not find a problem with it nor could he find any trouble codes on the vehicle's computers. No repairs were performed at the time. The vehicle's mileage when it was delivered to the dealer on this occasion was 14,384.¹⁸ The vehicle was in Brown's possession for four (4) days. Complainant was not provided with a loaner or rental vehicle while his vehicle was being repaired.

Complainant testified that soon thereafter Ms. Haggard was driving the vehicle when she heard a loud thud and clunk from under the vehicle which sounded like the transmission falling out. Complainant took the vehicle to Brown for repair for the transmission on February 3, 2016. Brown's service technician reprogrammed the vehicle's transmission and software.¹⁹ In addition, the technician determined that the problems complained of by Complainant were normal operating characteristics of the vehicle's eight (8) speed transmission.²⁰ The vehicle's mileage when it was delivered to the dealer on this occasion was 15,905.²¹ The vehicle was in Brown's possession for two (2) days. Complainant was not provided with a loaner or rental vehicle while his vehicle was being repaired.

Complainant stated that the vehicle continued to shudder and jerk. Complainant testified that on Easter Sunday, March 27, 2016, he was at his in-law's house preparing to drive home when the vehicle's transmission acted up again. Complainant put the transmission in gear and the engine's RPM's jumped up to about 3000 before the transmission engaged. The vehicle then jerked

¹⁴ Complainant Ex. 5, Repair Order dated September 28, 2015.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 7, Repair Order dated December 3, 2015.

¹⁸ *Id.*

¹⁹ Complainant Ex. 8, Repair Order dated February 3, 2016.

²⁰ *Id.*

²¹ *Id.*

forward and took off. Complainant testified that transmission took about three (3) to five (5) seconds to engage. Complainant took the vehicle to Brown for repair on March 31, 2016, as a result of this incident. Brown's service technician verified that the transmission had a delayed engagement when shifting into reverse and drive on a cold start up.²² The technician removed the vehicle's transmission and replaced the stator support before reinstalling the transmission.²³ The vehicle's mileage on this repair visit was 19,307.²⁴ Brown had possession of the vehicle for two (2) weeks. Complainant was not provided with a loaner or rental vehicle while his vehicle was being repaired.

Complainant wrote a letter to Respondent advising them of the fact that he felt that the vehicle was not being repaired and requesting that the vehicle be replaced.²⁵ Complainant filed a Lemon Law complaint with the Texas Department Of Motor Vehicles (Department) on June 7, 2016.²⁶

On June 28, 2016, Respondent's representative performed an inspection of the vehicle at Brown.²⁷ The representative performed an update to the vehicle's TCM and performed a fast adapt shift relearn in order to address the shuddering issue.²⁸ The vehicle's mileage on this occasion was 23,961.²⁹

Complainant testified that the vehicle is still acting the same as in the past. He feels that the vehicle is shuddering and that the transmission is slipping. It occurs every time he drives the vehicle. Complainant stated that the vehicle acts worse when he's driving it in traffic.

During cross-examination, Complainant indicated that he, his wife, and his son drive the vehicle. He doesn't drive the vehicle on dirt or gravel roads. He has not experienced an accident or loss of control in the vehicle. Complainant testified that the vehicle does not have any dings, scratches, or cracked glass. There is no interior damage to the vehicle. In addition, Complainant has not added any after-market items to the vehicle. No warning lights have ever illuminated in the vehicle when Complainant's driven it. Complainant testified that he also took the vehicle to Brown on February 17, 2015, for repair to the vehicle's lift gate and that he mentioned his concerns about the vehicle's transmission at that time to Brown's service advisor, but it was not

²² Complainant Ex. 9, Repair Order dated March 31, 2016.

²³ *Id.*

²⁴ *Id.*

²⁵ Complainant Ex. 4 Letter to GMC, undated. Complainant's testimony was inconsistent as to the mailing date of the letter. He stated that it was mailed on July 16, 2016, but then went on to state that the letter was mailed at the same time as the Lemon Law complaint which was mailed to the Texas Department Of Motor Vehicles on or about June 2, 2016.

²⁶ Complainant Ex. 10, Lemon Law Complaint dated June 7, 2016. The complaint was signed and dated by Complainant on June 2, 2016, but was not received by the Department until June 7, 2016, which is the effective date of the complaint.

²⁷ Complainant Ex. 11, Repair Order dated June 28, 2016.

²⁸ *Id.*

²⁹ *Id.*

documented on the repair order.³⁰ The vehicle's mileage at this time was 1,180.³¹ Also, Complainant testified that the vehicle stalled in July of 2016 on a trip to Oklahoma City. The vehicle started up again and he was not left stranded.

2. Tawna Haggard's Testimony

Tawna Haggard, Complainant's spouse, testified that she is the primary driver of the vehicle. She has experienced situations where the vehicle's transmission shifts so hard that it jars her whole body. Ms. Haggard stated that this occurs in stop-and-go traffic and when driving in parking lots. In addition, she stated that she can feel the hard shift sometimes when she's a passenger in the vehicle. She stated that this occurs about ninety percent of the time that she drives the vehicle. She has not experienced any problems with the transmission shift when driving on highways.

Ms. Haggard also testified that she's frustrated with the vehicle. She feels that there is constantly an issue with it and that it has needed too many repairs.

C. Respondent's Evidence and Arguments

David Piper, Field Service Engineer, testified for Respondent. He has worked for Respondent or its authorized dealers since 1990. He has worked for the past two and a half years as a field service engineer. He is an Automotive Service Excellence (ASE) Master Technician. In addition, he has been certified as a General Motors (GM) World Class Technician. Mr. Piper has an Associates degree in automotive technology.

Mr. Piper testified that he was dispatched to perform a final repair attempt on Complainant's vehicle on June 28, 2016. The final repair attempt was performed at the Brown dealership in Amarillo, Texas. Mr. Piper did not have any specifics as to what was alleged to be wrong with the vehicle. So, when he arrived at the Brown dealership, he spoke to the service advisor and technicians about the problems with Complainant's vehicle. Mr. Piper was informed that the vehicle's transmission had a hard shift, delayed engagement, and a "busy" shift. After inspecting the vehicle, Mr. Piper determined that the transmission had a delayed shift and updated the vehicle's transmission control module and performed a drive learn procedure pursuant to a technical service bulletin issued by Respondent. Mr. Piper felt that the vehicle did not have a defect and that the issues raised by Complainant were all part of the vehicle's normal operating characteristics.

After taking a test drive in the vehicle, Mr. Piper testified that he did feel a bit of a shudder between the second and third shift. He did not feel that this was a defect or nonconformity in the vehicle. He stated that he would feel comfortable driving the vehicle. Mr. Piper also stated that

³⁰ Respondent Ex. 4, Repair Order dated February 17, 2015.

³¹ *Id.*

he did not feel that the issue constituted a serious safety issue or that it would substantially affect the normal use of the vehicle.

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 January 2, 2015, and presented the vehicle to an authorized dealer of Respondent due to his concerns with the vehicle's transmission on the following dates: June 15, 2015, September 28, 2015, December 3, 2015, February 3, 2016, and March 31, 2016. 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 2301.604(a) 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." The evidence presented at the hearing establishes that Complainant has met the requirements of this test. Complainant presented the vehicle for repairs to an authorized dealer for Respondent on four (4) occasions. Although the mileage on the vehicle at the time of the second visit was 13,192, this is not fatal, as the second repair attempt was not significantly beyond the 12,000 mile standard. In addition, the next two repair attempts were performed within the next year and the next 12,000 miles. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with a final opportunity to cure the defect. Complainant informed Respondent via letter of his dissatisfaction with the vehicle. The vehicle was inspected on June 28, 2016, by Respondent's representative who updated the vehicle's transmission control module.

The evidence indicates that the defect in Complainant's vehicle creates a serious safety hazard as defined in the Code. The fact that the vehicle does not shift properly impairs Complainant's ability to control or operate the vehicle for its ordinary use or purposes. As such, Complainant

has met his burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

In addition, the defect in Complainant's vehicle substantially impairs its use and market value. The vehicle's transmission slipping makes it less desirable to drive than comparable vehicles. In addition, it can cause the driver to decide that the vehicle is not roadworthy for extended trips which can affect its marketability due to the reduced capacity for use.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. Robert J. Haggard (Complainant) purchased a new 2015 Yukon Denali on January 2, 2015, from Brown Buick GMC, in Amarillo, Texas, with mileage of 20 at the time of delivery.
2. The manufacturer of the vehicle, General Motors LLC (Respondent), issued a bumper-to-bumper warranty for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 100,000 miles.
3. The vehicle's mileage on the date of hearing was 28,589.
4. At the time of hearing the vehicle was still under warranty.
5. After purchasing the vehicle, Complainant noticed that the vehicle's transmission seemed to slip and shudder. In addition, the transmission appears to be unable to decide which gear it needs to be in.
6. Complainant took the vehicle to Respondent's authorized dealer in order to address his concerns with the vehicle's transmission, on the following dates:
 - a. June 15, 2015, at 7,819 miles;
 - b. September 28, 2015, at 13,192 miles;
 - c. December 3, 2015, at 14,384 miles;
 - d. February 3, 2016, at 15,905 miles; and
 - e. March 31, 2016, at 19,307 miles.
7. Respondent, through its authorized dealer, undertook a reasonable number of attempts to conform Complainant's vehicle to an applicable express warranty, but the nonconformity in the vehicle continues to exist.

8. The defective condition of Complainant's vehicle creates a serious safety hazard. A vehicle that does not shift properly impairs Complainant's ability to control or operate the vehicle for its ordinary use or purposes.
9. The defective condition of Complainant's vehicle substantially impairs its use and market value. The vehicle's transmission slipping makes it less desirable to drive than comparable vehicles. In addition, it can cause the driver to decide that the vehicle is not roadworthy for extended trips which can affect its marketability due to the reduced capacity for use.
10. Complainant provided written notice of the defect to Respondent, and Respondent was given the opportunity to inspect the vehicle on June 28, 2016.
11. On June 7, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On July 12, 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 on August 31, 2016 in Amarillo, Texas before Hearings Examiner Edward Sandoval and closed that same day. Complainant, Robert J. Haggard, represented himself at the hearing. In addition, Tawna Haggard, spouse, testified for Complainant. Respondent was represented by Kevin Phillips, Business Resource Manager. David Piper, Field Service Engineer, testified for Respondent.

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'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 2015 Yukon Denali. 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 **\$52,294.38**.³² Complainant is not entitled to reimbursement of incidental expenses. The refund 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;

³² The original financed price of the vehicle was \$75,834.06. The price was reduced by \$15,117.76 which was the amount the dealership paid to pay off the lien that Complainant owed on his trade-in, a 2013 Cadillac Escalade.

Purchase price, including tax, title, license and registration	\$61,592.73
Delivery mileage	20
Mileage at first report of defective condition	7,819
Mileage on hearing date	28,589
Useful life determination	120,000

Purchase price, including tax, title, license and registration		\$61,592.73			
Mileage at first report of defective condition		7,819			
Less mileage at delivery		<u>-20</u>			
Unimpaired miles		7,799			
Mileage on hearing date		28,589			
Less mileage at first report of defective condition		<u>-7,819</u>			
Impaired miles		20,770			
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
		<u>7,799</u>			
	120,000		X	\$61,592.73	= \$4,003.01
Impaired miles		<u>20,770</u>			
	120,000		X	\$61,592.73	X .5 = <u>\$5,330.34</u>
Total reasonable allowance for use deduction:					\$9,333.35
Purchase price, including tax, title, license and registration		\$61,592.73			
Less reasonable allowance for use deduction		-9,333.35			
Plus filing fee refund		<u>\$35.00</u>			
TOTAL REPURCHASE AMOUNT		\$52,294.38			


3. 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,³³
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 October 21, 2016



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

³³ 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.