

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0038 CAF**

**MARIA L. CUENCA,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Maria L. Cuenca (Complainant) filed a 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 her vehicle manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable 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 January 31, 2017, in Pharr, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Daniel Cuenca testified for the Complainant. Rose Crookston, District Manager Aftersales, represented the Respondent. John Ferrell, Field Service Engineer, and Lupe Salazar, Service Manager, 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

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the 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 (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁸

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)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

Additionally, 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.⁹

However, a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹⁰ 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.¹¹

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;¹² (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ and (3) the

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[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.’”).

¹¹ *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹² 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 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.

¹³ 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).

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.¹⁴

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."¹⁵ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁷ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that every required fact is more likely than not true.¹⁸ If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.¹⁹ The complaint should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."²⁰ However, the parties may expressly or impliedly consent

¹⁴ TEX. OCC. CODE § 2301.606(d)(2).

¹⁵ TEX. OCC. CODE § 2301.204.

¹⁶ TEX. OCC. CODE § 2301.603(a).

¹⁷ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁸ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁹ "In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days." TEX. GOV'T CODE §§ 2001.051; "Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted." TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) ("The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty."); TEX. OCC. CODE § 2301.204(d) ("A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.").

²⁰ 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.²¹ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²²

A. Complainant's Evidence and Arguments

On September 12, 2015, the Complainant, purchased a new 2015 GMC Sierra from Weslaco Motors, a franchised dealer of the Respondent, in Weslaco, Texas. The vehicle had 117 miles on the odometer at the time of purchase. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first. On October 6, 2016, the Complainant mailed a written notice of defect to the Respondent. On October 11, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle vibrated and squeaked/rattled. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
7/29/16	13,527	Vehicle vibration at 75 mph ²³
10/10/16	17,874	Truck vibrates at 70 – 80 mph ²⁴

The Complainant testified that, at a certain speed, the vehicle vibrates. Mr. Cuenca elaborated that the sound occurred at 72 to 78 mph. The Complainant stated that initially, the vehicle made a rattling sound. The hearings examiner asked the Complainant if the sound was a squeak or a rattle. She clarified that the sound was a squeaking-rattling. Mr. Cuenca explained that the dealership lubricated the leaf springs and that he also occasionally greased the leaf springs. The Complainant answered that they first noticed the squeak/rattle about the first regular maintenance visit for an oil change and tire rotation on May 9, 2015. The Complainant did not know the exact date, but the first instance of the squeak/rattle occurred sometime before the first service visit. Mr. Cuenca testified that he noticed the vibration/noise over 72 to 75 mph. However the vehicle drives smoothly at 65 mph. He confirmed that the vehicle made the vibration/noise every time it reached 72 mph. He last noticed the vibration/noise on the way to the hearing. He explained that he could feel the vibration through the center console. Mr. Cuenca answered that the issue went away after replacing all four tires at 13,527 miles but the issue came back again. He noted that the new

²¹ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²² See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

²³ Complainant's Ex. 9, Invoice GCCS349408.

²⁴ Complainant's Ex. 8, GCCS354004.

Goodyear tires made the issue worse so he had those replaced with Continentals. The Complainant pointed out that the vehicle was originally equipped with Continentals. Mr. Cuenca confirmed that they received a loaner vehicle for all but one service visit for which they left the vehicle at the dealership. The Complainant noted that they did not keep the original invoices because they did not think they would need them. Mr. Cuenca added that they asked the dealer for a copy of the invoices, but the dealer did not keep a copy and only provided a summary of the service visits.

B. Respondent's Evidence and Arguments

On cross-examination, Mr. Cuenca confirmed that the rattling noise went away after lubricating the leaf springs. Mr. Ferrell explained that the manufacturer has a service bulletin for the leaf spring noise explaining that it is a preventative maintenance item, for which the customer has the responsibility of cleaning and lubricating the leaf springs. Mr. Ferrell testified that the complaint provided a vague description of the concern without reference to where or when the vibration occurred so he kept his scope of inspection broad. He found that the right rear wheel had impact damage. He test drove the vehicle while using a PicoScope. The PicoScope measured 22.8 milli-g's, which exceeded the accepted limit of 18 milli-g's. Checking the tires/wheels with a road force balancer showed all four wheels exceeded 15 lbs. of road force. Optimizing the tire placement on the wheels reduced the force to 10.7 milli-g's as measured by the PicoScope. Mr. Ferrell noted that the vehicle had many alterations not original to the vehicle (as manufactured by the factory), such as the bumper, grill, fog lights, wheels and tires. Mrs. Cuenca asserted that she did not make any changes to the vehicle. Mr. Ferrell explained that, according to the VIN, the vehicle was not originally equipped with its current bumper and grill. The hearings examiner asked Mr. Salazar whether the dealer added parts like on the Complainant's vehicle. He answered that the dealer only installed genuine GM accessories.

C. Inspection

The vehicle had 24,696 miles on the odometer at the hearing, before the test drive. The Tire and Loading Information label on the vehicle showed the correct tire pressure as 32 psi. However, all four tires were overinflated (three at 39 psi and one at 38 psi). The front, driver's side wheel exhibited some abrasions. The vehicle was driven 33 miles, predominately on the highway and to a lesser extent on the service roads. On the short stretches of smooth road, the vehicle did

not appear to exhibit any substantial vibration. On the rougher road surfaces, the vehicle did not exhibit any vibration distinguishable from that caused by the road surface. The vehicle otherwise operated abnormally. Mr. Ferrell clarified that the squeaking/rattling was a leaf spring issue, which was taken care of. He pointed out that the vehicle was first brought in for the squeak/rattle concern on May 9, 2016, at 10,057 miles.

D. Analysis

1. Squeak/Rattle

The record reflects that the squeaking/rattling noise results from a normal maintenance issue related to the leaf springs, which require cleaning and lubrication. Mr. Cuenca confirmed that lubrication of the leaf springs resolved the squeak/rattle issue.

2. Vibration

The Lemon Law does not apply to every problem that may occur with a vehicle. Instead, the Lemon Law only applies to problems covered by warranty (warrantable defects). The Lemon Law does not require any particular level of coverage but only requires that the manufacturer comply with whatever coverage the warranty does provide. In this case, the warranty specifies that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle related to materials or workmanship occurring during the warranty period." However, the warranty expressly excludes the vibration in this case. The record shows that road force balancing of the wheels/tires reduced the PicoScope measured vibration from 22.8 milli-g's to 10.7 milli-g's, below the 18 milli-g maximum. During the test drive at the hearing, the vehicle did not exhibit any discretely identifiable vibration attributable to the vehicle itself as opposed to external conditions, such as the road surface. The vehicle exhibited little vibration on smooth stretches of road and greater vibration on rough stretches of road, indicating that the vibration is a function of the road surface rather than the vehicle itself. Vibration from the vehicle itself, if any, was so attenuated as to be indistinguishable from other normally occurring factors. Accordingly, the warranty expressly excludes such vibration, making Lemon Law relief inapplicable.

III. Findings of Fact

1. On September 12, 2015, the Complainant, purchased a new 2015 GMC Sierra from Weslaco Motors, a franchised dealer of the Respondent, in Weslaco, Texas. The vehicle had 117 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.
3. On October 6, 2016, the Complainant mailed a written notice of defect to the Respondent.
4. On October 11, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle vibrated and squeaked/rattled.
5. On November 28, 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.
6. The hearing in this case convened and the record closed on January 31, 2017, in Pharr, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Daniel Cuenca testified for the Complainant. Rose Crookston, District Manager Aftersales, represented the Respondent. John Ferrell, Field Service Engineer, and Lupe Salazar, Service Manager, testified for the Respondent.
7. The vehicle's odometer displayed 24,696 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. The squeaking/rattling issue was resolved.
10. The vehicle's measureable vibration falls within the accepted 18 milli-g maximum.
11. The vehicle did not exhibit any identifiable vibration attributable to any warrantable defects in the vehicle and otherwise operated normally during the test drive at the hearing.

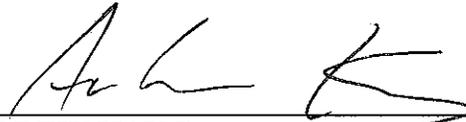
IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.
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 Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
9. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603.

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 April 3, 2017



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