

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0068 CAF**

JENNIFER PARKER,
 Complainant

v.

GENERAL MOTORS LLC,
 Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Jennifer Parker (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2015 Chevrolet Silverado 1500 Z71 4x4. Complainant asserts that the vehicle has transmission issues which causes it to hesitate and fail to accelerate. General Motors LLC (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 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 March 1, 2017, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant, Jennifer Parker, represented herself in the hearing. Also present to testify for Complainant was Brenda Smith, friend. Respondent was represented by Kevin Phillips, Business Resource Manager. Bruce Morris, Field Service Engineer, and Shawn Angel, District Manager for After-Sales, testified for Respondent in the hearing.

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 repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

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

1. Jennifer Parker's Testimony

Complainant purchased a new 2015 Chevrolet Silverado 1500 Z71 4x4 from AutoNation Chevrolet (AutoNation) in Houston, Texas on February 16, 2016, with mileage of 8 at the time of delivery.^{7,8} Respondent provided a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever comes first.⁹ In addition, Respondent's powertrain warranty provides coverage for the powertrain for five (5) years or 100,000 miles.¹⁰ On the date of hearing the vehicle's mileage was 22,996. At this time, Respondent's warranty is still in effect.

Complainant feels that the vehicle's transmission doesn't work properly. She feels that the vehicle hesitates and fails to accelerate. Complainant stated that the problem occurs on a daily basis. She feels that the problem is particularly bad on left hand turns and during acceleration. Complainant said that she began noticing the issue soon after purchasing the vehicle. She test drove the vehicle before purchasing it, but did not notice any issues at that time.

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 Contract dated February 16, 2016.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated February 16, 2016.

⁹ Respondent Ex. 3, Respondent's Evidence Packet, p. 3.

¹⁰ *Id.*

Complainant took the vehicle to AutoNation on June 25, 2016, for an oil change. She testified that she informed the dealer's service advisor of her concerns with the vehicle hesitating and jerking. However, the service advisor informed Complainant that it could be that the vehicle was just getting "broken in." No repair was performed for the issue. The vehicle's mileage at the time of the repair visit was 7,627.¹¹ The vehicle was in the dealer's possession for part of the day.¹²

On July 20, 2016, Complainant had the vehicle towed to AutoNation because it would not start due to a battery failure. While the vehicle was being repaired for the battery issue, Complainant informed the service advisor that the vehicle was failing to accelerate properly.¹³ AutoNation's service technician reprogrammed the vehicle's transmission control module (TCM) to address the concern.¹⁴ The vehicle's mileage on this repair visit was 9,238.¹⁵ The vehicle was in the dealer's possession for two (2) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

When Complainant picked up the vehicle from AutoNation, she felt that the acceleration concern was still present, so she called the service advisor to inform him that the issue had not been corrected. The service advisor advised her that the dealership was about to close for the night. Complainant did not take the vehicle back to AutoNation for further repair until August 15, 2016. Complainant raised two (2) issues with the vehicle on this occasion: the transmission hesitating on shifting and vibration in the vehicle.¹⁶ AutoNation's service technician couldn't duplicate the hesitation issue and performed no repair for it.¹⁷ The technician determined that the vibration issue was caused by the tires and replaced two (2) tires.¹⁸ The vehicle's mileage on this occasion was 10,995.¹⁹ The vehicle was in AutoNation's possession for eleven (11) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant testified that she continued to experience the same issues with the vehicle. She took the vehicle to AutoNation for further repair on September 26, 2016. On this occasion, Complainant informed the service advisor that the vehicle died at times when idling at a stop, that it hesitated on acceleration from a stop, and that it jerked and surged at times.²⁰ AutoNation's

¹¹ Complainant Ex. 3, Repair Order dated June 25, 2016. The repair order does not indicate that the dealer was asked to repair the vehicle for the hesitation issue. The only items on the order are the oil change and a safety inspection.

¹² *Id.*

¹³ Complainant Ex. 4, Repair Order dated July 20, 2016.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainant Ex. 5, Repair Order dated August 15, 2016.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Complainant Ex. 6, Repair Order dated September 26, 2016.

service technician could not duplicate any of Complainant's concerns.²¹ He did indicate that some slight hesitation is a normal operating characteristic of the vehicle.²² The vehicle's mileage on this repair visit was 13,875.²³ The vehicle was in the dealer's possession for four (4) days during this repair visit. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant continued to experience the same issues with the vehicle. She took the vehicle to AutoNation on October 17, 2016. Complainant informed AutoNation's service advisor that the vehicle would hesitate when she was attempting to accelerate onto the freeway and that the vehicle sometimes died when she was at a stop.²⁴ Respondent sent a field service engineer, Bruce Morris, to AutoNation to inspect the vehicle.²⁵ Mr. Morris decided that the vehicle's input and output speed sensor needed replacement.²⁶ However, he was unable to duplicate the concern of the vehicle dying when at a stop.²⁷ The vehicle's mileage was 15,221 at the time of the visit.²⁸ The vehicle was in the dealer's possession for eight (8) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant testified that she began experiencing the same issues with the vehicle when she picked it up. She did not take the vehicle to a dealer for further repairs.

On October 25, 2016, Complainant mailed a letter to Respondent notifying them of her dissatisfaction with the vehicle.²⁹ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on November 1, 2016.³⁰

Complainant was contacted by Respondent's representative in mid-November of 2016. Complainant's request to buy back the vehicle or assist in a trade-in of the vehicle was refused by the representative. However, a final repair attempt on the vehicle was scheduled for December 12, 2016, at AutoNation. The final repair attempt was performed by Mr. Morris.³¹ Mr. Morris

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 7, Repair Order dated October 17, 2016.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Complainant Ex. 9, Undated Letter to General Motors and U. S. Postal Service Certified Mail Receipt date stamped October 25, 2016.

³⁰ Complainant Ex. 8, Lemon Law Complaint dated November 1, 2016. Complainant signed and dated the complaint on October 25, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until November 1, 2016, which is the effective date of the complaint.

³¹ Complainant Ex. 10, Repair Order dated December 12, 2016.

was unable to duplicate Complainant's concern regarding the vehicle hesitating on acceleration.³² The vehicle's mileage was 18,589 at the time of the final repair attempt.³³ The vehicle was in AutoNation's possession for eight (8) days. Complainant was provided with a rental vehicle while her vehicle was being inspected.

Complainant feels that the vehicle has not been repaired and that there is a problem with it. She stated that the vehicle hesitates or jerks usually on take-off. This occurs whether she's driving on the freeway or not.

During cross examination, Complainant testified she has not had any accidents in the vehicle nor has the vehicle suffered any damage. She's the primary driver of the vehicle. Complainant does not haul heavy cargo in the vehicle. There have been no insurance claims on the vehicle. Complainant is a smoker and smokes in the vehicle. Complainant stated that she has installed an after-market Pioneer radio and rear view camera on the vehicle. The items are hooked up to the vehicle's original wiring harness. She has not changed any of the vehicle's software. Complainant stated that the vehicle's check engine light (CEL) has never illuminated. Also, none of the vehicle's transmission warning lights have ever illuminated. Although the vehicle has died a couple of times, she has never had any problems restarting it.

2. Brenda Smith's Testimony

Brenda Smith, friend, testified for Complainant. Ms. Smith stated that she rides in the vehicle about once a week. She has noticed that the vehicle seems to hesitate when Complainant is driving and tries to accelerate. Ms. Smith feels the vehicle jerk on those occasions. However, the issue is intermittent. Ms. Smith indicated that the ride to the hearing location on the date of hearing was somewhat bumpy, but the ride she was experiencing was not due to the road conditions.

C. Respondent's Evidence and Arguments

1. Kevin Phillips' Testimony

Kevin Phillips, Business Resource Manager, represented Respondent in the hearing. He stated that Complainant's June 25, 2016, repair order did not include any indication that Complainant raised the issue of the vehicle hesitating or failing to accelerate. He also indicated that

³² *Id.*

³³ *Id.*

Respondent scheduled a final repair attempt on Complainant's vehicle for December 12, 2016, at AutoNation.

2. Shawn Angel's Testimony

Shawn Angel, District Manager for After-Sales, has worked for Respondent for 17 years. She's been in her current position for the last five (5) years. She does not have a technical background.

Ms. Angel testified that she first became aware of Complainant's dissatisfaction with the vehicle in October of 2016, when she was contacted by Doug Olsen, AutoNation's Service Director. Mr. Olsen requested technical assistance in addressing Complainant's concerns with the vehicle. As a result, Bruce Morris, Field Service Engineer, was dispatched to inspect the vehicle. Mr. Morris looked at the vehicle on October 17, 2016, at which time the input and output speed sensor was replaced.

Ms. Angel was also responsible for addressing Complainant's request to either replace the vehicle or to provide trade-in assistance to purchase another vehicle. Ms. Angel denied the requests.

Ms. Angel was involved in the final repair attempt performed on the vehicle on December 12, 2016. She rode along with Mr. Morris on the test drive of the vehicle in an attempt to verify Complainant's concerns. Ms. Angel testified that she and Mr. Morris drove the vehicle for several miles, but could not duplicate the concerns. She did not discern that there was any hesitation when riding in the vehicle nor could she feel a lack of acceleration. Ms. Angel did not observe any of the vehicle's warning lights illuminate.

Ms. Angel testified that she observed that Complainant had installed an after-market radio in the vehicle and that the functions on the vehicle's steering wheel were not operating.

3. Bruce Morris' Testimony

Bruce Morris, Field Service Engineer, has 30 years' experience in the automotive industry. He has 25 Automotive Service Excellence (ASE) certifications. He's worked for the last nine (9) years as a field service engineer, as an outsourced contractor and a direct employee for Respondent.

Mr. Morris testified that he was assigned to inspect the vehicle on October 17, 2016, at AutoNation due to a request from Mr. Olsen. Mr. Morris took the vehicle on several long test

drives. He did feel a jerk upon initial take off in the vehicle. He determined that the vehicle's input and output speed sensor needed replacement. So, Mr. Morris had AutoNation's techs replace the sensor and the wiring harness. Mr. Morris determined that as a result of the repair, the vehicle was operating properly.

Mr. Morris returned to AutoNation on December 12, 2016, in order to perform a final repair attempt on the vehicle. Mr. Morris performed a visual inspection of the vehicle and found that the vehicle had an after-market radio, back-up camera, and trailer brake controller. When Mr. Morris attempted to perform a diagnostic scan of the vehicle's computers, his scan tool caused a glitch in the computer readouts because of a fault cord. So, Mr. Morris cleared out all of the diagnostic codes in the vehicle's computers. He then performed a test drive of the vehicle along with Ms. Angel. The test drive was performed with a scan tool connected to the vehicle. The scan tool did not reveal any trouble codes and Mr. Morris determined that the vehicle was operating as designed. No repairs were performed on the vehicle at the time. Mr. Morris stated that the vehicle's transmission can have a lag time of about a second. This is a normal characteristic of the transmission and not a defect in the transmission.

Mr. Morris also stated that the after-market items installed by Complainant could cause electrical problems with the vehicle and that voltage spikes from the items could damage the vehicle's transmission. The items did render the vehicle's steering wheel functions inoperable.

Mr. Morris feels that the vehicle is operating as designed. He feels that it conforms to Respondent's warranty. He would be comfortable driving the vehicle.

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 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.

The evidence presented at the hearing established that the vehicle is working as designed and that there is no defect in the vehicle. Although Complainant has complained of a hesitation during

acceleration, the evidence indicates that some hesitation may occur as the transmission shifts. This is a normal operating characteristic of the transmission that is installed in the vehicle. A normal operating characteristic is not a defect and does not warrant that a vehicle be repurchased or replaced. Given the totality of the evidence, the hearings examiner must hold that Complainant has not established the existence of a defect in the vehicle. As such, Complainant is not entitled to repurchase or replacement relief.

Respondent's bumper-to-bumper warranty applicable to Complainant's vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 100,000 miles. On the date of hearing, the vehicle's mileage was 22,996 and it remains under this warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

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

III. FINDINGS OF FACT

1. Jennifer Parker (Complainant) purchased a new 2015 Chevrolet Silverado 1500 Z71 4x4 on February 16, 2016, from AutoNation Chevrolet (AutoNation) in Houston, Texas, with mileage of 8 at the time of delivery.
2. The manufacturer of the vehicle, General Motors LLC (Respondent), issued a bumper-to-bumper warranty for 3 years or 36,000 miles, whichever occurs first and a separate powertrain warranty for 5 years or 100,000 miles.
3. The vehicle's mileage on the date of hearing was 22,996.
4. At the time of hearing the vehicle was still under warranty.
5. Complainant took the vehicle to Respondent's authorized dealer, AutoNation, in order to address her concerns with the vehicle hesitating and failing to accelerate on the following dates:
 - a. June 25, 2016, at 7,627 miles;
 - b. July 20, 2016, at 9,238 miles;
 - c. August 15, 2016, at 10,995 miles;
 - d. September 26, 2016, at 13,875 miles; and
 - e. October 17, 2016, at 15,221 miles.

6. On June 25, 2016, AutoNation's representative informed Complainant that hesitation and lack of acceleration could be a result of the vehicle's engine and transmission "breaking in."
7. On July 20, 2016, AutoNation's service technician reprogrammed the vehicle's transmission control module (TCM) in order to address Complainant's concern regarding the vehicle's lack of acceleration.
8. On August 15, 2016, AutoNation's service technician could not duplicate the concern regarding the vehicle's hesitation on acceleration, so no work was performed.
9. On September 26, 2016, AutoNation's service technician could not duplicate Complainant's concerns with the vehicle dying, hesitating, and jerking. No repairs were performed on the vehicle
10. On October 17, 2016, AutoNation's service technician replaced the vehicle's Input and Output Speed Sensor to address Complainant's concern regarding the vehicle hesitating during acceleration.
11. On November 1, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On December 12, 2016, Respondent's field service engineer, Bruce Morris, performed a final repair attempt on the vehicle in order to address Complainant's concern regarding the vehicle hesitation on acceleration, but was unable to duplicate the concern.
13. Respondent's field service engineer determined during the final repair attempt that the vehicle was operating as designed, so no repairs were recommended or performed.
14. On January 5, 2017, 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.
15. The hearing in this case convened and the record was closed on March 1, 2017, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant, Jennifer Parker, represented herself in the hearing. Also present to testify for Complainant was

Brenda Smith, friend. Respondent was represented by Kevin Phillips, attorney with Business Resource Manager. Bruce Morris, Field Service Engineer, and Shawn Angel, District Manager for After-Sales, testified for Respondent in the hearing.

IV. 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 Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED March 16, 2017.



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