

the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2016 GMC Sierra 1500 SLT on December 14, 2015, from Kris Brown Chevrolet–Buick–GMC (Brown) in Cleburne, Texas, with mileage of 5 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 provided a five (5) year or 60,000 mile powertrain warranty for the vehicle.¹⁰ On the date of hearing the vehicle's mileage was 28,339. At this time, Respondent's warranties are still in effect.

Complainant testified that he did not test drive the vehicle before purchasing it. He did test drive a similar vehicle. However, the vehicle Complainant test drove had a six (6) speed transmission as opposed to the eight (8) speed transmission which was in the vehicle Complainant purchased. In February of 2016, Complainant heard a bad knock from the vehicle's transmission and took the vehicle to Brown for repair. Complainant was informed that the transmission was learning the way he drove and was adjusting to his driving style. Brown's sales manager, James Lopez, advised Complainant to continue driving the vehicle as it was still in the process of learning the way he drove.

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, Purchase Order dated December 14, 2015.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated December 14, 2015.

⁹ Respondent Ex. 2, Document packet–Global Warranty Management, p. 38.

¹⁰ *Id.*

Complainant testified that he felt the vehicle jolting/jerking when coming to a stop or accelerating. He took the vehicle to Brown on April 4, 2016, for repair for the issue. Brown's technician reprogrammed the vehicle's transmission control module (TCM) to resolve the issue of rough downshifts and upshifts.¹¹ The vehicle's mileage at the time of the repair visit was 5,776.¹² The vehicle was in the dealer's possession for one (1) day. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that he did not feel a change in the way the vehicle behaved after the repair. He felt that the vehicle was jolting/jerking in stop and go traffic as he would stop and accelerate in traffic. Complainant stated that he then began to hear knocks in the vehicle. He stated that it felt like the vehicle's transmission gears were not in the right spot. On an occasion when he felt the vehicle hesitate when he tried to accelerate and pass a truck on the highway, he decided to take the vehicle back for repair as he felt that there was a safety concern with the vehicle. On July 1, 2016, Complainant took the vehicle to Brown for repair. Brown's service technician could not duplicate Complainant's concern during this visit, so no repair was performed.¹³ The vehicle's mileage on this occasion was 11,345.¹⁴ The vehicle was in the dealer's possession for seven (7) days. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant felt that the vehicle continued to intermittently knock and jolt/jerk when he was driving it. Complainant took the vehicle to Brown for repair on July 20, 2016. Brown's technician again could not duplicate the concern.¹⁵ However, for customer goodwill, the technician decided to have the transmission's clutches relearn the fast adapts in an attempt to improve the transmission's shifting.¹⁶ The vehicle's mileage on this occasion was 12,272.¹⁷ The vehicle was in Brown's possession for two (2) days. Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that after the July 20, 2016 repair, the jolting issue improved somewhat, particularly when the transmission downshifted. However, he was still intermittently hearing the knocking noise and felt that the vehicle was still not acting properly. Complainant took the vehicle to Brown for repair on August 25, 2016. Brown's technician scanned the vehicle's TCM, was unable to find any fault codes, and was unable was unable to duplicate Complainant's

¹¹ Complainant Ex. 3, Repair Order dated April 4, 2016.

¹² *Id.*

¹³ Complainant Ex. 4, Repair Order dated July 1, 2016.

¹⁴ *Id.*

¹⁵ Complainant Ex. 5, Repair Order dated July 20, 2016.

¹⁶ *Id.*

¹⁷ *Id.*

concerns.¹⁸ The technician indicated to Complainant that the vehicle's eight (8) speed transmission shifts differently from other transmissions and is constantly learning the driver's driving habits.¹⁹ Brown's service manager determined that the vehicle was driving normally and he did not feel any unusual behavior during the test drive he took in the vehicle.²⁰ No repairs were done at the time. The vehicle's mileage on this occasion was 14,434.²¹ The vehicle was in Brown's possession for eleven (11) days.

On October 25, 2016, Complainant filed a complaint with the Better Business Bureau (BBB) regarding his issues with the vehicle.²² No hearing was conducted by the BBB. However, Complainant and Respondent settled the complaint and Respondent agreed to inspect the vehicle and repair any warranted, verified nonconformities in the vehicle.²³ The inspection was performed on November 17, 2016, at Lynn Smith Chevrolet (Smith) in Burleson, Texas. Respondent's field service engineer (FSE) performed the inspection and determined that the vehicle's C3 clutch was in "unlearned status."²⁴ Smith's technician performed the procedure to relearn the C3 clutch.²⁵ The vehicle's mileage on this occasion was 19,066.²⁶ The vehicle was in Smith's possession for six (6) days. Complainant received a loaner vehicle while his vehicle was being inspected and repaired. Complainant testified that the vehicle made a knocking noise after the inspection and repair. He took Smith's service manager, Chuck Clark, with him on a test drive of the vehicle and Mr. Clark heard the knock also. However, Mr. Clark informed Complainant after speaking to Respondent's engineers that the knock was a result of the vehicle's design and could not be repaired.

On November 8, 2016, Complainant mailed a letter to Respondent notifying them of his dissatisfaction with the vehicle.²⁷ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on December 5, 2016.²⁸

Complainant testified that the vehicle still jerks and jolts and knocks periodically. He last heard the knock on April 11, 2017, the day before the hearing as he was coming to a stop in the vehicle.

¹⁸ Complainant Ex. 6, Repair Order dated August 25, 2016.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Complainant Ex. 8, Better Business Bureau Auto Line complaint, p. 3.

²³ *Id.*, p. 1.

²⁴ Complainant Ex. 9, Repair Order dated November 17, 2016.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Complainant Ex. 7, Letter to General Motors LLC dated November 8, 2016.

²⁸ Complainant Ex. 10, Lemon Law Complaint dated December 5, 2016. Complainant signed and dated the complaint on November 30, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until December 5, 2016, which is the effective date of the complaint.

During cross-examination, Complainant testified that he has not taken the vehicle back for repairs since November of 2016. He stated that he is the primary driver of the vehicle. He doesn't use the vehicle to transport heavy equipment. However, he does occasionally tow trailers. Complainant stated that he doesn't drive the vehicle on dirt or gravel roads.

Complainant stated that the vehicle does not have any major damage to it. There is a small ding on the vehicle's front passenger door. He has not spliced any wiring on the vehicle or added any after-market items to it. The vehicle's check engine light (CLE) has never illuminated. He's not seen any other warning lights illuminate when driving the vehicle. Complainant stated that the vehicle has never stalled or ever left him stranded.

C. Respondent's Evidence and Arguments

1. John Metcalf's Testimony

John Metcalf, District Manager for After-Sales, testified for Respondent. He has worked in the automotive industry for 29 years. Mr. Metcalf has worked with Respondent for 25 years. He worked as a field service engineer for Respondent for ten (10) years prior to obtaining his present position six (6) years ago.

Mr. Metcalf testified that he met Complainant at the time of the final repair attempt on the vehicle on November 17, 2016. Mr. Metcalf went on a test drive of the vehicle on that date. He states that did not experience any problem with the transmission on the test drive. Mr. Metcalf did not have any contact with Complainant after the final repair attempt.

Mr. Metcalf also stated that during the test drive taken on the hearing date he did not notice the vehicle "sag" or hesitate. Mr. Metcalf did feel a slight clunk in the transmission during deceleration. However, he does not feel that there is a defect in the vehicle.

2. Irfaun Bacchus' Testimony

Irfaun Bacchus, Field Service Engineer, testified for Respondent. He has worked in the automotive industry for approximately 17 years. He has been in his present position since December 2013.

Mr. Bacchus testified that he performed the final repair attempt on Complainant's vehicle on November 17, 2016. He test drove the vehicle during the final repair attempt. When he inspected the vehicle, he discovered that the C3 clutch had not been "learned." Mr. Bacchus stated that all of the vehicle's clutches (there are five clutch packs in the vehicle) had to be verified to see if

they had been learned. The vehicle's transmission, to ensure consistent gear shifts, uses an automatic adjusting process to maintain the originally calibrated shift timing.²⁹ This is called "adaptive learning." The clutches can be learned in order to ease the feel of the transmission shifting gears. This is what Mr. Bacchus did during the final repair attempt.

Mr. Bacchus stated that some hesitation is normal for a vehicle. In addition, all vehicles will make noises and vibrate to a certain extent. The engine in Complainant's vehicle will occasionally shift modes from V8 to V4. Sometimes the shift to different modes will cause the transmission to "clunk." Mr. Bacchus stated that the vehicle's transmission is very busy since it is an eight (8) speed transmission. Mr. Bacchus does not feel that the vehicle's transmission is defective. He feels that it is working as designed.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is 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 complained that the vehicle intermittently jolts or jerks and makes a knocking noise. The evidence presented at the hearing indicates that Complainant's concerns are due to the design of the vehicle's V8 transmission. The transmission is busier than a regular transmission due to the fact that there are several clutch packs and the clutches all have to be learned. The evidence also indicates that the knocking noise Complainant is concerned about is probably caused by the transmission downshifting and going from V4 to V8 mode or vice versa. A design characteristic is not a defect in the vehicle and does not warrant that a vehicle be repurchased or replaced. Given the totality of the evidence, the hearing 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.

²⁹ Respondent Ex. 2, Document packet–Service Bulletin 16-NA-019, p. 11.

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 is good for five (5) years or 60,000 miles. On the date of hearing, the vehicle's mileage was 28,339 and it remains under these warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

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

III. FINDINGS OF FACT

1. David R. Andrade (Complainant) purchased a new 2016 GMC Sierra 1500 SLT on December 14, 2015, from Kris Brown Chevrolet–Buick–GMC (Brown) in Cleburne, Texas, with mileage of 5 at the time of delivery.
2. The manufacturer of the vehicle, General Motors LLC (Respondent), issued a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever occurs first. In addition, Respondent issued a powertrain warranty for the vehicle good for five (5) years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 28,339.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Soon after purchasing the vehicle, Complainant began to notice that the vehicle's transmission intermittently jolted or jerked and knocked.
6. Complainant took the vehicle to Respondent's authorized dealer, Brown, on the following dates in order to address his concerns with the transmission:
 - a. April 4, 2016, at 5,776 miles;
 - b. July 1, 2016, at 11,345 miles;
 - c. July 20, 2016, at 12,272 miles; and
 - d. August 25, 2016, at 14,434 miles.
7. On April 4, 2016, Brown's service technician reprogrammed and updated the vehicle's transmission control module (TCM) in order to address Complainant's concerns.
8. On July 1, 2016, Brown's service technician could not duplicate the concern and performed no repair for the issue.

9. On July 20, 2016, Brown's service technician could not find an issue with the vehicle's transmission, but he performed a fast adapt relearn to the vehicle's clutches.
10. On August 25, 2016, Brown's service technician was unable to duplicate the concern and could not find any fault codes on the vehicle's computers.
11. On November 23, 2016, Respondent's field service engineer (FSE) during a final repair attempt of the vehicle determined that a relearn of the vehicle's C3 clutch had not been performed. The FSE performed the relearn at that time.
12. On December 5, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On January 20, 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.
14. The hearing in this case convened and the record was closed on April 12, 2017, in Cleburne, Texas before Hearings Examiner Edward Sandoval. Complainant, David R. Andrade, represented himself in the hearing. Respondent was represented by Kevin Phillips, Business Resource Manager. Irfaun Bacchus, Field Service Engineer, and John Metcalf, District Manager for After-Sales, testified for Respondent.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (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 June 2, 2017



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