

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0173687 CAF**

**EFRAIN RAMIREZ,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Efrain Ramirez (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in his vehicle manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect that creates a serious safety hazard or substantially impairs the vehicle's use or market value after a reasonable number of repair attempts. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement. However, the vehicle's stereo issue qualifies for 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 on August 17, 2017, in Conroe, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Maurilia (Lili) Meza testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. John Ferrell, Field Service Engineer, José Milan, District Manager Aftersales, 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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

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:

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).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of 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.¹¹ 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.¹²

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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *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.’”).

¹² *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.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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).

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.¹⁵

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."¹⁶ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.¹⁹ 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.²⁰ 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."²¹ However, the parties may expressly or impliedly consent

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ "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 factual 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.").

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

to trying issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

A. Complainant's Evidence and Arguments

On May 21, 2016, the Complainant, purchased a new 2016 Cadillac Escalade from Tom Peacock Cadillac, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 13 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first. On January 31 2017, the Complainant provided a written notice of defect to the Respondent. On February 10, 2017, the Complainant filed a complaint with the Department alleging problems with the cruise control and the automatic high beams (IntelliBeam). Additionally, the notice of defect included with the complaint also identified a problem with the stereo freezing, leading to its replacement. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
01/27/2017	11,391	Auto high beams do not work, cruise control intermittently does not work
12/23/2016	10,043	screen freezes,
10/12/2016	8,724	Cruise control will not set
10/10/2016	8,805	Cruise control will not set

The Respondent had an opportunity to repair on March 29, 2017. The Complainant testified that the stereo was replaced but continued to malfunction. Specifically, on the way to the hearing, the stereo volume was down and the stereo froze (the Respondent objected to consideration of any issues other than the high beams and cruise control). The Complainant testified that neither the cruise control nor the high beams were successfully repaired. He explained that when placing the vehicle on cruise control it works shortly and then comes off. He stated that he first noticed the problem when they got the vehicle and month later the vehicle started having problems on a trip to California. He last noticed the problem the week before the hearing. The Complainant identified his sister-in-law as the primary driver of the vehicle. He explained that he only drove the vehicle about once a month because he is in California. Ms. Meza confirmed she noticed the cruise control issue about a month after purchase and that they took the vehicle for repair in California. She

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

²³ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

testified that she drove the vehicle practically every day. She explained that the cruise control problem happened often and that she would notice the light come on that the cruise control was not operating. She last noticed the cruise control issue the week before the hearing. With regard to the high beam issue, Ms. Meza explained that the vehicle used to automatically lower the high beam when another vehicle approached but now she would have to lower the headlights manually. She first noticed this coming back from California sometime last year; the Complainant concurred. Ms. Meza stated that the high beam (lowering) still did not work. The Complainant noted that he last noticed the issue the Thursday before the hearing. Ms. Meza explained that the automatic high beam lowering did not work at all. She testified that the stereo would blackout randomly and that this last occurred on the way to the hearing. On cross-examination, the Complainant testified that the vehicle had an aftermarket grill when he took delivery of the vehicle.

B. Respondent's Evidence and Arguments

Mr. Ferrell testified that he noticed the aftermarket grill and spoke with the two technicians that worked on the vehicle at the dealership. The technician realized that they had installed the wrong style grill, which obstructed a camera, and fixed this issue. When test driving the vehicle on March 29, 2017, the vehicle's cruise control slowed down the vehicle with no vehicle in front, but with a tractor trailer in an adjacent lane. At the time, he could not duplicate the high beam concern. When coming in for the cruise control issue, Mr. Ferrell found that the long range sensor had been damaged and replaced and the bracket bent and bent back. However, a damaged bracket should always be replaced. He also explained that the grill weighed down on the plastic on the front end causing the short range sensors to pull down. Additionally, the wiring harness was not installed correctly. When installing the aftermarket grill, a screw had dug into the wiring harness. Mr. Farrell did not find a factory defect but found problems related to the installation of the grill. The aftermarket grill was not a GM product and could have caused the cruise control to not work right among other things. He did not find any trouble codes for the cruise control. On cross-examination, Mr. Ferrell confirmed that the grill can potentially cause problems, but not with the radio. Mr. Ferrell did not know if there was a software issue with the radio since he did not look at it. On redirect examination, Mr. Ferrell affirmed that he was not dispatched to address a radio issue.

Mr. Milan testified that the vehicle had an aftermarket grill. He confirmed that the vehicle was equipped with adaptive cruise control but the grill did not go with the vehicle. The vehicle was manufactured with a chrome grill and the black grill and wheels were not GM parts. He confirmed that to address the concerns would require going back to the factory grill. He affirmed that the dealer altered the vehicle with parts not authorized by GM.

C. Inspection and Test Drive

Inspection of the vehicle showed that it had an aftermarket E&G Classic grill and aftermarket Vogue Tyre wheels. The vehicle had a loose wire behind the grill. Mr. Ferrell pointed out that the opening for the long range sensor on the aftermarket grill was smaller than on the originally equipped grill, potentially obstructing the sensor. The windshield had a crack incurred during a trip from California. Mr. Ferrell also noted abrasions under the grill, by the long range sensor. The vehicle had 23,425 miles on the odometer upon inspection before the test drive. While on the freeway, the hearing examiner asked Ms. Meza to set the cruise control. She turned the cruise control system on as shown by the white cruise control indicator appearing on the instrument panel. However, Ms. Meza could not set the speed. She had attempted to set the speed by pushing in the middle of the control bar. Mr. Ferrell instructed Ms. Meza to press the bar downward, upon which Ms. Meza successfully set the speed as shown by the cruise control indicator turning green. During the test drive, the cruise control icon turned white indicating that the speed was not being controlled. Mr. Ferrell thought Ms. Meza had touched the brake pedal but Ms. Meza did not believe so. Mr. Ferrell took over driving on the return leg of the test drive. The adaptive cruise control appeared to operate normally, including slowing down for vehicles in front of the subject vehicle. The infotainment display also appeared to function normally. At the end of the test drive, the odometer displayed 23,447 miles.

D. Analysis

As an initial matter, the Lemon Law only applies to defects covered by warranty (warrantable defects). Here, the vehicle's warranty only applies to a "vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period." However, the warranty specifically excludes damage from "[a]lteration, modification, or tampering to the vehicle, including, but not limited to the body,

chassis, powertrain, driveline, software, or other components after final assembly by GM” and “[i]nstallation of any non-GM (General Motors) parts.

1. Cruise Control

The evidence clearly shows damage caused by the dealer’s installation of an aftermarket grill, including displacement of cruise control sensor(s) and a screw cutting into a wiring harness. Further, the aftermarket grill had a smaller opening for the long range sensor as compared to the original grill. Additionally, Ms. Meza’s unfamiliarity with setting the speed on the cruise control appears to have contributed to the apparent nonfunctioning of the cruise control. In sum, the evidence does not show that the cruise control more likely than not has a warrantable defect.

2. High Beams (IntelliBeam)

The record does not show the required number of repair attempts for the high beam issue. Consequently, the high beams cannot qualify the vehicle for repurchase or replacement. However, the testimony showed that the automatic high beams malfunctioned as recently as the week before the hearing but after the final repair attempt. Accordingly, the automatic high beams qualify for warranty repair.

3. Stereo

The Complainant testified that the stereo had been replaced but on the way to the hearing, the stereo continued to malfunction (the volume was down and the stereo froze/blacked out). The Respondent objected to the stereo issue because it was not listed on the complaint form. However, the notice of defect, which the complaint included, did identify the stereo as an issue. Under Texas law, pleadings are liberally construed as a whole.²⁴ Accordingly, when looking at the pleadings as a whole, i.e., the complaint with the attached notice of defect, the pleadings provided sufficient facts to identify the stereo issue. However, the stereo issue does not create a serious safety hazard or substantially impair the vehicle’s use or market value. Consequently, this issue only qualifies for repair relief.

²⁴ *Fleetwood Construction Company, Inc. v. Western Steel Company*, 510 S.W.2d 161, 165 (Tex. Civ. App.—Corpus Christi 1974).

III. Findings of Fact

1. On May 21, 2016, the Complainant, purchased a new 2016 Cadillac Escalade from Tom Peacock Cadillac, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 13 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
01/27/2017	11,391	Auto high beams do not work, cruise control intermittently does not work
12/23/2016	10,043	screen freezes,
10/12/2016	8,724	Cruise control will not set
10/10/2016	8,805	Cruise control will not set

4. On January 31 2017, the Complainant provided a written notice of defect to the Respondent.
5. On February 10, 2017, the Complainant filed a complaint with the Department alleging problems with the cruise control and the automatic high beams.
6. On May 22, 2017, 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 factual matters asserted.
7. The hearing in this case convened on August 17, 2017, in Conroe, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Maurilia (Lili) Meza testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. John Ferrell, Field Service Engineer, José Milan, District Manager Aftersales, testified for the Respondent.
8. The vehicle's odometer displayed 23,425 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.

10. Inspection of the vehicle at the hearing showed that the vehicle had an aftermarket grill, the vehicle had a loose wire behind the grill, and the opening for the long range sensor on the aftermarket grill was smaller than the cruise control sensor.
11. Installation of the aftermarket grill damaged a wiring harness and dislocated or damaged the cruise control sensor(s).
12. The automatic high beams malfunctioned as recently as the week before the hearing.
13. During the test drive while on the freeway, the hearings examiner asked Ms. Meza to set the cruise control. She turned the cruise control system on as shown by the white cruise control indicator appearing on the instrument panel. However, Ms. Meza could not set the speed. She attempted, unsuccessfully, to set the speed by pushing in the middle of the cruise control bar. Mr. Ferrell instructed Ms. Meza to press the bar downward, upon which Ms. Meza successfully set the speed as shown by the cruise control indicator turning green. At the end of the test drive, the odometer displayed 23,447 miles.
14. The vehicle appeared to operate normally during the test drive at the hearing.
15. Ms. Meza is the primary driver of the vehicle.

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 filed a sufficient complaint with the Department. 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's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the cruise control issue is covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603(a) and 2301.604(a); the Complainant did not prove that the stereo and high beam issues create a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a); the high beam issue did not have a sufficient number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
7. The Complainant provided written notice of the alleged defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
9. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. 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.

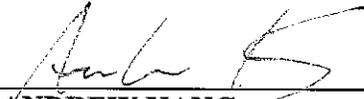
V. Order

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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the vehicle's stereo and high beams (IntelliBeam) to the applicable warranty. The Complainant shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.²⁵ Within 20 days after receiving

²⁵: (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order,

the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED October 9, 2017



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

this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Order.