

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0174571 CAF**

**CLAUDIA GONZALEZ,  
Complainant**

v.

**BMW OF NORTH AMERICA, LLC,  
Respondent**

§  
§  
§  
§  
§  
§  
§

**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Claudia Gonzalez (Complainant) seeks relief pursuant to Texas Occupations Code § 2301.204 (Warranty Performance) for alleged defects in her used 2011 BMW 328i. Complainant asserts that the subject vehicle intermittently stalls, surges and idles roughly. BMW of North America, LLC (Respondent) asserts that there is no defect with the vehicle. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repair relief at this time.

**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 initially convened on July 28, 2017, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself. Also present to testify for Complainant were Ronald Gonzalez, husband, and Grant Gonzalez, son. Respondent was represented by Stephen Soncini, After-Sales Area Manager. Also present to testify for Respondent were Randal Hearn, Shop Foreman for BMW of San Antonio, and Victor Cheung, Technical Support Engineer. The hearing was continued as Respondent's representative offered Complainant a settlement for her complaint during the course of the hearing which she wished to consider. Complainant later refused the settlement offer and the hearing was reset in order to complete taking testimony from the parties.

The continued hearing convened and the record closed on October 12, 2017, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself. Also present to testify for Complainant was Ronald Gonzalez, husband. Respondent was represented by Stephen Soncini, After-Sales Area Manager. Also present to testify for Respondent was Victor Cheung, Technical Support Engineer.

## II. DISCUSSION

### A. Applicable Law

Occupations Code § 2301.002(24) provides that a “[n]ew motor vehicle” means a motor vehicle that has not been the subject of a retail sale regardless of the mileage of the vehicle.” Occupations Code § 2301.603(a) provides that “[a] manufacturer, converter, or distributor shall make repairs necessary to conform a **new motor vehicle** to an applicable manufacturer’s, converter’s, or distributor’s express warranty.” (Emphasis mine.) Therefore, repurchase or replacement relief for defects in a vehicle is available only for new vehicles as defined in the Code. However, relief is available for purchasers of used vehicles under Occupations Code § 2301.204(a) which provides that “[t]he owner of a motor vehicle or the owner’s designated agent may make a complaint concerning a defect in a motor vehicle that is covered by a manufacturer’s, converter’s, or distributor’s warranty agreement applicable to the vehicle.” The relief available under this section of the Code is repair of the vehicle in question.

### B. Complainant’s Evidence and Arguments

Complainant purchased a used 2011 BMW 328i on April 8, 2014, from an individual, Brent Haverlah, with mileage of 28,000 at the time of delivery.<sup>1</sup> Respondent provided a new vehicle limited warranty for the vehicle for the first four (4) years or 50,000 miles of ownership, whichever comes first. On the date of hearing the vehicle’s mileage was approximately 71,369. The original warranty for the vehicle was expired by the date of hearing.

#### 1. Claudia Gonzalez’ Testimony

Complainant testified that she and her husband test drove the vehicle prior to purchasing it from Mr. Haverlah. She did not notice anything unusual with the vehicle at the time. However, in 2015, she began to notice a change in the way the vehicle drove. She felt that the vehicle idled rough and had a lack of acceleration.

On September 16, 2015, Complainant took the vehicle to BMW of San Antonio (BMW) for repair because it was idling rough and for other unrelated issues.<sup>2</sup> BMW’s service technician was unable to duplicate the problem and was unable to find any stored fault codes on the vehicle’s computer for the issue, so no repairs were performed for the concern.<sup>3</sup> The vehicle’s mileage at the time was 48,652.<sup>4</sup> The vehicle was in BMW’s possession for six (6) days. Complainant received a loaner vehicle while her vehicle was being repaired.

---

<sup>1</sup> Complainant Ex. 1, Note and Disclosure Statement – Security Agreement, Agreement to Provide Insurance, Hand Written Receipt from Brent Haverlah, Power of Attorney to Transfer Motor Vehicle.

<sup>2</sup> Complainant Ex. 3, Repair Order dated September 16, 2015.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Complainant testified that she continued to experience the same problems with the vehicle. On October 26, 2015, she took the vehicle to BMW for repair because it was running rough when the air conditioner was turned on. BMW's service technician could not recreate the concern and was unable to find any fault codes on the vehicle's computer regarding the issue.<sup>5</sup> As a result, there were no repairs performed on the vehicle.<sup>6</sup> The vehicle's mileage on this occasion was 49,895.<sup>7</sup> The vehicle was in the dealer's possession for six (6) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant testified that she continued to experience problems with the vehicle's rough idle and lack of acceleration. On June 10, 2016, she took the vehicle to BMW because the idle was fluctuating and because she was hearing whistling noises from the vehicle's engine compartment.<sup>8</sup> BMW's service technician replaced the vehicle's belt tensioner and valve cover to address the issues.<sup>9</sup> The vehicle's mileage at the time was 57,549.<sup>10</sup> The vehicle was in BMW's possession for three (3) days. Complainant was not provided with a loaner vehicle on this occasion.

On July 11, 2016, Complainant took the vehicle to BMW for repair because the check engine light (CEL) had illuminated and the vehicle died while her husband was driving it. BMW's service technician found a fault code on the vehicle's computer indicating that the vehicle's eccentric shaft sensor was disconnected.<sup>11</sup> The technician cleaned the sensor and reinstalled it to address the concern.<sup>12</sup> The problem was determined to have been caused by an error committed by the service technician who worked on the vehicle at the previous repair visit.<sup>13</sup> The vehicle's mileage at the time was 58,421.<sup>14</sup> The vehicle was in BMW's possession for three (3) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

In August of 2016, the vehicle died while Complainant's husband was driving it in Houston, Texas. On August 8, 2016, Complainant took the vehicle to BMW for repair due to the incident. BMW's service technician determined that the vehicle's Vanos solenoid valve was faulty.<sup>15</sup> The technician replaced the solenoid valve and determined that the vehicle was repaired.<sup>16</sup> The vehicle's mileage on this occasion was 59,411.<sup>17</sup> The vehicle was in BMW's possession for three

---

<sup>5</sup> Complainant Ex. 4, Repair Order dated October 26, 2015.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Complainant Ex. 5, Repair Order dated June 10, 2016.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Complainant Ex. 6, Repair Order dated July 11, 2016.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Complainant Ex. 7, Repair Order dated August 8, 2016.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

(3) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired. Complainant testified that the vehicle has not died again since this repair.

On October 18, 2016, Complainant took the vehicle to BMW for repair because it was idling rough, it lacked acceleration, and the CEL had illuminated.<sup>18</sup> BMW's service technician replaced the vehicle's ignition coils and spark plugs in order to address the issues.<sup>19</sup> The vehicle's mileage on this occasion was 61,142.<sup>20</sup> The vehicle was in the dealer's possession for one (1) day.<sup>21</sup> BMW did not provide Complainant a loaner vehicle while the repair was being performed.

Complainant testified that she continued to experience a rough idle and lack of acceleration in the vehicle. She felt that it was a nuisance and annoying to continue taking the vehicle to the dealer for repair. On January 25, 2017, Complainant took the vehicle to BMW for repair because the CEL had illuminated.<sup>22</sup> BMW's service technician found broken bolts on the Vanos gears.<sup>23</sup> The technician replaced both Vanos gears to resolve the issue.<sup>24</sup> The vehicle's mileage on this occasion was 64,126.<sup>25</sup> The vehicle was in BMW's possession for six (6) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

The vehicle's CEL illuminated again, so Complainant took the vehicle to BMW for repair for the issue on February 28, 2017.<sup>26</sup> BMW's service technician replaced two (2) oxygen sensors in the vehicle's engine in order to address the concern.<sup>27</sup> The vehicle's mileage on this occasion was 65,133.<sup>28</sup> The vehicle was in BMW's possession for seven (7) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

On March 10, 2017, Complainant wrote a letter to Respondent in which she outlined the problems she was experiencing with the vehicle and indicated that she was dissatisfied with it.<sup>29</sup> As a result, Respondent scheduled an inspection of the vehicle by one of their technical support engineers. The inspection was performed by Victor Cheung on March 14, 2017, at BMW. The complaints that Mr. Cheung was looking into were that the vehicle idled rough and that the vehicle had stalled while being driven.<sup>30</sup> Mr. Cheung performed some diagnostic tests on the vehicle to see if its computers contained any fault codes and then took a test drive in the

---

<sup>18</sup> Complainant Ex. 8, Repair Order dated October 18, 2016.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Complainant testified that the vehicle was in BMW's shop for one (1) day. However, the repair order indicates that it was opened on October 18, 2016 and the vehicle was ready on October 20, 2016, two (2) days later.

<sup>22</sup> Complainant Ex. 9, Repair Order dated January 25, 2017.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Complainant Ex. 10, Repair Order dated February 28, 2017.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Complainant Ex. 14, Letter to BMW of North America, LLC dated March 10, 2017.

<sup>30</sup> Complainant Ex. 11, Repair Order dated March 14, 2017.

vehicle.<sup>31</sup> Mr. Cheung was not able to duplicate any of the problems with the vehicle and did not perform any repairs at the time.<sup>32</sup> The vehicle's mileage on this occasion was 65,320.<sup>33</sup> The vehicle was in BMW's possession for three days. Complainant was not provided with a loaner vehicle while her vehicle was being inspected.

Complainant filed a Lemon Law/Warranty Performance complaint with the Texas Department of Motor Vehicles (Department) on April 4, 2017.<sup>34</sup>

On July 12, 2017, Complainant took the vehicle to BMW for repair because it was idling rough and surging.<sup>35</sup> In order to address the concerns, BMW's service technician replaced the vehicle's ignition coil #6 and the connecting spark plug after he determined that they were damaged.<sup>36</sup> The vehicle's mileage at the time was 69,051.<sup>37</sup> The vehicle was in BMW's possession for three (3) days. Complainant could not recall if she received a loaner vehicle while her vehicle was being repaired.

On September 20, 2017, Complainant took the vehicle to BMW for repair because it was idling rough and lacked acceleration.<sup>38</sup> BMW's service technician updated the vehicle's software in order to address the concerns.<sup>39</sup> The vehicle's mileage on this occasion was 70,804.<sup>40</sup> The vehicle was in BMW's possession for two days. Complainant was provided with a loaner vehicle on this occasion.

During cross-examination, Complainant testified that she noticed that the vehicle lacked acceleration or idled rough on at least three (3) different occasions prior to taking it for repair on September 20, 2017. On August 28, 2017, Complainant noticed that the vehicle seemed sluggish. On August 29, 2017, she noticed that the vehicle lacked acceleration and sputtered. Finally, on September 12, 2017, Complainant noticed that the vehicle was idling rough after she started it for the first time that day. Complainant feels that the problems with the vehicle seem to be increasing in frequency. She thinks that the vehicle's engine needs to be replaced.

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Complainant Ex. 15, Complainant's Lemon Law/Warranty Performance complaint dated April 4, 2017. Although the complaint was signed by Complainant on March 23, 2017, it was not received by the Texas Department of Motor Vehicles until April 4, 2017, which is the effective date of the complaint.

<sup>35</sup> Complainant Ex. 12, Repair Order dated July 12, 2017.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Complainant Ex. 13, Repair Order dated September 20, 2017.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

## 2. Ronald Gonzalez' Testimony

Ronald Gonzalez, Complainant's husband, testified that Complainant is the primary driver of the vehicle. He drives the vehicle about 20% of the time.

Mr. Gonzalez testified that he last experienced an issue driving the vehicle about a week prior to the hearing conducted on October 12, 2017. He stated that on this occasion the vehicle did not have power and hesitated to respond. He felt that the idle was erratic and fluctuating, like the vehicle was going to stall out. He feels that the vehicle is not performing as it should.

The vehicle has died on two occasions and both times Mr. Gonzalez was driving it. The first time the vehicle died was in July of 2016. Mr. Gonzalez was driving on a highway frontage road on his way to a store. The vehicle's CEL illuminated and the vehicle lost all power. The brakes and power steering stopped working. He was able to pull over to the side of the ride to stop. The vehicle started right up after the incident.

The second time the vehicle died was in August of 2016. This time Mr. Gonzalez was driving on Interstate 45 between Houston and Galveston, Texas. The CEL illuminated and the vehicle lost all power. Mr. Gonzalez said the vehicle rolled to a stop in the middle of the highway and that he was able to start it immediately, but it was a scary situation for him and his son who was a passenger in the vehicle.

During cross-examination, Mr. Gonzalez testified that he feels that the vehicle's rough idle and lack of acceleration are connected. He also stated that he could not recall the last time that the vehicle's CEL illuminated.

### C. Respondent's Evidence and Arguments

Victor Cheung, Technical Support Engineer, testified for Respondent. Mr. Cheung has worked in the automotive industry and for Respondent for 31 years. He is an Automotive Service Excellence (ASE) Master Certified Technician. In addition, Mr. Cheung is a Level 1 BMW technician which is Respondent's highest rating for its technicians.

Mr. Cheung inspected Complainant's vehicle on two (2) separate occasions: March 14, 2017 and July 12, 2017. Complainant had mailed a letter to Respondent on March 10, 2017, in which she voiced her dissatisfaction with the vehicle. Mr. Cheung inspected the vehicle a few days later due to complaints that the vehicle was shaking while idling and had stalled while being driven. Mr. Cheung took a test drive in the vehicle and performed some diagnostic tests on the vehicle. He could not recreate the problems nor did he find any fault codes stored in the vehicle's computers. Mr. Cheung next saw the vehicle on July 12, 2017, when Complainant took the vehicle for repair because it was idling rough, misfiring, and surging intermittently. Mr. Cheung, who happened to

be at the dealership, looked at the vehicle and determined that the engine's #6 ignition coil was corroded and that it had damaged the spark plug. So, Mr. Cheung replaced both items.

Mr. Cheung testified that, after reviewing the vehicle's repair history, he doesn't believe that the issues raised by Complainant are all for the same issue and that not all of them have to do with the vehicle's engine. He specified that the vehicle died while being driven on two separate occasions (July 11, 2016 and August 9, 2016 repair orders) and that the first incident was due to a sensor being disconnected and the second was due to a faulty Vanos solenoid valve. Mr. Cheung feels that the issue regarding the vehicle dying has been resolved, since it has not died again since the repair performed on August 9, 2016. Mr. Cheung also testified that the vehicle is not idling rough. He feels that the start-up idle is normal for the vehicle and that it smooths over once the vehicle is warmed up. He does not feel that the vehicle's engine should be replaced. If there was a mechanical problem with the engine, then the problems would not be intermittent as testified by Complainant, the problems would be occurring constantly.

During cross-examination, Mr. Cheung stated that rough idle in the vehicle could be caused by a vacuum leak or an electrical problem. He also stated that not all idle related issues create fault codes unless the problem gets bad. Mr. Cheung testified that fluctuating RPM's in the engine could be caused by many things, including bad coils, bad gaskets, and vacuum leaks.

#### **D. Analysis**

In order to determine whether Complainant has a remedy under Section 2301.204 of the Occupations Code, there first has to be evidence of a defect or condition in the vehicle that has not been repaired by Respondent. Complainant indicated that she feels that the vehicle intermittently idles rough, lacks acceleration and acts sluggishly. In addition, the vehicle has died twice while being driven by Complainant's husband. The preponderance of the evidence provided by Complainant has established that the vehicle has an existing defect (rough idle) which Respondent will be responsible to repair. There was a dispute whether the vehicle idled roughly, with Complainant indicating that it intermittently idled roughly and Respondent's witness saying that the idle is normal for the vehicle. There does seem to be an issue with the vehicle's idle which has been verified on occasion by the dealer's technicians who have made several attempts to resolve it. However, there was no substantiation that the vehicle lacked acceleration, as this could be subjective based on Complainant's expectations for the vehicle. The issue of the vehicle dying seems to have been repaired, since it hasn't died since August of 2016. As such, the hearings examiner holds that Complainant has met her burden of proof to establish that there is a defect or condition in the vehicle that has not been repaired by Respondent or its authorized dealers. Complainant is entitled to repair relief at this time.

Respondent's new vehicle limited warranty applicable to Complainant's vehicle provides coverage for four (4) years or 50,000 miles. As of the date of hearing the vehicle's original warranty had expired since the vehicle's mileage was 71,369 at the time.

Complainant's request for repair relief is granted. Respondent is hereby ordered to perform any necessary repairs within 20 days of the decision becoming final to conform the vehicle to Respondent's warranty.

### III. FINDINGS OF FACT

1. Claudia Gonzalez (Complainant) purchased a used 2011 BMW 328i on April 8, 2014, from Brent Haverlah, an individual, with mileage of 28,000 at the time of delivery.
2. Respondent, BMW of North America, LLC, provided a four (4) year or 50,000 mile new vehicle limited warranty for the vehicle.
3. The vehicle's mileage on the date of hearing was 71,369.
4. At the time of the hearing, the new vehicle limited warranty for the vehicle was expired.
5. Complainant has experienced problems with the vehicle stalling (dying), surging, and idling rough.
6. Prior to the filing of the complaint, Complainant took the vehicle to Respondent's authorized dealer, BMW of San Antonio, for repairs on the following dates because of her concerns with the vehicle:
  - a. September 16, 2015, at 48,652 miles;
  - b. October 26, 2015, at 49,895 miles;
  - c. June 10, 2016, at 57,549 miles;
  - d. July 11, 2016, at 58,421 miles;
  - e. August 8, 2016, at 59,411 miles;
  - f. October 18, 2016, at 61,142 miles;
  - g. January 25, 2017, at 64,126 miles;
  - h. February 28, 2017, at 65,133 miles; and
  - i. March 14, 2017, at 65,320 miles.
7. On September 16, 2015, the dealer's service technician attempted to resolve Complainant's concern regarding the vehicle idling rough, but was unable recreate the issue and did not find any fault codes on the vehicle's computer indicating a problem with the vehicle.

8. On October 26, 2015, the dealer's service technician could not recreate the problem of the vehicle running rough when the air conditioner was turned on and did not find any fault codes on the vehicle's computer indicating a problem with the vehicle.
9. On June 10, 2016, the dealer's service technician replaced the vehicle's belt tensioner and valve cover in order to address Complainant's complaints regarding the idle fluctuating and a whistling noise from the vehicle's engine compartment.
10. On June 11, 2016, the dealer's service technician reconnected the eccentric shaft sensor which had become disconnected and which had caused the vehicle to die when it was being driven.
11. On August 8, 2016, the dealer's service technician replaced the vehicle's Vanos solenoid valve after the vehicle had died while being driven on the highway.
12. On October 18, 2016, the dealer's service technician replaced the vehicle's spark plugs and ignition coils to address the issues of the check engine light (CEL) illuminating, rough idle, and low acceleration.
13. On January 25, 2017, the dealer's service technician replaced both Vanos gears in the vehicle because the CEL had illuminated and the vehicle had been shaking while being driven.
14. On February 28, 2017, the dealer's service technician replaced the vehicle's oxygen sensors because the CEL had illuminated and the vehicle was idling rough and driving rough.
15. Complainant wrote a letter to Respondent on March 10, 2017, informing them of the problems she had been experiencing with the vehicle and that she was unhappy with its performance.
16. On March 14, 2017, Respondent's technician inspected the vehicle to see what might be causing it to idle rough and to stall. The technician determined that the vehicle was operating as designed at the time.
17. On April 4, 2017, Complainant filed a Warranty Performance complaint against Respondent with the Texas Department of Motor Vehicles (Department).
18. On July 12, 2017, the dealer's service technician replaced the #6 ignition coil and spark plug because they were damaged (corroded) and causing the vehicle to idle rough, surge, and misfire.

19. On September 20, 2017, the dealer's service technician reprogrammed the vehicle's computers to address the concern regarding rough idle at start up.
20. On June 7, 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.
21. The hearing in this case initially convened on July 28, 2017, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant, Claudia Gonzalez, represented herself. Also present to testify for Complainant were Ronald Gonzalez, husband, and Grant Gonzalez, son. Respondent was represented by Stephen Soncini, After-Sales Area Manager. Also present to testify for Respondent were Randal Hearn, Shop Foreman for BMW of San Antonio, and Victor Cheung, Technical Support Engineer. The hearing was continued as Respondent's representative offered Complainant a settlement to her complaint during the course of the hearing which she wished to consider. Complainant refused the settlement offer and the hearing was reset in order to complete taking testimony from the parties.
22. A continued hearing convened and the record closed on October 12, 2017, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself. Also present to testify for Complainant was Ronald Gonzalez, husband. Respondent was represented by Stephen Soncini, After-Sales Area Manager. Also present to testify for Respondent was Victor Cheung, Technical Support Engineer.

#### IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.204(a) (Warranty Performance).
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 proved by a preponderance of the evidence that the vehicle has a verifiable defect or condition that is covered by Respondent's warranty and which has not been repaired. Tex. Occ. Code § 2301.204.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.

### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repair relief pursuant to Texas Occupations Code § 2301.204 is hereby **GRANTED**. Respondent is further **ORDERED** to **PERFORM ALL NECESSARY REPAIRS** within 20 days of this decision becoming final in order to conform the vehicle to Respondent's warranty.

**SIGNED November 10, 2017**



---

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