

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0174762 CAF**

**DANIEL P. McKELLIPS,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Daniel P. McKellips (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 shows that the subject vehicle has a warrantable defect but the defect does not create a serious safety hazard or substantially impair the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase or replacement but does qualify 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 28, 2017, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Kevin Phillips, Business Resource Manager, represented and testified for the Respondent. Kevin Brown, Field Service Engineer, William Hepburn, District Manager Aftersales, and Chuck Farrell, Service Manager at Patriot Chevrolet, 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 August 16, 2016, the Complainant, purchased a new 2016 GMC Sierra 2500 from Patriot Buick GMC, a franchised dealer of the Respondent, in Killeen, Texas. The vehicle had 189 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and provides coverage of maintenance items for 7,500 miles. On April 6, 2017, the Complainant provided a written notice of defect to the Respondent. On April 10, 2017, the Complainant filed a complaint with the Department alleging that the vehicle exhibited an abnormal vibration at all speeds not associated with road conditions and most pronounced at highway speeds from 60 to 80 mph. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
08/23/16	1,241	Shimmy between 60-80 mph
12/09/16	2,335	Vibration when going 75 mph
03/20/17	5,113	Shimmy vibration at 75 mph
04/19/17	6,917	Shimmy vibration at highway speeds 60-80 mph
07/14/17	8,097	Install new tires and road force balance

The Complainant testified that the vehicle exhibits a vibration felt at highway speeds, starting at 60 mph and most pronounced between 70 to 80 mph, most often in neutral. He added that he can see the steering wheel vibrate and the vibrations was not associated with road conditions. He first noticed the vibration essentially upon taking delivery after purchasing the vehicle. The Complainant testified that he had not noticed this vibration when test driving similar vehicles (newer heavy duty trucks from various manufacturers). He last noticed the vibration on the day of the hearing. On cross-examination, the Complainant testified that replacement of the tires improved the vibration in the truck but the truck still had the same sensation in the steering wheel.

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).

B. Respondent's Evidence and Arguments

Mr. Brown reviewed his inspection report of the subject vehicle. He testified that the vehicle had problems with the centering check, which he concluded resulted from a machine or adapter problem. The wheel/tire balancing were not correct because of issues with the centering check at Patriot GMC, the tires/wheels were delivered to All American Chevrolet in Killeen to use its equipment. Before delivering the wheels and tires to All American, the vehicle's brake rotors and axle shaft were found to be within specifications. Mr. Brown stated that at All American, the tire/wheel measuring at 46 pounds of road force was indexed and then pressure was applied to the tire while spinning to allow the bead to work into the proper position. The road force was reduced from 46 to 9 pounds, below the 24 pound specification. Mr. Brown drove a 2016 3500 HD, his company vehicle, for comparison, which exhibited the same vibration as the subject vehicle on the same roads. Additionally, Mr. Brown noted that a 2017 2500 HD Denali borrowed from Patriot GMC, also performed similarly. He explained that the HD (heavy duty) trucks did not ride like half-ton trucks. One of the tires had higher 2nd harmonics but all four tire were ultimately replaced with the new tires indexed to the wheels and the bead massaged. Pico Scope readings before and after replacement showed the improvement in vibration. Mr. Hepburn testified that the subject vehicle rode better relative to a comparison vehicle. Mr. Brown noted that the subject vehicle rode better than his company truck. He also confirmed that wheel weights could be knocked off. On cross-examination, Mr. Brown confirmed that on the test drive at the hearing, he felt a vibration in the steering that he did not feel at the April 20, 2017, inspection. Mr. Brown attributed the vibration to the wheel balance. Mr. Hepburn confirmed that the warranty did not cover slight noise or vibration and that the warranty covers tire rotation, wheel alignment, and balancing up to 7,500 miles. He affirmed that the subject vehicle's vibration was reduced significantly, well below specifications. Mr. Farrell testified that all vehicles vibrated, for example, in the steering wheel and seats. He did not notice vibration sitting in the back seat but did notice vibration in the steering wheel, which he confirmed usually results from a tire balance issue.

C. Inspection and Test Drive

The vehicle had 12,082 miles on the odometer upon inspection before the test drive. The vehicle was driven for 20 miles, predominantly on a freeway. The hearing examiner drove the vehicle for the first 10 miles and Mr. Brown drove the vehicle for the second 10 miles. The

Complainant suggested holding the steering wheel lightly, with two fingers, while driving on the highway. On the highway, the vehicle generally exhibited vibration that appeared abnormal. However, when holding the steering wheel lightly at higher speeds, as the Complainant noted, vibration was more distinct in the steering wheel. The vibration did not affect the control of the vehicle.

D. Analysis

A preponderance of the evidence shows that the vehicle continues to have a warrantable defect that qualifies for warranty repair but not repurchase or replacement. Although replacing the tires reduced the vehicle's overall vibration, the Complainant found that the vibration in the steering wheel remained the same. Ordinarily wheel balancing, rotation, and alignment constitute maintenance issues not covered by warranty. The warranty specifies that wheel alignment/balance are maintenance items after 7,500 miles. However, in this case, the Complainant raised the steering wheel vibration issue before 7,500 miles. In particular, the manufacturer's inspection occurred on April 19, 2017, at 6,917, which specifically addressed the vibration in the steering. Because the Complainant reported the steering vibration before the 7,500 mile warranty expired, the Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct the steering vibration.²⁴ As shown during the test drive at the hearing, the subject vehicle exhibited a particular vibration in the 70 mph range that appeared distinguishable from the vibration that may normally occur with a heavy duty truck. Although the steering vibration constitutes a warrantable defect in this case, this defect does not qualify for repurchase or replacement relief. The record does not show that the steering vibration poses a serious life-threatening safety hazard. Moreover, nothing in the record indicates that the vibration actually impairs the vehicle's use. Additionally, under the prospective purchaser standard, the vibration has no substantial effect on the vehicle's value, given the moderate magnitude of vibration and the vibration's presence only at high speeds.

²⁴ TEX. OCC. CODE § 2301.603.

III. Findings of Fact

1. On August 16, 2016, the Complainant, purchased a new 2016 GMC Sierra 2500 from Patriot Buick GMC, a franchised dealer of the Respondent, in Killeen, Texas. The vehicle had 189 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and provides coverage of maintenance items for 7,500 miles.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
08/23/16	1,241	Shimmy between 60-80 mph
12/09/16	2,335	Vibration when going 75 mph
03/20/17	5,113	Shimmy vibration at 75 mph
04/19/17	6,917	Shimmy vibration at highway speeds 60-80 mph
07/14/17	8,097	Install new tires and road force balance

4. On April 6, 2017, the Complainant provided a written notice of defect to the Respondent.
5. On April 10, 2017, the Complainant filed a complaint with the Department alleging that the vehicle exhibited an abnormal vibration at all speeds not associated with road conditions and most pronounced at highway speeds from 60 to 80 mph.
6. On June 26, 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 28, 2017, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Kevin Phillips, Business Resource Manager, represented and testified for the Respondent. Kevin Brown, Field Service Engineer, William Hepburn, District Manager Aftersales, and Chuck Farrell, Service Manager at Patriot Chevrolet, testified for the Respondent.

8. The vehicle's odometer displayed 12,082 miles at the time of the hearing.
9. The warranty's bumper to bumper coverage was in effect at the time of the hearing. However, the warranty coverage applicable to wheel alignment/balance expired at 7,500 miles.
10. The Complainant experienced the same steering wheel vibration before and after replacement of the subject vehicle's tires.
11. During the test drive at the hearing, the vehicle exhibited a moderate vibration in the steering wheel at higher speeds, distinguishable from normally occurring vibration.

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 vehicle has a warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).

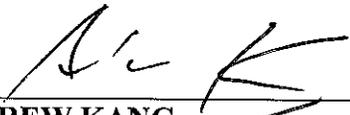
7. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
8. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
9. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. 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 steering wheel vibration occurring at highway speeds 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 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).

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, 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.

SIGNED October 19, 2017



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