



testified for the Respondent; Bobby Shreeve, Field Service Engineer, testified for the Respondent. Michelle Holmes, Assistant Vice President and CFO, represented the Intervenor.

## **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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

#### **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

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<sup>5</sup>

**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.”<sup>6</sup>

**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.<sup>7</sup>

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

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<sup>5</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

<sup>6</sup> *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.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>8</sup>

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:

[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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

**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;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or

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<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *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.’”).

<sup>12</sup> *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.”).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

nonconformity;<sup>14</sup> and (3) the Lemon Law complaint was filed within six months after the earliest 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.<sup>15</sup>

## 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” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.<sup>16</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> The complaint should state “sufficient facts to enable the department and the party complained against to know

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<sup>14</sup> 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).

<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

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

<sup>20</sup> “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

the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.”<sup>21</sup> However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

#### A. Complainant’s Evidence and Arguments

On September 30, 2015, the Complainant, leased a new 2015 GMC Sierra from Bert Ogden Motors, a franchised dealer of the Respondent, in Edinburg, Texas. The vehicle had 14 miles on the odometer at the time of lease. The vehicle’s limited warranty provides bumper to bumper coverage for 3 years or 36,000 miles, whichever comes first. On June 8, 2017, the Complainant filed a complaint with the Department alleging that the vehicle vibrated at highway speeds. On June 20, 2017, the Complainant, provided a written notice of defect to the Respondent. The Complainant testified that when driving on the highway, from 60 to 70 mph, the vehicle intermittently vibrates but does not exhibit any issues when off the highway. He first noticed the vibration at about 12,000 miles. He last noticed the vibration on the morning of the hearing. The Complainant responded that repairs made minor improvements to the vibration. The vehicle exhibited a slight vibration in the steering wheel, console, and seats. He described the vibration like that of the wheels being out of balance or damaged.

On cross-examination, the Complainant affirmed that the vehicle did not have a check engine or brake warning light or a driver information center message. He also confirmed that the vehicle had never left him stranded, had recently passed a state inspection, and had not caused any bodily harm. He affirmed that the vehicle had not lost control, run off the road, or hit an object. The Complainant stated that he did compare vehicles, possibly twice. He explained that the vibration was sporadic and that sometimes driving at highway speeds, he would not feel the vibration.

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be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>23</sup> 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. Winarto testified that the evidence showed no safety hazard and that almost all vehicles will have vibration. Mr. Shreeve testified that he used a PicoScope to analyze the frequency and amplitude of the vibration. He found between 15 to 20 milli-g's of tire vibration with a slight vibration in the steering. Three out of four tires were out of balance. The three tire were balanced and road forced reduced below 15 milli-g's. One tire required replacement. The driveshaft fell within specifications, but to reduce vibration as low as possible, the driveshaft was replaced. After repairs, the vibrations were reduced to specifications with not abnormal vibrations. Mr. Shreeve explained that the newer trucks were more sensitive and were built to tighter tolerances.

### C. Inspection and Test Drive

Before the test drive, the subject vehicle had 25,555 miles on the odometer. The front right wheel had a small scuff, less than an inch long. The Complainant drove the vehicle on a highway and the adjacent frontage roads. The vehicle exhibited some noticeable vibration at highway speeds through the steering wheel. However, the vibration was not constant or consistent. The test drive ended at 25,568 miles.

### D. Analysis

Lemon Law relief does not apply to all problems that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).<sup>24</sup> Consequently, to qualify for replacement or repurchase or warranty repair, the vehicle must have a warrantable defect.<sup>25</sup> The Lemon Law does not require that a warranty provide any particular coverage nor does the Lemon Law specify any standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the vehicle's warranty specifies that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period."<sup>26</sup> According to these terms, the warranty only

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<sup>24</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>25</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>26</sup> Complainant's Exhibit 4, Limited Warranty and Owner Assistance Information (emphasis added).

applies to defects in materials or workmanship (manufacturing defects).<sup>27</sup> A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications.

The warranty does not guarantee that the vehicle will not vibrate. In fact, the warranty contemplates that the vehicle will normally exhibit some vibration and the warranty excludes such vibration from coverage. Whether any vibration can be felt is not the standard for determining the existence of a defect. Rather, the standard is whether the vibration conforms to the manufacturer's specification. Accordingly, a defect exists when the vehicle's vibration exceeds the manufacturer's specifications. Conversely, the vibration is not a defect if it falls within the manufacturer's specifications. In this case, the record shows that prior to repair, the vehicle's vibration exceeded the manufacturer's specifications. However, after balancing three tires, replacing a tire, and replacing the driveshaft, the vehicle's vibration fell within the applicable specifications. Accordingly, any vibration that continues to exist is not a defect but complies with the vehicle's specifications and do not constitute a warrantable defect that qualifies for relief.

### III. Findings of Fact

1. On September 30, 2015, the Complainant, leased a new 2015 GMC Sierra from Bert Ogden Motors, a franchised dealer of the Respondent, in Edinburg, Texas. The vehicle had 14 miles on the odometer at the time of lease.
2. The vehicle's limited warranty provides bumper to bumper coverage for 3 years or 36,000 miles, whichever comes first.
3. On June 8, 2017, the Complainant filed a complaint with the Department alleging that the vehicle vibrated at highway speeds.
4. On June 20, 2017, the Complainant, provided a written notice of defect to the Respondent.

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<sup>27</sup> Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship . . . .' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

5. On August 8, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent.
6. On November 1, 2017, the Department's Office of Administrative Hearings issued an amended notice of hearing directed to the Complainant, Respondent, and Intervenor, 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 initially convened on October 31, 2017, in Pharr, Texas, before Hearings Examiner Andrew Kang. The hearing reconvened on November 21, 2017, and the record closed on the same day. The Complainant, represented and testified for himself. Joko Winarto, District Manager Aftersales, represented and testified for the Respondent; Bobby Shreeve, Field Service Engineer, testified for the Respondent. Michelle Holmes, Assistant Vice President and CFO, represented the Intervenor.
8. The vehicle's odometer displayed 25,555 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. During the test drive at the hearing, the vehicle exhibited random vibration at highway speed that may have varied with the road's surface.
11. The warranty does not cover all vibrations and contemplates that the vehicle will normally exhibit some vibrations.
12. The vehicle's warranty expressly excludes all normal vibrations (vibrations within specifications).
13. The vehicle does not have any vibration exceeding specifications.

#### **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 defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603(a) and 2301.604(a).
7. 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**.

**SIGNED January 22, 2018**

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