

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0188113 CAF**

**DANIEL A. CANTU,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Daniel A. Cantu (Complainant) seeks relief pursuant to Texas Occupations Code § 2301.204 (Warranty Performance) for alleged defects in his 2015 Dodge Ram 2500 diesel pickup truck. Complainant asserts that the vehicle is defective because he hears a clanking noise when the vehicle is decelerating. FCA US LLC (Respondent) argues that the vehicle is operating as designed, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is not eligible for relief.

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 convened and the record was closed on May 2, 2019, in Pharr, Texas before Hearings Examiner Edward Sandoval. Efrain Molina, Jr., attorney with the Law Office of Efrain Molina, Jr. PLLC, represented Complainant at the hearing. Complainant was present to offer testimony. Respondent was represented by Ryan Delgado, attorney with Beatty, Navarre, Strama, PC. Torry Piechowski, Technical Advisor, testified for Respondent.

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 2015 Dodge Ram 2500 diesel pickup truck from Spikes Ford (Spikes) in Mission, Texas on August 25, 2016, with mileage of 23,267 at the time of delivery.¹ Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first.² In addition, Respondent’s powertrain warranty provides coverage for the vehicle’s powertrain for five (5) years or 100,000 miles.³ On the date of hearing the vehicle’s mileage was 79,700. At the time of hearing, the vehicle’s bumper-to-bumper warranty was expired. However, the vehicle’s powertrain warranty was still in effect.

Complainant testified when the vehicle decelerates to about 20 miles per hour he hears a mechanical clanking noise from underneath the vehicle. He stated that about a month after each repair attempt the clanking would return. The first time he noticed the clanking noise was in 2016, approximately three months after purchase. He last heard the clanking noise on the day of the hearing. Complainant explained that he hears the noise every time he drives the vehicle. Additionally, the longer the drive the worse the noise gets.

Complainant explained that the clanking noise only occurs when the vehicle is decelerating. The vehicle originally made the noise at 30 miles per hour, however, it now occurs when decelerating at about 20 miles per hour. Complainant believed originally that the problem stemmed from the vehicle’s differential, however, the differential was repaired and the problem remained. The transfer case and U-joints were also replaced on the vehicle. Neither repair solved the problem. During a repair attempt, the dealer’s service technician replaced the old transmission with a refurbished one. All repairs to the vehicle were performed at Burns Motors (Burns), located in McAllen, Texas. This is one of Respondent’s authorized dealers.

¹ Complainant Ex. 2, Purchase Agreement dated August 25, 2016.

² Complainant Ex. 4, VIP Summary Report dated April 25, 2019

³ *Id.*

Complainant spoke with Mr. Flannigan, Service Manager for Burns, who told him that trucks will often have mechanical clanking sounds. Complainant sought to get the statement in writing from a dealer representative but was unsuccessful. Mr. Flannigan also recommended that Complainant pursue a Lemon Law complaint, since the issue was not resolved to Complainant's satisfaction.

On direct examination of Complainant, he testified that the clanking noise has been a continuous problem from November 12, 2016, through February 23, 2019. Complainant also stated that the clanking noise was heard at least five times during the inspection and test drive of the vehicle that occurred at the time of hearing. Complainant's request is for Respondent to fulfill their warranty obligation and repair the vehicle. Additionally, Complainant stated that he has driven his brother-in-law's vehicle, a Dodge Ram 3500, in the past which he feels is a comparable vehicle to the subject vehicle and it did not make the clanking noise which Complainant is complaining of.

On cross examination, Complainant testified that he is not a vehicle technician or a mechanic. The vehicle is necessary for Complainant's work. Complainant stated that he puts between 15,000 to 20,000 miles a year on the vehicle. Complainant testified that his understanding of the repairs to the vehicle were the transfer case, U-joints, some gears, and the differential were all replaced, and a refurbished transmission was installed. Complainant stated that the issue has not impaired driving the vehicle or caused the vehicle to stop working. Complainant is, however, concerned that the vehicle would not function properly if used for towing. The vehicle has been taken to Burns for repair at least nine different times over the course of Complainant's ownership.

| Date | Issue(s) | Repair Performed |
|------------------|--|---|
| November 4, 2016 | <ol style="list-style-type: none"> 1. Rear suspension makes a noise 2. Rear differential and rear pinion bearings making noise | <ol style="list-style-type: none"> 1. Replaced torque converter 2. Replaced all components in the rear differential, including ring gear, pinion, and pinion bearings 3. Performed updates for the powertrain control module (PCM), the anti-lock brake system (ABS), and the integrated brake module (ITBM) |

| Date | Issue(s) | Repair Performed |
|-------------------|--|---|
| December 14, 2016 | 1. Suspension noise 2. Suspension rattle at center of driver's feet | 1. Rebuilt vehicle's axle assembly 2. Replaced transfer case |
| May 5, 2017 | Clunk noise at 20 MPH | Replaced pinion bearings and side bearings |
| May 23, 2017 | Clunk noise in the differential | Reset back lash |
| December 14, 2017 | Erratic shifting from transmission | Installed new rebuilt transmission |
| January 18, 2018 | Thump noise when decelerating under 20 MPH and when accelerating at 30 MPH | Replaced valve body |
| December 15, 2018 | Transmission has a kick when accelerating | Replaced rear case housing and axle |
| February 19, 2019 | Clunk in transmission and humming noise | Test drove vehicle to verify noise ⁴ |

Complainant filed a Warranty Performance complaint with the Texas Department of Motor Vehicles (Department) on June 29, 2018.⁵

C. Respondent's Evidence and Arguments

Torry Piechowski, Technical Advisor, testified that the vehicle was operating normally based on his experience. He explained that a heavy-duty drive train, which the vehicle has, means the vehicle will have noticeable shifts between gears. The clanking noise is caused when the vehicle is on a downshift and the vehicle tries to engine brake to slow itself. The engine brake creates a pressure increase on the gear engagement. The clunking noise occurs because there is a lapse in preload on the drive train during this downshift process. He also explained that the vehicle's drive train is a heavy duty drive train because it is designed to tow large loads. Mr. Piechowski testified that there is no way to repair the clunking noise. Mr. Piechowski further stated that a new transmission would probably not fix the problem because the vehicle's transmission has been rebuilt and replaced already.

On direct examination by Mr. Delgado, Mr. Piechowski stated that he has a bachelor's degree in automotive technology from Montana State. He is also an Automotive Service Excellence (ASE) Certified Master Technician and has specialized in diagnostics for about six years. He has

⁴ Complainant Ex. 3, Repair Orders from Burns Motors.

⁵ Complainant Ex. 1, Lemon Law Complaint dated June 29, 2018. Although Complainant signed the complaint on June 7, 2018, it was not received by the Texas Department of Motor Vehicles (Department) until June 29, 2018, which is the effective date of the complaint.

worked for two different manufacturers and has been working for Respondent for two and a half years. He also explained that he has diagnosed about twenty-five to thirty vehicles similar to Complainant's. Mr. Piechowski testified that during a test drive of the vehicle, he did not think the clunking noise was abnormal. The test drive covered about 15 miles. After the test drive, Mr. Piechowski inspected the vehicle and determined the clunking noise was a characteristic of the vehicle. He explained that a characteristic of the vehicle means that the characteristic in question is expected. Therefore, the clunking noise is expected in the vehicle and towing with the vehicle may stop the clunking noise. Mr. Piechowski stated that he has looked at the repair orders and there appeared to be actual issues with the vehicle, which were repaired. The transmission was repaired twice, the vehicle had a remanufactured transom, a new transfer case was installed, the drive line repaired and the rear differential was repaired twice and replaced twice. Mr. Piechowski explained that the new components from each repair will have a tighter fit with the vehicle. The result is the clunking noise returning when the new parts are worn in. Mr. Piechowski concluded that the vehicle is operating normally and does not need repair.

With respect to the powertrain warranty, Mr. Piechowski explained that the warranty covers anything that touches oil, which includes the engine, transfer case, transmission, and rear differential. The vehicle's powertrain warranty is still in effect.

Mr. Piechowski testified that based on the technical reports made by the technicians, the repairs were all made in good faith to help the customer. However, the technical reports did not include why the repairs were made. Mr. Piechowski feels that the technicians' pursuit of helping Complainant was misguided because the vehicle did not require any repairs for the clunking noise. He reiterated that the clunking noise is not an issue that needs to be repaired and the issue does not affect the use or resale value of the vehicle. The vehicle should not have an issue that would affect its towing capacity. Mr. Piechowski stated that the issue is not a vehicular issue but rather one of Complainant's expectation of the vehicle.

Mr. Piechowski inspected the vehicle on December 15, 2018, at Burns. He stated that he went through the technician notes regarding the subject vehicle with Burns' service manager. After going through the notes, Mr. Piechowski tried to duplicate the concern. In trying to duplicate the issue, he took the vehicle on a test drive of about 15 miles. He reported that he did not feel that the vehicle acted abnormally during the test drive. After the test drive, Mr. Piechowski checked the vehicle's transmission fluid, the transfer case fluid, and the rear differential fluid. During the inspection he found the rear differential fluid had metal shavings in it. He took the rear differential apart and found the side bearings were spinning inside and creating metal shavings which were getting into the differential fluid. The side bearings were not repairable so he authorized replacing the rear axle. After the axle was replaced, Mr. Piechowski test drove the vehicle and did not feel anything unusual during the drive. Mr. Piechowski also called a technical

advisor in Arkansas for advice, who informed him that the vehicle had a “rough transmission” which means that when the vehicle is not towing anything the gear shifts will be more noticeable. Mr. Piechowski feels that the extra weight from towing something with the vehicle should smooth out the issue.

Mr. Piechowski discussed the repairs that were made to the vehicle and which were described on the submitted repair orders. On November 12, 2016, Burns Motors replaced the ring and pinion in the rear differential and set the preload and backlash. On December 14, 2016, the rear axle was rebuilt. On February 1, 2017, the check engine light came on for two issues unrelated to the clunking noise. On May 19, 2017, the pinion bearings and side bearings were replaced, the preload was reset, and the backlash was filled with fluid. On May 23, 2017, the backlash was reset. On January 4, 2018, the vehicle had the transmission rebuilt to fix an erratic shifting problem. On February 2, 2018, the vehicle’s valve body was replaced. On December 18, 2018, the rear axle was replaced because the transmission kicked while accelerating. The repair on December 18, 2018, was a result of Mr. Piechowski’s inspection of the vehicle.

Mr. Piechowski responded to Complainant’s testimony that his brother-in-law drives a similar vehicle and doesn’t have the same concerns as he does. Mr. Piechowski stated that although the engine and transmission in the brother-in-law’s vehicle are the same as in Complainant’s vehicle, the chassis, rear axle, drive line, and rear tires are different. The two vehicles should not be used as a comparison.

On cross examination, Mr. Piechowski testified that the VIP summary of the vehicle is an information service history page for repairs performed under warranty and recalls performed by authorized dealerships or employees of Respondent. The vehicle was under warranty for all the repairs that have been performed by Burns’ technicians and the vehicle remains under warranty for the powertrain.

Mr. Piechowski testified that the clunking noise is a characteristic of the vehicle as a daily driver but he did not say that the noise is supposed to occur. Mr. Piechowski stated that there is no literature or official information from Respondent or its engineers that say the vehicle should make the clunking noise. The conclusion that the clunking noise is normal is based on Mr. Piechowski’s professional experience. He also testified that if Complainant purchased another 2016 diesel truck, it would also make a clunking noise or a variation thereof. Mr. Piechowski stated that similar trucks can make the same clunking noise but would not guarantee they would make the noise.

Mr. Piechowski further testified that the clunking noise is not something that a salesman would know about or tell a purchaser. A salesman’s knowledge is limited to the overview and

operational information of vehicles, not technical information. Mr. Piechowski also explained that Burns Motors was reimbursed for the labor and repairs from Respondent for the warranty repairs of the vehicle for the clunking noise. Mr. Piechowski stated upon concluding his inspection of the vehicle that there was nothing left to repair on the vehicle because the clunking noise is a characteristic of the vehicle. Mr. Piechowski did not speak to the technicians about the vehicle and his conclusions are based on the technician notes, talking with the service manager, the test drives, and the inspection. Mr. Piechowski also explained that talking to the technicians would not have helped him because the technician notes have all the information he needed. Mr. Piechowski testified he was hired to inspect the vehicle and to make his own conclusions about the vehicle.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

The preponderance of the evidence establishes that the clunking noise heard by Complainant is an operational characteristic of the vehicle and not a defect. Although the sound is noticeable when pointed out, there is no evidence that it affects the way that the vehicle drives or functions. Mechanical devices sometimes make noise, but this is not evidence that there is an issue that the item is not working properly or that it needs to be repaired. Therefore, the hearings examiner finds that there is no defect or nonconformity with the vehicle as defined in the Occupations Code which is repairable and, as such, the issue is not grounds to order repair of the vehicle.

Respondent's warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. Respondent also has provided a powertrain warranty which provides coverage for five (5) years or 100,000 miles. On the date of hearing, the vehicle's mileage was 79,700. The vehicle's bumper-to-bumper warranty has expired; however, the powertrain warranty is still in effect. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the powertrain warranty.

Complainant's request for repair relief is denied.

III. FINDINGS OF FACT

1. Daniel A. Cantu (Complainant) purchased a used 2015 Dodge Ram 2500 diesel pickup truck on August 25, 2016, from Spikes Ford (Spikes) in Mission, Texas, with mileage of 23,267 at the time of delivery.
2. The manufacturer of the vehicle, FCA US LLC (Respondent), issued a bumper-to-bumper warranty which provides coverage for the vehicle for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty which provides coverage for five (5) years or 100,000 miles.
3. The vehicle's mileage on the date of hearing was 79,700.
4. At the time of hearing the vehicle's bumper-to-bumper warranty had expired, but the powertrain warranty was still in effect.
5. Complainant feels that the vehicle's transmission and suspension make a clunking sound when he's decelerating in the vehicle and the transmission is downshifting.
6. Complainant took the vehicle for repair to Burns on the following dates due to his concerns regarding the clunking noise:
 - a. November 4, 2016, at 28,854 miles;
 - b. December 14, 2016, at 29,611 miles;
 - c. May 5, 2017, at 36,525 miles;
 - d. May 23, 2017, at 36,679 miles;
 - e. December 14, 2017, at 50,837 miles;
 - f. January 18, 2018, at 52,642 miles;
 - g. December 15, 2018, 2018, at 73,131 miles; and
 - h. February 19, 2019, at 76,785 miles.

7. On November 4, 2016, Burns' service technician replaced the vehicle's torque converter and all of the components in the vehicle's rear differential, including the vehicle's rear ring gear and pinion gear, and the pinion inner and outer bearings, to resolve the issue of noises coming from the vehicle's rear suspension and rear differential.
8. On December 14, 2016, Burns' service technician replaced the vehicle's transfer case and rebuilt the rear axle assembly in order to resolve the noise issue.
9. On May 5, 2017, Burns' service technician replaced the vehicle's pinion bearings and side bearings in order to resolve Complainant's concerns.
10. On May 23, 2017, Burns' service technician reset the vehicle's backlash to resolve the complaint of a clunking noise in the vehicle's differential.
11. On December 14, 2017, Burns' service technician replaced the vehicle's transmission with a rebuilt transmission, as the original transmission was shifting erratically.
12. On January 18, 2018, Burns' service technician replaced the vehicle's valve body to resolve the issue of a thumping noise occurring when the vehicle decelerated under 20 MPH or accelerated at 30 MPH.
13. On June 29, 2018, Complainant filed a Warranty Performance complaint with the Texas Department of Motor Vehicles (Department).
14. On December 15, 2018, Burns' service technician replaced the vehicle's rear case housing and axle to resolve an issue where the vehicle's transmission was kicking when the vehicle accelerated.
15. On February 19, 2019, Complainant took the vehicle to Burns for repair because he was hearing a clunk and a humming noise in the vehicle's transmission. Burns' service technician test drove the vehicle to verify the concern, but did not perform any repair at the time.
16. On October 19, 2018, 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.

17. The hearing in this case convened and the record was closed on May 2, 2019, in Pharr, Texas before Hearings Examiner Edward Sandoval. Efrain Molina, Jr. attorney with the Law Office of Efrain Molina, Jr. PLLC, represented Daniel A. Cantu (Complainant) at the hearing. Complainant was present to offer testimony. Respondent was represented by Ryan Delgado, attorney with Beatty, Navarre, Strama, PC. Torry Piechowski, Technical Advisor, testified for Respondent.

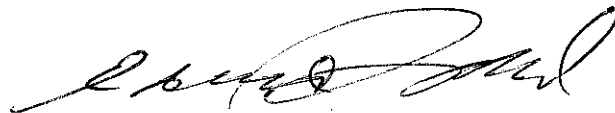
IV. CONCLUSIONS OF LAW

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 failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition in the vehicle. 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, 2301.603.
8. Complainant's vehicle does not qualify for repair relief. 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 **DISMISSED**.

SIGNED June 25, 2019



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