

Green, Business Resource Manager, represented and testified for the Respondent. Bobby Shreeve, field service engineer, also testified for the Respondent.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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 currently 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 respondent, (2) an opportunity to cure by the respondent, 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

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ 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.”⁵

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

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

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).

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:

[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 respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴

⁸ TEX. OCC. CODE § 2301.605(a)(2).

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 A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the

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.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” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.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 of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the

respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id.* at 2.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

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

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

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁴ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁵ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On November 30, 2016, the Complainant, leased a new 2016 Cadillac Escalade from Bert Ogden Cadillac, a franchised dealer of the Respondent, in Mission, Texas. The vehicle had 3,566 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first and powertrain coverage for six years or 70,000 miles, whichever comes first. On January 8, 2018, the Complainant’s

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)(3).

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).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

attorney provided a written notice of defect to the Respondent. On August 15, 2018, the Complainant filed a complaint with the Department alleging that the vehicle would: fail to take off, hesitate, shake, vibrate, and jerk.

Mr. Guerrero testified that he and the Complainant leased the vehicle together on November 30, 2016. The Complainant told Mr. Guerrero about harsh road conditions and hard downshifting, and he replicated the conditions. He elaborated that the issues occurred intermittently. He described that before leasing the vehicle, their test drive consisted of a couple of turns out of the dealership at 35-45 mph and they did not test drive the actual subject vehicle. Mr. Guerrero stated that the Complainant was the primary driver but he also drove the vehicle, primarily on road trips. He described that the vehicle would hesitate and shift hard from first to second gear, and jerk when downshifting. The vehicle also exhibited a grinding noise during hard stops. He also experienced a shake in his arms and hands, which did not feel like the average feeling in the steering wheel, particularly in improved road conditions. While on the expressway merging and letting off the gas, the vehicle will lunge. In such instances he had to brake. He affirmed that the transmission had been reprogrammed and the wheels balanced. After repairs, in some instances, the vehicle felt fine leaving the parking light and on the frontage road but on the same day, the issues would reoccur. The Complainant confirmed that they were provided a loaner vehicle. Based on the repair orders, Mr. Guerrero acknowledged that the vehicle had been in for repair for over 30 days during the March 21, 2017, repair visit. He described that on a trip to Colorado, the vehicle was harsh even with the adaptive cruise control. He elaborated that the roads were flat with no holes but the vehicle wanted to jump with him holding the steering wheel. He affirmed the first-second shift was not fixed, with the vehicle vibrating on trips with excessive road force and hesitation. Mr. Guerrero explained that what he called hesitation occurred when accelerating: when mashing the gas pedal, the vehicle “stalls” and jumps into gear, which differs from the harsh shifting that sounds like grinding metal. These issues occurred intermittently. He felt that the issues were progressively getting worse. The vehicle was at the dealer for 10 days during the June 12, 2017, repair visit. The Complainant expressed that the vehicle felt like it was vibrating, with the whole system shaking. At this service visit, the dealership did not specify an issue with the tires or shock absorbers, just that the issue had been fixed. The vehicle was at the dealer for six days during the September 21, 2017, repair visit. In response to the lunging, the Complainant stated that she would hold the steering wheel tighter and stay below a certain speed

in the right lane and not in the passing lane. Mr. Guerrero affirmed that the vehicle would shudder when accelerating like a hard downshift. He clarified that the never used the term “shudder” but the shifting vibration was the same. He affirmed that the vehicle would operate normally but then the issues (clunking noise, jerking, harsh downshifts) would come back. At the August 20, 2018, repair visit, Mr. Guerrero was notified that the transmission had been replaced. The shaking was the same and the vehicle was shaking even at 50 mph. He testified that the grinding and jump-shifting into second gear were the same issue. Upon clarification questions, the Complainant stated the dealership verbally stated that the vehicle had a new transmission. Mr. Guerrero added that the repair related to the torque converter and replacement of the transmission control assembly.

On cross-examination, Mr. Guerrero testified that the subject vehicle never left him stranded and had not shut down, but did shake badly. He described vehicle during the test drive at the hearing as definitely improved, though she still had some complaints. The vehicle previously felt dangerous. Mr. Guerrero elaborated that he felt better about the vehicle and it has improved, but he still felt confident that it would still have issues. He noted that the road conditions where they normally drove were not like that in the neighborhoods where the test drive occurred. They parked in “nice” parking lots and drove on roads without potholes.

C. Inspection

Upon inspection at the hearing before the test drive, the odometer displayed 35,163 miles. The vehicle was driven on various local roads, service roads, and a freeway for 58 miles. During various times during the test drive at highway speeds, the steering wheel exhibited some light vibrations. Mr. Guerrero noted that he could also feel vibration through the pedals. He confirmed that he had felt such vibrations at lower speeds as well. Mr. Shreeve noted that V-4 mode changes the dynamics of the exhaust (V-8 mode deactivates to conserve fuel). He also noted that the vehicle has a programmed hesitation when accelerating. As an example, he explained that during heavy acceleration, a pause may occur. He added that when coming to a stop, the transmission expects to shift from third to first gear and pressing the throttle will cause a jerk. Approximately one hour into the test drive, Mr. Shreeve began driving the vehicle. The test drive ended with 35,221 miles on the odometer. The vehicle appeared to operate normally.

D. Summary of Respondent's Evidence and Arguments

Mr. Green testified that the warranty did not cover "slight noise, vibrations, or other normal characteristics of the vehicle."²⁷ He also pointed out that owner's manual addressed downshifting in a section describing the shift stabilization feature.²⁸ This feature adjusts the transmission to current driving conditions and determines before shifting whether the engine can maintain vehicle speed and may hold the current gear which may appear like a delayed shift. Also, he noted that the transmission uses adaptive shift controls, which constantly adjust according to the vehicle's use.

Mr. Shreeve testified that during his inspection, he checked the vehicle for codes but found no relevant concerns. He explained that 22" wheels were susceptible to being bent on the inside, which he did not find. Imperfections on the outside, like those seen during the inspection at the hearing, are not considered. He found three tires out of balance with one tire with excessive road force. The high road force was adjusted to within the acceptable limit. Using a Pico Scope, he could not identify any excessive vibration. The overall vibration improved after repair. He could not duplicate the transmission concern. The vehicle did not have any diagnostic trouble codes for the transmission or shift control module. He emphasized that for a transmission fast learn, the vehicle needed extensive test driving to allow the transmission to learn. Without sufficient driving, the customer may notice poor shift quality because the transmission takes time to learn. He explained that any time internal components are replaced, the memory has to be wiped and the transmission must relearn. The dealer did not properly test drive the vehicle, so the vehicle is being driven with unlearned shift points. The vehicle needs time for the shifts to improve. Mr. Shreeve explained that the test driving was especially important for eight-speed transmissions (as on the subject vehicle). Mr. Green added that the any recall updates must be performed before selling the vehicle due to NHTSA (National Highway Traffic Safety Administration) requirements.

On cross-examination, Mr. Shreeve testified that no abnormal vibrations were noticed. He did not feel anything or detect anything on the Pico Scope. However, any impact can move into the tire and affect the tire's cords as well. A pot hole, or anything, can affect road force and balance. The Pico Scope identifies those types of vibrations. He could not say why the dealer addressed vibration but acknowledged that the shock absorbers could have an effect. He explained that he

²⁷ Complainant's Ex. 2, New Vehicle Limited Warranty.

²⁸ Respondent's Ex. 1, Owner's Manual, Driving and Operating.

did not inspect the shock absorbers because he had no reason to do so. He affirmed that torque converters can cause shudder concerns, which has a very specific feel. At certain speeds, this may feel like rumble strips, but he could not say why the dealer replaced the torque converter. He explained that the computer has a lot going on in deciding what gear to engage. If the customer has certain driving characteristics, the ECM (engine control module) and TCM (transmission control module) determine that the vehicle must be in a certain gear, but the customer may change his mind. The delayed shift is designed to allow the engine and transmission to synchronize under certain circumstances. However, the customer changing his mind can cause abrupt (harsh) shifts. For example, if the vehicle slows down for a stop, the transmission may “think” it needs to shift from third to first gear but if the driver accelerates the transmission may actually select a different gear, causing an abrupt feel. Shift stabilization smooths out shifts from first to second, second to third, and so forth. The mileage in and mileage out on the repair order being the same indicates that the proper test driving was not completed, so the shift stabilization is not a factor, so the customer must drive the vehicle for the transmission to relearn the shift patterns to make the shift stabilization come into play. The ECM and TCM will learn the driver’s habits, which depends on the individual driver. He acknowledged that problems with shifting may be intermittent. Upon clarification questions, Mr. Shreeve confirmed that transmissions no handle multiple drivers and different driving styles better.

E. Analysis

A preponderance of the evidence does not show that the issues alleged in the complaint (failure to take off, hesitation, shaking, vibration, and jerking) are currently existing defects covered by warranty. Lemon Law relief does not apply to all issues that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).²⁹ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally states 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

²⁹ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts.³⁰

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹ A manufacturing defect is generally an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which exists before manufacturing) or dealer representations and improper dealer repairs (which occur after manufacturing), are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.³² In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics or design defects. In the present case, the evidence does not show that the alleged issues are more likely than not warrantable defects. Even though an issue may be undesirable or problematic, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect. The alleged problems (failure to take off, hesitation, shaking, vibration, and jerking) appear to fall into two categories: transmission related issues and wheel/tire/suspension related issues and are addressed accordingly below:

1. Failure to Take Off, Hesitation, and Jerking (Transmission)

The failure to take off, hesitation, and jerking all appear as likely to result from the characteristics of the transmission as designed as opposed to any manufacturing defect. Significantly, the owner's manual specifies that the vehicle is designed with a feature that may be experienced as a hesitation and the adaptive shifting may cause different shift feelings.

³⁰ Complainant's Ex. 2, New Vehicle Limited Warranty.

³¹ 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.").

³² In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

The vehicle has a shift stabilization feature that adjusts the transmission shifting to the current driving conditions in order to reduce rapid upshifts and downshifts. This shift stabilization feature is designed to determine, before making an upshift, if the engine is able to maintain vehicle speed by analyzing things such as vehicle speed, throttle position, and vehicle load. If the shift stabilization feature determines that a current vehicle speed cannot be maintained, the transmission does not upshift and instead holds the current gear. In some cases, this could appear to be a delayed shift, however the transmission is operating normally.

The transmission uses adaptive shift controls. The adaptive shift control process continually compares key shift parameters to pre-programmed ideal shifts stored in the transmission's computer. The transmission constantly makes adjustments to improve vehicle performance according to how the vehicle is being used, such as with a heavy load or when the temperature changes. During this adaptive shift control process, shifting might feel different as the transmission determines the best settings.³³

The evidence also shows that after any changes/repairs requiring a transmission relearn, the transmission may shift roughly while learning the appropriate shift points. Even after the transmission has learned the appropriate shift points, the transmission may still shift unexpectedly and jerk when the gear actually needed based on the driver's input differed from the gear predicted to be needed (that is, the transmission may shift abruptly/harshly when it reacts to an unexpected input from the driver). However, all of this arise from the design of the vehicle and not any warrantable manufacturing defect.

2. Shaking/Vibration (Wheels, Tires, and Suspension)

The vehicle does not appear to have any warrantable vibration/shaking. Analysis with a Pico Scope showed no abnormal vibration. Although the Complainant's evidence reflects that the vibration occurred intermittently, any existing vibration does not rise to the level of a warrantable defect, as described by the warranty. During the test drive at the hearing, the vehicle exhibited slight vibration in the steering wheel. However, this vibration was indistinguishable from vibration that may normally occur due to external factors affecting the vehicle. Mr. Guerrero also acknowledged that the vehicle has improved. Furthermore, external factors may normally cause changes in road force and wheel balance. Additionally, the evidence reflects that the fuel-saving V-4 mode can alter the dynamics of the exhaust. In sum the record does not show that the shaking and vibration more likely than not arise from a manufacturing defect.

³³ Respondent's Ex. 1, Owner's Manual, Driving and Operating (emphasis added).

III. Findings of Fact

1. On November 30, 2016, the Complainant, leased a new 2016 Cadillac Escalade from Bert Ogden Cadillac, a franchised dealer of the Respondent, in Mission, Texas. The vehicle had 3,566 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first and powertrain coverage for six years or 70,000 miles, whichever comes first.
3. On January 8, 2018, the Complainant's attorney provided a written notice of defect to the Respondent.
4. On August 15, 2018, the Complainant filed a complaint with the Department alleging that the vehicle would: fail to take off, hesitate, shake, vibrate, and jerk.
5. On November 19, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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.
6. The hearing in this case convened on February 26, 2019, in Weslaco, Texas, before Hearings Examiner Andrew Kang, and the record closed on March 13, 2019, the deadline for any responses to written submissions. Adam Mott, attorney, appearing by telephone, represented the Complainant. The Complainant testified on her own behalf and her husband, Sanzabeedee Guerrero, Jr, also testified for the Complainant. Clifton Green, Business Resource Manager, represented and testified for the Respondent. Bobby Shreeve, field service engineer, also testified for the Respondent.
7. The vehicle's odometer displayed 35,163 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. Upon inspection at the hearing before the test drive, the odometer displayed 35,163 miles. The vehicle was driven on various local roads, service roads, and a freeway for 58 miles. During various times during the test drive at highway speeds, the steering wheel exhibited

some light vibrations. The test drive ended with 35,221 miles on the odometer. The vehicle appeared to operate normally.

10. Failure to take off, hesitation, and jerking, may all occur normally with the vehicle under certain conditions.
11. The vehicle does not currently exhibit any significant vibration and external factors may normally cause the vehicle to vibrate/shake.

IV. Conclusions of Law

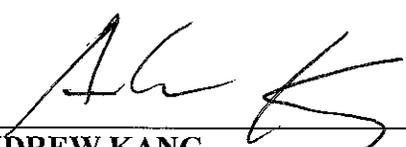
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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 and 2301.604(a).
7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
9. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED May 13, 2019



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