

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0007375 CAF**

AMIT G. PATEL,
Complainant

v.

**JAGUAR LAND ROVER NORTH
AMERICA, LLC,**
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Amit G. Patel (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) for alleged warrantable defects in his vehicle distributed by Jaguar Land Rover North America, LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has warrantable defects that qualify for warranty repair relief.

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 November 14, 2019, in Killeen, Texas, before Hearings Examiner Andrew Kang. The hearing was recessed and reconvened on November 22, 2019, in Austin, Texas. The record closed on December 9, 2019, upon admission of Complainant's Exhibit 22. Adam Mott, attorney, represented the Complainant. John Chambless, attorney, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

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 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: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.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: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁸

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).

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 and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an 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 or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹³

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). The Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” *Mail. Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

(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 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

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).

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,

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 hearing 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 January 11, 2017, the Complainant, purchased a new 2017 Land Rover Range Rover from Autobahn Imports LP, a franchised dealer of the Respondent, in Fort Worth, Texas. The vehicle had 27 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. On

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)(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).

March 10, 2017, the Complainant's attorney provided a written notice of defect to the Respondent; however, the notice did not identify any specific defects or nonconformities. As a result, the Respondent did not have notice of the specific defects until receiving a copy of the complaint. On March 26, 2019, the Complainant filed a complaint with the Department alleging the following defects:

date not displaying on home screen or infotainment center, radio turning on by itself intermittently, crackling sound heard from dashboard area when radio is on, rain sensor setting for windshield wipers inoperable, speed limit display system defects, Eco start/stop function defects, AEB (Autonomous Emergency Braking) fault displayed, software conflict between modules, phone will not connect through Bluetooth intermittently, restrictive fuel filler pipe necessitating replacement, Auto High Beam Sensor Blocked message illuminating, remote start inoperable intermittently, Traction Reduced message illuminating, AEB Initializing message illuminating constantly, sign recognition system inoperable, system faults in IMAP module, AEB system fault, when pulling out of parking spot Forward Alert system beeps loudly, when vehicle put in Reverse and while driving in Reverse loud clunking noise heard, Lane Keep Assist system inoperable, Auto High Beam Blocked message illuminating, [would] not start until sits for few minutes to hours, Windshield Camera Obstructed message illuminating, many messages illuminating at random times, AEB Not Available message incorrectly displayed, lift gate drain trim pieces are warped, and Blind Spot Monitor Blocked message illuminating.

The Complainant asserted that the following issues remained unresolved: the AEB, height/suspension, no-start, and instrument panel/touch screen displays rebooting. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
02/16/17	1,083	AEB
03/29/17	1,717	AEB
04/19/17	2,352	AEB
07/12/17	4,327	AEB
08/22/17	5,491	AEB
09/11/17	6,267	AEB
02/23/18	9,735	Instrument cluster blank
05/25/18	12,161	No-start, suspension
11/05/18	15,809	Display blank
03/30/19	19,886	AEB, display blank, suspension
08/05/19	21,901	AEB, screen blank
10/29/19	23,208	No-start, suspension, touch screen reboots, AEB

The Complainant testified that the AEB (Autonomous Emergency Braking) light came on when leaving the dealer's lot (upon purchasing the vehicle). Thereafter, the Complainant brought

the vehicle to the dealer for a software update. However, the warning indicator continued to pop up while heading home. The Complainant recited the various issues affecting the vehicle, pointing out that the vehicle had been in for service 12 to 14 times. Mrs. Sejal Patel testified that the vehicle turned off by itself. After parking, the doors would turn off. In addition, the steering was stiff turning left or right and the touch screen would turn off and on by itself. The Complainant stated that the stability control issue related to the suspension and maybe software. After filling the vehicle with gas, the instrument panel would not show the range. The gas will appear low even with the tank full. With seatbelts on, the vehicle will indicate that the seatbelts are not on, apparently due to the software. The hood open indicator would pop on without the hood open and reset itself. The AEB light had come on 15 to 20 times. The Complainant experienced the touch screen rebooting three to four times and Mrs. Patel noticed the rebooting many times. At 22,183 miles, the message center on the instrument panel cycled through various messages: AEB Not available Windshield camera obscured, Auto High Beam Sensor Blocked, LKA not available Windscreen camera obscured, Blind Spot Assist Not Available Windscreen Camera Obscured, and Auto High Beam Sensor Blocked. On March 9, 2019, at 22,282 miles, the instrument panel flashed and the vehicle would not start for about an hour. Mrs. Patel stated that the failure to start occurred a couple of times. The Complainant also recited that the vehicle had an issue with the wipers and leaking washer fluid. The AEB issue was addressed multiple times. In addition, the vehicle radio exhibited static noise, the camera system malfunctioned, and the lane keep assist did not work correctly. The Complainant affirmed that the engine misfired, the vehicle displayed a warning that the blind spot monitor sensor was blocked, the trim by the lift gate was warped, auto high beam blocked message came on, the vehicle will roll back on an incline with the foot off the brake. In addition, the instrument panel went blank. The Complainant confirmed that the vehicle's failure to start had been recorded on video. The vehicle also had a cracked fuel filler neck replaced. The Complainant explained that in relation to the air suspension/adaptive dynamics warning, the vehicle would change heights and he would have to turn the vehicle off to make it go away. He elaborated that one side would be higher than the other and felt crooked. He acknowledged being provided loaner vehicles, a Nissan Rogue, Land Rover Range Rover Sport, and Jaguar X-Type, but he did not find them comparable.

On cross-examination, the Complainant affirmed that the vehicle did not lose power at 70 mph. He further affirmed that the AEB, suspension height, and no-start issues remained

ongoing and added that the vehicle did not want to turn left or right out of the lane. When asked if the AEB feature ever activated, the Complainant testified that the vehicle came close (to another vehicle), maybe six inches and the AEB light flashed. He also responded that the AEB did not brake the vehicle when not braking with his foot. The Complainant did not know what the beeping noise was. He first noticed the suspension issue in April or May of 2018. When asked if the vehicle limped or listed since May 15th, he expounded that the vehicle changed heights on its own. The Complainant recounted that the vehicle would not start about a month or five weeks before the hearing. He affirmed always getting a loaner vehicle for repair visits, including a Nissan Rogue at the last repair attempt. He denied that the hood may have been left up at an oil change on October 10, 2018. On recross-examination, the Complainant stated that he had seen the windshield camera obscured warning at least a couple of times. With regard to the AEB message, he explained that nothing had obstructed the camera.

On redirect-examination, the Complainant testified that he never tried to test the AEB. However, when approaching a vehicle within eight inches, the vehicle should have stopped, but did not give a warning.

Upon clarifying questions, the Complainant affirmed the remaining issues as: the AEB, height/suspension, no-start, console (instrument panel and touch screen displays) rebooting, and hard to steer left/right. He noted that the headliner issue was cosmetic. He answered that the AEB light last came on about a month before the hearing and the height/suspension issue last occurred a couple of weeks before the last repair attempt. The car failed to start last about five weeks before the hearing. The displays last rebooted within three to four weeks before the last repair attempt or about five or six weeks before the hearing. He last noticed difficulty steering probably four to five weeks before the hearing.

On cross-examination, Mrs. Patel testified that the AEB did not function, and was dimmed and could not be highlighted (on the instrument panel menu). She elaborated that some functions were dimmed and could not be checked (selected). Mrs. Patel stated that the vehicle last did not start a couple of months before the hearing at a parking lot. In response, she did as previously instructed by the dealer: get out, lock and unlock the vehicle, and start again.

C. Inspection

Upon inspection before the test drive at the hearing, the subject vehicle's odometer displayed 23,730 miles. During the test drive, the speedometer and tachometer respectively highlighted a range 10 mph above and below the current mph and 1,000 rpms above and below the current rpms. The highlighting resulted from the vehicle's "Spotlight" feature, which appeared to have been activated during a repair attempt. The vehicle appeared to operate normally. The test drive ended with 23,750 miles on the odometer.

D. Summary of Respondent's Evidence and Arguments

Mr. Brandon Sangster, customer satisfaction senior technical specialist, testified that he did not see the AEB not available message after May 25, 2018. Moreover, he did not find any AEB fault codes. Mr. Sangster explained that the "AEB Not available Windshield camera obscured" message may result from a dirty windshield, or bugs. The AEB uses a stereo camera system and the message may occur if one or both cameras are blocked. Mr. Sangster affirmed that he did not see any AEB fault codes when seeing the vehicle after 22,183 miles. Mr. Sangster noted that steering was not identified as an issue and he had to deduce when/where the issue occurred based on broad assertions. He found the vehicle to be operating as designed. He explained that AEB was only a driving aid and not the primary source of stopping. He confirmed that the owner's manual stated that the AEB was not a substitute for the driver. Mr. Sangster found that the vehicle would start every time over a span of three days and he did not experience any steering problems. Regarding the touch screen, he explained that it may blank out for various reasons, for example plugging in a phone. However, the vehicle did not have any faults stored regarding the touchscreen. Moreover, the screen going blank and rebooting did not substantially impair the vehicle. The headliner appeared natural and normal for a leather headliner. Mr. Sangster explained that the vehicle had an active air suspension. The vehicle monitors the corners of the vehicle and can be adjusted to take the vehicle off-road. The suspension can also be manually adjusted and locked but most people leave the suspension in automatic mode, which will adjust the suspension according to speed and cornering. He put the suspension in low access mode, expecting it to rise with speed and put it in the high setting. Mr. Sangster measured the ride height and checked for differences sitting overnight.

On cross-examination, Mr. Sangster acknowledged that he had not seen the vehicle before October 2019. He test drove the vehicle 17 to 18 miles for 30 to 40 minutes. He found no codes relevant here. No repairs were performed at the October 2019 visit because Mr. Sangster found no issues. Regarding AEB, he explained that it should not be tested, since it would require a very bad situation. Mr. Sangster did not find anything to substantiate why the vehicle would not start. He noted the possibility that a phone may restrict the fob's signal. He pointed out that one video (Complainant's Ex. 2, Car Doesnt Start _ Eletrical Issue MOVIE.MOV) shows that the engine was already running at 600 rpm. He did not find any data indicating the vehicle will not start. Even the battery in the fob did not show any indications of being low.

On redirect examination, Mr. Sangster stated that if the vehicle battery fell below a certain threshold, it would exhibit certain things, such as rapid clicking. But if the battery is low enough, it may not start at all. Mr. Sangster affirmed that the 16,000 miles service was declined but should have been performed.

E. Analysis

The Complainant asserted that the following issues remained unresolved: the AEB, height/suspension, no-start, instrument panel/touch screen displays rebooting, and hard to steer left/right. The Complainant did not include the steering issue in the complaint and the Respondent objected to the consideration of this issue, accordingly the steering issue will not be addressed here. A preponderance of the evidence shows that the subject vehicle has warrantable defects that qualify for warranty repair relief but not repurchase or replacement.

1. Currently Existing Warrantable Defect

As an initial matter, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect)²⁷ that continues to exist after repair.²⁸ In part, the warranty generally states that the Respondent "warrants that during the warranty period, if a Land Rover vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for service."

²⁷ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁸ TEX. OCC. CODE § 2301.605.

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁹ In this case, the last actual repair for the AEB and blank screen occurred on August 5, 2019; the suspension on March 30, 2019; and the no-start on May 25, 2018. The record indicates that no repairs were performed at the October 29, 2019, attempt because no issues were found.

a. AEB

The Complainant testified that an AEB indicator last came on about a month before the hearing (mid-October 2019), while the last AEB repair occurred on August 5, 2019. However, the record reflects that at least some of the AEB warnings were ostensibly due to the cameras being obscured, which is not a defect but a result of external environmental factors. For instance, at 22,183 miles, the vehicle displayed “AEB Not Available Windshield Camera obscured.”³⁰ Because the record does not appear to sufficiently distinguish between actual AEB malfunctions as opposed to conditions caused by external factors, a preponderance of the evidence does not show that the AEB issue is an existing defect.

b. Suspension

The height/suspension issue last occurred a couple of weeks before the last repair attempt (mid-October 2019), while the last repair for the issue occurred on March 30, 2019. Therefore, the suspension issue appears to currently exist.

c. No-Start

The vehicle failed to start about five weeks before the hearing (early October 2019), while the last no-start repair occurred on May 25, 2018. Further, Complainant’s Ex. 22 shows the vehicle

²⁹ 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.”).

³⁰ Complainant’s Ex. 1, 22183 miles AEB Sensor.pdf.

failing to start on November 20, 2019, at 23,522 miles. Accordingly, the evidence shows that the no-start issue continues to exist.

d. Displays

The displays last rebooted within three to four weeks before the final repair attempt or about five or six weeks before the hearing (late September 2019). Given that the last repair for this issue happened on August 5, 2019, this issue continues to exist after repair.

2. Reasonable Repair Attempts

The Lemon Law requires reasonable repair attempts to qualify for repurchase or replacement.³¹

a. Four Attempt Presumption

As outlined in the discussion of applicable law, the Lemon Law presumes a vehicle to have had reasonable repairs if two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following delivery to the owner; and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the second repair attempt. Only the AEB issue meets this presumption; however, as outlined above, a preponderance of the evidence does not show that the AEB issue is an existing defect.

b. Two Attempt Presumption for Serious Safety Hazards

The Lemon Law also provides a two-repair attempt presumption for serious safety hazards but none of the issues here fall within the definition of serious safety hazard.

c. 30-Day Presumption

The Lemon Law also has a presumption for vehicles out of service at least 30 days for repair with at least two repair attempts in the first 12 months or 12,000 miles. However, the 30 days do not include days for which the complainant has been provided a comparable motor vehicle. The Complainant acknowledged receiving a loaner vehicle for the applicable time periods but contended that the loaner vehicles were not comparable to the subject vehicle ostensibly because of the difference in the vehicles' price. The Lemon Law does not define the term, "comparable motor vehicle" in § 2301.605(c). The Department's rules do define "comparable motor vehicle"

³¹ The pre-2017 version of the Lemon Law applies to vehicles purchased before September 1, 2017.

as “[a] new motor vehicle, with comparable mileage, from the same manufacturer, converter, or distributor’s product line and the same model year or newer as the motor vehicle to be replaced or as reasonably equivalent to the motor vehicle to be replaced.”³² However, this definition only applies to Subchapter B; other than the definition section, the term only appears in § 215.208, regarding the replacement of vehicles under a Lemon Law decision granting relief. As a result, for purposes of § 2301.605(c), we refer to the plain meaning of comparable motor vehicle. Dictionary.com defines “comparable” as “capable of being compared; having features in common with something else to permit or suggest comparison.”³³ Additionally, the Lemon Law expressly considers impairment of use in granting repurchase or replacement relief. In other words, the vehicle’s usage is relevant under the Lemon Law. Accordingly, though a loaner vehicle need not be identical to the subject vehicle, a loaner vehicle should be comparable in relation to the Complainant’s use of the subject vehicle. For instance, if a complainant owns a full-size SUV to be able to transport seven people, then a seven-passenger minivan may be comparable. In contrast, if the complainant uses the SUV to tow a large trailer beyond the towing capacity of the minivan, then the minivan would not be comparable. In sum, a comparable vehicle must fit the complainant’s use of the subject vehicle. In the present case, the Complainant mentioned the price of the subject as compared to the loaner vehicles as not making the vehicles comparable but did not address comparability in terms of usage of the vehicle. Accordingly, a preponderance of the evidence does not show that the loaner vehicles in this case were not comparable for purposes of the 30-day standard. Consequently, the subject vehicle does not satisfy the 30-day standard for reasonable repairs.

d. Other Reasonable Repair Attempts

In addition to the presumptions above, a reasonable number of attempts to repair the vehicle may be found based on different circumstances and fewer attempts.³⁴ However, the evidence does not appear to include any circumstances that warrant varying from the presumptions above.

³² 43 Tex. Admin. Code § 215.201(c) (emphasis added).

³³ *Comparable*, Dictionary.Com Unabridged (2019), <https://www.dictionary.com/browse/comparable> (last visited August 9, 2019).

³⁴ *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.’”).

3. Warranty Repair Relief

As noted in the discussion of applicable law, a vehicle may still qualify for warranty repair relief of warrantable defects even if the vehicle does not meet all the requirements for repurchase/replacement. As described above, the subject vehicle more likely than not continues to have warrantable defects subject to warranty repair.

4. Attorney's Fees

The Department's rules only allow reimbursement when repurchase or replacement is ordered. Moreover, attorney's fees are only reimbursable "if the complainant retains counsel after notification that the respondent is represented by counsel."³⁵ In this case, the Respondent's attorney filed a notice of appearance in this case on May 23, 2019. However, the notice of defect sent on March 10, 2017, reflects that the Complainant had already retained counsel. Consequently, attorney's fees are not reimbursable.

III. Findings of Fact

1. On January 11, 2017, the Complainant, purchased a new 2017 Land Rover Range Rover from Autobahn Imports LP, a franchised dealer of the Respondent, in Fort Worth, Texas. The vehicle had 27 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.
3. The vehicle's warranty generally states that the Respondent "warrants that during the warranty period, if a Land Rover vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for service."

³⁵ 43 TEX. ADMIN. CODE § 215.209(a).

4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
02/16/17	1,083	AEB
03/29/17	1,717	AEB
04/19/17	2,352	AEB
07/12/17	4,327	AEB
08/22/17	5,491	AEB
09/11/17	6,267	AEB
02/23/18	9,735	Instrument cluster blank
05/25/18	12,161	No-start, suspension
11/05/18	15,809	Display blank
03/30/19	19,886	AEB, display blank, suspension
08/05/19	21,901	AEB, screen blank
10/29/19	23,208	No-start, suspension, touch screen reboots, AEB

5. No repairs were performed at the October 29, 2019, repair attempt, because no nonconformities could be found.
6. On March 10, 2017, the Complainant's attorney provided a written notice of defect to the Respondent; however, the notice did not identify any specific defects or nonconformities. As a result, the Respondent did not have notice of the specific defects until receiving a copy of the complaint.
7. On March 26, 2019, the Complainant filed a complaint with the Department alleging the following defects:

date not displaying on home screen or infotainment center, radio turning on by itself intermittently, crackling sound heard from dashboard area when radio is on, rain sensor setting for windshield wipers inoperable, speed limit display system defects, Eco start/stop function defects, AEB (Autonomous Emergency Braking) fault displayed, software conflict between modules, phone will not connect through Bluetooth intermittently, restrictive fuel filler pipe necessitating replacement, Auto High Beam Sensor Blocked message illuminating, remote start inoperable intermittently, Traction Reduced message illuminating, AEB Initializing message illuminating constantly, sign recognition system inoperable, system faults in IMAP module, AEB system fault, when pulling out of parking spot Forward Alert system beeps loudly, when vehicle put in Reverse and while driving in Reverse loud clunking noise heard, Lane Keep Assist system inoperable, Auto High Beam Blocked message illuminating, [would] not start until sits for few minutes to hours, Windshield Camera Obstructed message illuminating, many messages illuminating at random times, AEB Not

Available message incorrectly displayed, lift gate drain trim pieces are warped, and Blind Spot Monitor Blocked message illuminating.

8. On May 22, 2019, 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.
9. The hearing in this case convened on November 14, 2019, in Killeen, Texas, before Hearings Examiner Andrew Kang. The hearing was recessed and reconvened on November 22, 2019, in Austin, Texas. The record closed on December 9, 2019, upon admission of Complainant's Exhibit 22. Adam Mott, attorney, represented the Complainant. John Chambless, attorney, represented the Respondent.
10. The vehicle's odometer displayed 23,730 miles at the time of the hearing.
11. The vehicle's warranty was in effect at the time of the hearing.
12. Upon inspection before the test drive at the hearing, the subject vehicle's odometer displayed 23,730 miles. The vehicle appeared to operate normally. The test drive ended with 23,750 miles on the odometer.
13. The record does not adequately distinguish between actual AEB malfunctions as opposed to conditions caused by external factors, making the current existence of an AEB defect uncertain.
14. The height/suspension issue last occurred a couple of weeks before the last repair attempt (mid-October 2019), while the last repair for the issue occurred on March 30, 2019.
15. The vehicle failed to start about five weeks before the hearing (early October 2019), while the last no-start repair occurred on May 25, 2018. Further, the vehicle failed to start on November 20, 2019, at 23,522 miles.
16. The displays last rebooted within three to four weeks before the final repair attempt or about five or six weeks before the hearing (late September 2019), while the last repair for this issue happened on August 5, 2019.

17. None of the existing defects had two repair attempts in the 12 months or 12,000 miles, following delivery of the vehicle.
18. None of the existing issues fall within the definition of serious safety hazard.
19. The Complainant was provided a comparable loaner vehicle while the subject vehicle was out of service for repair.

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 based on the AEB issue. The Complainant did not prove that the AEB issue was a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. The existing defects did not meet the requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. 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.

9. 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).
10. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
11. 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.

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 subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the following issues: air suspension malfunction, no-start, and the instrument panel/touch screen displays rebooting. Upon this Order becoming final under Texas Government Code § 2001.144.³⁶ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. 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).

³⁶ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

SIGNED February 7, 2020

A handwritten signature in black ink, appearing to read "Andrew Kang", is written over a horizontal line.

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