

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0013199 CAF**

KEN WILCOX,
Complainant

v.

**AMERICAN HONDA MOTOR
COMPANY, INC.,**
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Ken Wilcox (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 American Honda Motor Company, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on February 25, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Daniel Durand, attorney represented the Complainant. Abigail Mathews, 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 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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹¹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹²

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has 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 and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹² *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1). 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 to provide notice of the defect or nonconformity to the Respondent.

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 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.

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 nature of the complaint and the specific problems or circumstances forming the basis of the claim

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 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.”).

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 December 18, 2017, the Complainant, purchased a new 2018 Honda CR-V from AutoNation Honda Lewisville, a franchised dealer of the Respondent, in Lewisville, Texas. The vehicle had five miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On April 16, 2019, the Complainant provided a written notice of defect to the Respondent. On July 9, 2019, the Complainant filed a complaint with the Department alleging that fuel migrated into the oil system causing the oil level to rise.

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).

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

| Date | Miles | Issue |
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General description of issues

The Complainant explained that some fuel injected engines have issues with fuel dilution but his vehicle worsened after a service campaign and software fix. He testified that he would smell fuel when passing. He had intended to retire to Alaska and take the vehicle there. However, his research found the engine's issue was more of a problem in the cold. Given that the vehicle already exhibited problems in Texas' warm climate, the Complainant was reluctant to take the vehicle to Alaska. The Complainant brought the vehicle in for service on April 17, 2018, at which time the oil level was above normal. At the time, he believed that the factory had overfilled the vehicle. Subsequently, after an oil change, the oil level appeared high, which the Complainant initially attributed to overfilling at the dealership. The vehicle continued to have problems even after the software fix. The Complainant pointed out that the vehicle's owner's manual instructs not to fill engine oil above the upper mark and that overfilling may cause leaks and engine damage.²⁷ At the March 19, 2019, service visit, the technician attempted to (but could not) duplicate the concern while driving. The technician confirmed that the vehicle already had the latest software updates. At the April 8, 2019, service visit, the oil was above the full mark and the technician dropped the oil to the proper level and took an oil sample for the Complainant. An oil analysis showed 0.5% fuel in the oil at 1,216 miles after the last oil change and 1.5% fuel in the oil at 1,977 miles after the last oil change. The oil level was above the full mark at the May 8, 2019, service visit. The district parts & service manager, Jeff Queen, inspected the vehicle on October 17, 2019, and the oil was at a normal level. The Complainant represented that he was not allowed to observe the inspection. He had an independent repair facility, Christian Brothers Automotive - Corinth,

²⁷ Complainant's Ex. 3B, Excerpt from 2018 Honda CR-V Owner's Manual.

sample the oil for another analysis. The Complainant stated that the service campaign for the oil dilution did not resolve his vehicle's problem, noting that the highest fuel dilution occurred after the software update. However, he also testified that the vehicle drove "fine". He affirmed experiencing a gas smell once. He explained that driving long distances slightly mitigated the problem. However, he had intended to operate the vehicle on an island.

On cross-examination, the Complainant testified that he was not aware of any driveability issues or any diagnostic trouble codes (DTCs). He confirmed that the vehicle did not display a malfunction indicator light (MIL)/check engine light. He affirmed that he never waited for the maintenance minder to bring the vehicle in for an oil change. The Complainant acknowledged receiving a call about a product update but he did not know what the update was about. He confirmed that the vehicle did not display a MIL/check engine light at the time he observed the high oil level at the dealership on March 9, 2019. He did not know of any DTCs associated with the instance he noticed the fuel smell. The Complainant acknowledged that he did not know if Christian Brothers followed any directions from Oil Analyzers when obtaining an oil sample. He affirmed being notified that the oil level normally fluctuated over the full mark but he was not satisfied with this explanation. Though the vehicle never exhibited a warning indicator or DTC, the Complainant was concerned about what could happen.

C. Inspection

Upon inspection at the hearing, before the test drive, the vehicle's odometer displayed 19,456 miles. The vehicle showed oil life at 40%. The oil level exceeded the upper mark on the dipstick. The vehicle was driven predominantly on a freeway and service roads. In particular, the vehicle was driven on and off freeway ramps to try to duplicate the fuel smell. The complainant noticed a fuel smell once during aggressive acceleration. The test drive ended with 19,461 miles on the odometer. The oil level was checked after standing approximately three minutes. The Complainant stated that the oil had a fuel smell. The oil level was between the upper and lower marks on the dipstick.

D. Summary of Respondent's Evidence and Arguments

Mr. Queen testified that the vehicle received a software update, which improves efficiency and maybe improves longevity. In contrast, a recall concerns safety and requires immediate

attention. Mr. Queen explained that the Respondent's video related to oil dilution actually concerned driveability issues, specifically misfires from too rich of a fuel mixture, which would set DTCs. However, none of the repair orders indicated the existence of any driveability issues or DTCs. Mr. Queen explained that the owner's manual's notice regarding overfilling only applied to the filling of oil and not any fluctuation due to the mixture of fuel. When Mr. Queen inspected the vehicle, the oil level was between the lower and upper marks. He drained the oil into a clean container to observe, the cleanliness of the oil, any smell, etc. The vehicle did not have any DTCs at the inspection. Mr. Queen affirmed that if the oil rose to excessive levels, he would expect DTCs.

On cross-examination, Mr. Queen acknowledged that diluted oil circulating in the engine could be harmful, but DTCs would be set. The DTC would be for a misfire. He explained that the software update did not address oil dilution and instead concerned driveability issues.

Doug Toler, field technical specialist, testified that the product sheet helped educate customers about their vehicle and explained that the oil level reading above full was normal for the engine. There was no correction for the high dipstick level. For a problem to exist, the vehicle would have to exhibit a MIL or driveability issue, which could be a lag or noise. However, he saw no concerns. If enough fuel diluted the oil to cause a concern, the vehicle would behave as if under load and a malfunction lamp would illuminate. Mr. Toler elaborated that an update was for improving, whether a problem existed or not. He explained that there were no guidelines about what constituted an abnormal oil level. Instead, an abnormality would be indicated by a DTC and check engine light. The oil level may normally vary due to environmental conditions and driving habits. Mr. Toler agreed that the Oil Analyzers report reflected what was sampled, which was high because of varying oil dilution. However, nothing indicated that the fuel in the oil ran at 5% all the time. Mr. Toler added that the purpose of the service bulletin (software update) was to help reach operating temperature faster and make the engine operate more quickly. In sum, he did not find anything not normal and did not believe the engine had a defect.

On cross-examination, Mr. Toler agreed that if the oil dilution level ran high all the time, this would be at the edge of acceptability. However, he did not consider the increase in dilution from 0.5% to 1.5% to be unusual. He indicated that there was no specific normal level of oil dilution. However, an abnormal level would set off an indicator light. Mr. Toler responded that

the software update did not mitigate oil dilution but instead allowed the engine to reach operating temperature faster and allowed a more complete burn of the fuel in the cylinders. Mr. Toler described that abnormally high dilution would cause misfires and an overly rich fuel mixture, which would set codes. He elaborated that the DTC indicated a misfire (not a particular dilution level). The DTC would be reflected on the dashboard as a warning light and the driver should be able to feel the misfire.

E. Analysis

As detailed below, the alleged defects in this case do not qualify for relief. Lemon Law relief does not apply to all issues that may occur with a vehicle but only to defects covered by warranty (warrantable defects).²⁸ 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: “Honda will repair or replace any part that is defective in material or workmanship under normal use. See Proper Operation on page 35. All repairs/replacements made under this warranty are free of charge. The replaced or repaired parts are covered only until this New Vehicle Limited Warranty expires.”²⁹ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³⁰ 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. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from

²⁸ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁹ Complainant’s Ex. 11, Warranty.

³⁰ 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.”).

manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or 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.³¹ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics or even design defects. Even though an issue may be undesirable or problematic, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

As described in the discussion of applicable law, the Complainant has the burden of proving that a warrantable defect exists. In the present case, the Complainant asserts that the oil level exceeding the upper mark on the dipstick indicates the existence of a defect. However, the owner's manual as well as other documentation from the manufacturer show that the oil level may normally fluctuate above the maximum fill level due to the vehicle's design. Significantly, the vehicle's owner's manual specifies that "[u]nder certain driving conditions, it is normal for the engine oil level to rise above the upper mark."³² Moreover, the Understanding Oil Dilution Product Characteristic Sheet explains that:

This engine uses direct injection to spray fuel into the cylinder. During engine operation, a very small amount of fuel may stick to the cylinder walls and drain into the crankcase where it mixes with the oil. . . . However, when there is more fuel being mixed into the oil than is vaporizing, the oil becomes diluted. This in turn can cause the oil level in the oil pan to rise, which you will see when reading the dipstick. . . . This is a normal occurrence with this engine.³³

In sum, the oil dilution is a design characteristic shared by CR-Vs with the same engine and not a manufacturing defect specific to the subject vehicle. Even if the oil dilution rises to the level of a design defect, because the warranty only covers manufacturing defects, the oil dilution and related high oil level cannot support any relief in this case. Moreover, any oil dilution that did occur never caused any performance issues nor triggered any DTCs or warning indicators.

³¹ 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).

³² Respondent's Ex. 3, Excerpt from 2018 CR-V Owner's Manual.

³³ Respondent's Ex. 5, Product Characteristic Sheet, Understanding Oil Dilution.

III. Findings of Fact

1. On December 18, 2017, the Complainant, purchased a new 2018 Honda CR-V from AutoNation Honda Lewisville, a franchised dealer of the Respondent, in Lewisville, Texas. The vehicle had five miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.
3. On April 16, 2019, the Complainant provided a written notice of defect to the Respondent.
4. On July 9, 2019, the Complainant filed a complaint with the Department alleging that fuel migrated into the oil system causing the oil level to rise.
5. On October 4, 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.
6. The hearing in this case convened on February 25, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Daniel Durand, attorney represented the Complainant. Abigail Mathews, attorney, represented the Respondent.
7. The vehicle's warranty was in effect at the time of the hearing.
8. Upon inspection at the hearing, before the test drive, the vehicle's odometer displayed 19,456 miles. The vehicle showed oil life at 40%. The oil level exceeded the upper mark on the dipstick. The vehicle was driven predominantly on a freeway and service roads. In particular, the vehicle was driven on and off freeway ramps to try to duplicate the fuel smell. The complainant noticed a fuel smell once during aggressive acceleration. The test drive ended with 19,461 miles on the odometer. The oil level was checked after standing approximately three minutes. The Complainant stated that the oil had a fuel smell. The oil level was between the upper and lower marks on the dipstick.

9. The oil level may normally fluctuate above the upper mark on the dipstick due to the vehicle's engine design.

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 or warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 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. 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 April 27, 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