

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0005958 CAF**

JOSE ROBLES,	§	BEFORE THE OFFICE
Complainant	§	
	§	
v.	§	OF
	§	
NISSAN NORTH AMERICA, INC,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Jose Robles (Complainant) seeks repair relief pursuant to Texas Occupations Code § 2301.204 (Warranty Performance) for alleged defects in his 2016 Nissan Sentra. Complainant asserts that the vehicle has a defect or nonconformity which causes the vehicle's transmission to intermittently not engage in low (L) gear. Nissan North America, Inc. (Respondent) argued that the vehicle is operating as designed, does not have a manufacturing defect, and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repair relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law.

The hearing in this case originally convened telephonically on April 14, 2020, before Hearings Examiner Edward Sandoval. Jose Robles, Complainant, appeared and represented himself at the hearing. Nissan North America, LLC, Respondent, was represented by Jesse Juan, Arbitration Specialist. During the hearing on the merits, the parties agreed to a settlement of the complaint. Pursuant to the settlement agreement, the complaint was dismissed from the Office of Administrative Hearings (OAH) docket. The hearings examiner issued an order dismissing the Warranty Performance complaint on April 15, 2020.

Complainant filed a Motion for Rehearing on May 10, 2020 indicating that repairs performed to the vehicle pursuant to the settlement agreement had not resolved the issue he was experiencing with the subject vehicle. On June 9, 2020, Order No. 3: Granting Motion for Reinstatement and Rehearing was issued by the hearings examiner. The hearings examiner issued Order No 5: Setting Hearing on June 9, 2020, and a hearing on the merits was scheduled for September 10, 2020.

On August 27, 2020, the hearings examiner issued Order No. 6: Continuing and Setting Rehearing, ordering a continuance for the hearing on the merits because an ordered inspection of the vehicle had not been conducted by Texas Department of Motor Vehicles (Department)

personnel due to the restrictions on travel imposed by the governor's office because of the Covid-19 national emergency. The hearing was continued until November 12, 2020, in order to allow the vehicle inspection to take place.

The hearing convened telephonically on November 12, 2020, before Hearings Examiner Edward Sandoval. Jose Robles, Complainant, appeared and represented himself in the hearing. Respondent was represented by Jesse Juan, Arbitration Specialist. The hearing record closed on November 12, 2020.

II. DISCUSSION

A. Applicable Law

Texas Occupations Code § 2301.002(24) provides that a “[n]ew motor vehicle” means a motor vehicle that has not been the subject of a retail sale regardless of the mileage of the vehicle.”

Texas Occupations Code § 2301.604 provides that “[a] manufacturer, converter, or distributor that is unable to 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 shall reimburse the owner for reasonable incidental costs resulting from loss of use of the motor vehicle because of the nonconformity or defect and:

- (1) replace the motor vehicle with a comparable motor vehicle; or
- (2) accept return of the vehicle from the owner and refund to the owner the full purchase price, less a reasonable allowance for the owner's use of the vehicle, and any other allowances or refunds payable to the owner.”

Texas Occupations Code § 2301.606 provides that in order to have the options of repurchase or replacement available as remedies, Complainant must commence the Lemon Law proceeding “not later than six months after the earliest of:

- (1) The expiration date of the express warranty term; or
- (2) The dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.”

For Complainants who fail to meet the timelines described above repair relief is available under Occupations Code § 2301.204(a) which provides that “[t]he owner of a motor vehicle or the owner's designated agent may make a complaint concerning a defect in a motor vehicle that is

covered by a manufacturer's, converter's, or distributor's warranty agreement applicable to the vehicle." The relief available under this section of the Code is repair of the vehicle in question.

B. Complainant's Evidence and Arguments

Complainant purchased a new 2016 Nissan Sentra on January 12, 2017, from Gunn Nissan (Gunn) in San Antonio, Texas.¹ The vehicle's mileage at the time of delivery was 12.² Respondent provided a new vehicle limited warranty for the vehicle which provides bumper-to-bumper warranty coverage for the vehicle for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent provided a five (5) year or 60,000 mile powertrain warranty for the vehicle. On the date of hearing the vehicle's mileage was 100,705. At the time of hearing the vehicle's warranties had expired.

Complainant stated that he first experienced issues with the vehicle's transmission in August of 2017. He took the vehicle to Gunn for repair on August 25, 2017. Gunn's service technician replaced the vehicle's mass air flow sensor in order to address the issue of the vehicle's check engine light illuminating.³ Complainant stated that he mentioned to Gunn's service advisor an issue with the vehicle's transmission jerking and slipping when he drove the vehicle. However, this was not included on the repair order and no repair was performed for the issue. The vehicle's mileage on this occasion was 19,233.⁴ The vehicle was in Gunn's possession for one (1) day on this occasion. Complainant did not receive a loaner vehicle at the time.

Complainant testified that he continued to experience issues with the vehicle's transmission slipping and jerking. On August 13, 2018, Complainant took the vehicle to Gunn for repair because the vehicle's service engine soon (SES) light illuminated. Gunn's service technician performed a repair to the vehicle for the SES light turning on, but did not perform any repairs to the transmission although Complainant raised the issue to Gunn's service advisor.⁵ The vehicle's mileage at the time was 62,384.⁶ The vehicle was in Gunn's possession for one (1) day. Complainant did not receive a loaner vehicle while his vehicle was being repaired.

Complainant testified that the vehicle's transmission continued to slip and jerk when he drove the vehicle. The issue continued to become more noticeable. Complainant stated that the vehicle then began to shut down while he was driving it. The engine RPMs would increase, but the vehicle would lose power. Complainant took the vehicle to Gunn for repair for the issue on June

¹ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated January 12, 2017.

² Complainant Ex. 2, Odometer Disclosure Statement dated January 12, 2017.

³ Complainant Ex. 4, Repair Order dated August 25, 2017.

⁴ *Id.*

⁵ Complainant Ex. 5, Repair Order dated August 13, 2018.

⁶ *Id.*

7, 2019. Gunn's service technician couldn't recreate the issue, but found a stored diagnostic trouble code (DTC).⁷ The technician replaced the vehicle's throttle body in order to address the issue.⁸ The vehicle's mileage on this occasion was 83,885.⁹ The vehicle was in Gunn's possession until June 25, 2019.¹⁰ Complainant did not receive a loaner vehicle while his vehicle was being repaired.

Complainant testified that he continued to experience problems with the vehicle's transmission. He took the vehicle to Gunn for repair for the transmission issues on November 25, 2019. He informed Gunn's service advisor that the transmission was slipping and jerking. Complainant stated that the recommendation from the dealer's service advisor was to replace the transmission, but Complainant refused because he was told that he would have to pay out of pocket for it. Complainant left the vehicle at Gunn's location for five (5) months while he tried to resolve the issue.

Complainant filed a Warranty Performance complaint with the Texas Department of Motor Vehicles (Department) on December 17, 2019.¹¹

A hearing on the merits of Complainant's Warranty Performance complaint was convened on April 14, 2020. During the hearing, Respondent's representative indicated that Respondent was willing to replace the vehicle's transmission at no cost to Complainant. Complainant agreed to settle the complaint under the terms outlined by Respondent.

On April 17, 2020, the vehicle's transmission and rear main seals were replaced at the Gunn location. Complainant stated that after the transmission was replaced, the vehicle seemed to drive normally. However, Complainant noticed the vehicle's transmission did not operate in low (L) gear. The transmission would not engage when he attempted to use the gear.

Complainant took the vehicle to Gunn for repair for the transmission issue on July 3, 2020. Complainant indicated that there was a problem with the smell of burning CVT fluid when driving at 85 to 100 mph.¹² No diagnostics for the issue were performed because the technician was prohibited from driving over the speed limit of 65 mph.¹³ The vehicle's mileage at the time was 94,260.¹⁴

⁷ Complainant Ex. 6, Repair Order dated June 7, 2019.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Complainant Ex. 3, Warranty Performance Complaint dated December 17, 2019.

¹² Complainant Ex. 7, Repair Order dated July 3, 2020.

¹³ *Id.*

¹⁴ *Id.*

As Complainant filed a Motion for Rehearing because of continued problems with the vehicle's transmission, the hearings examiner requested that a Department case advisor inspect the vehicle. The inspection took place on September 22, 2020, at the Gunn dealership. The vehicle's mileage was 97,366 on the date of the inspection.¹⁵ John Dufour, Case Advisor, performed the inspection.¹⁶ Mr. Dufour determined that there were no abnormal conditions, no diagnosis could be made, and that no repairs were recommended.¹⁷ The report did not indicate that Mr. Dufour inspected the vehicle's low (L) gear to determine if it was operating properly.

Complainant testified that he feels that the vehicle's low (L) gear is not catching and not working. The problem occurs intermittently. Complainant indicated that he uses low gear when driving up hills in the area where he lives.

C. Respondent's Evidence and Arguments

Jesse Juan, Arbitration Specialist, represented and testified for Respondent at the hearing. Mr. Juan stated that Respondent provided a three (3) year or 36,000 mile bumper-to-bumper warranty for the vehicle, as well as a five (5) year or 60,000 mile warranty for the vehicle's powertrain.

Mr. Juan testified that Respondent had agreed to replace the vehicle's transmission as settlement of the Warranty Performance complaint initially filed by Complainant on December 17, 2019. The transmission was replaced on April 17, 2020, at the Gunn location, at no cost to Complainant. Respondent provided a one (1) year or 12,000 mile warranty for the new transmission. Mr. Juan was not aware that there may be an issue with the low (L) gear in the new transmission.

D. Analysis

The issue to be addressed is whether Complainant's vehicle has a defect or condition that causes the vehicle's transmission's low (L) gear to not engage and which has not been repaired by Respondent. The preponderance of the evidence shows that the vehicle's low (L) gear intermittently does not engage. Complainant uses low gear to drive up hills and the engine has no power when he attempts to use the gear. As such, the hearings examiner must hold that the vehicle's transmission does not meet Respondent's warranties and should be repaired. Respondent will be ordered to repair the transmission so that it meets their warranties.

¹⁵ Commission Ex. 1, Vehicle Inspection Report dated October 1, 2020.

¹⁶ *Id.*

¹⁷ *Id.*

Complainant's request for repair relief is granted.

III. FINDINGS OF FACT

1. Jose Robles (Complainant) purchased a new 2017 Nissan Sentra on January 12, 2017, from Gunn Nissan (Gunn) in San Antonio, Texas with mileage of 12 at the time of delivery.
2. The manufacturer or distributor of the vehicle, Nissan North America, Inc. (Respondent), issued a new vehicle limited warranty for the vehicle which provides bumper-to-bumper warranty coverage for the vehicle for three (3) years or 36,000 miles, whichever occurs first. In addition, Respondent provided a five (5) year or 50,000 mile powertrain warranty.
3. The vehicle's mileage on the date of hearing was 100,705.
4. At the time of hearing the vehicle's warranties had expired.
5. In August of 2017, Complainant noticed that the vehicle's transmission seemed to jerk and slip out of gear.
6. Prior to filing the Warranty Performance complaint, Complainant took the vehicle for repair to Respondent's authorized dealer, Gunn, in order to address his concerns with the vehicle's transmission on the following dates:
 - a. August 25, 2017, at 19,233 miles;
 - b. August 13, 2018, at 62,384 miles; and
 - c. June 7, 2019, at 83,885 miles.
7. On August 25, 2017, Gunn's service technician replaced a faulty mass air flow sensor in the vehicle in order to address a complaint about the vehicle's check engine light illuminating. No work was done for a transmission issue, although Complainant raised the issue at the time of the repair.
8. On August 13, 2018, Gunn's service technician performed repairs to address the fact that the vehicle's service engine soon (SES) light was illuminated. No work was done for a transmission issue, although Complainant raised the issue at the time of the repair.
9. On June 7, 2019, Gunn's service technician replaced the vehicle's throttle body because the vehicle was losing power when he attempted to accelerate to highway speeds which was due to a transmission concern.

10. On November 25, 2019, Complainant took the vehicle to Gunn for repair for the issue of the transmission slipping and jerking.
11. The vehicle was in Gunn's possession for five (5) months during the repair visit described in Findings of Fact #10.
12. On December 17, 2019, Complainant filed a Warranty Performance complaint with the Texas Department of Motor Vehicles (Department).
13. On April 17, 2020, Respondent replaced the vehicle's transmission pursuant to a settlement of the initial Warranty Performance complaint.
14. After the transmission replacement, Complainant found that the vehicle's transmission intermittently will not engage in low (L) gear.
15. Complainant took the vehicle to Gunn for repair for the transmission issue (as well as other issues) on July 3, 2020. The vehicle's mileage was 94,260 at the time.
16. No repair for the vehicle's transmission was performed during the repair visit described in Findings of Fact #15, as the technician was prohibited from driving the vehicle over the speed limit of 65 mph.
17. On September 22, 2020, John Dufour, Texas Department of Motor Vehicles' case advisor, inspected the vehicle at Gunn. The vehicle's mileage was 97,366 at the time.
18. Mr. Dufour determined that the vehicle was operating as designed at the time.
19. During the inspection described in Findings of Fact #17, Mr. Dufour did not attempt to drive the vehicle in low (L) gear to determine if that gear was working properly.
20. The only remedy available to Complainant is repair of the vehicle, since he filed the complaint on December 17, 2019, more than six (6) months after 24 months from the date of purchase (January 12, 2017).
21. On February 21, 2020, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.

22. The hearing in this case originally convened telephonically on April 14, 2020, before Hearings Examiner Edward Sandoval. Jose Robles, Complainant, appeared and represented himself at the hearing. Nissan North America, LLC, Respondent, was represented by Jesse Juan, Arbitration Specialist. During the hearing on the merits, the parties agreed to a settlement of the complaint. Pursuant to the settlement agreement, the complaint was dismissed from the Office of Administrative Hearings (OAH) docket. The hearings examiner issued an order dismissing the Warranty Performance complaint on April 15, 2020.
23. Complainant filed a Motion for Rehearing on May 10, 2020 indicating that repairs performed to the vehicle pursuant to the settlement agreement had not resolved the issue he was experiencing with the subject vehicle. On June 9, 2020, Order No. 3: Granting Motion for Reinstatement and Rehearing was issued by the hearings examiner. The hearings examiner issued Order No 5: Setting Hearing on June 9, 2020, and a hearing on the merits was scheduled for September 10, 2020. On August 27, 2020, the hearings examiner issued Order No. 6: Continuing and Setting Rehearing, ordering a continuance for the hearing on the merits because an ordered inspection of the vehicle had not been conducted by Texas Department of Motor Vehicles (Department) personnel due to the restrictions on travel imposed by the governor's office because of the Covid-19 national emergency. The hearing was continued until November 12, 2020, in order to allow the vehicle inspection to take place.
24. The hearing convened telephonically on November 12, 2020, before Hearings Examiner Edward Sandoval. Jose Robles, Complainant, appeared and represented himself in the hearing. Respondent was represented by Jesse Juan, Arbitration Specialist. The hearing record closed on November 12, 2020.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code § 2301.204 (Warranty Performance) and §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.

3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant proved by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition in the vehicle. Tex. Occ. Code § 2301.204.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repair relief pursuant to Texas Occupations Code § 2301.204 is hereby **GRANTED**. Respondent shall make any repairs needed to conform the vehicle's transmission (the vehicle's transmission intermittently not engaging in low gear) to the applicable warranty. Complainant shall deliver the subject vehicle to Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.¹⁸ Within 40 days after receiving the vehicle from Complainant, Respondent shall complete repair of the subject vehicle. However, if the Department determines Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider 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).

SIGNED January 8, 2021.



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

¹⁸ (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Order.