

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0003514 CAF**

**BRIAN MCHUGH,
Complainant**

v.

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

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Brian McHugh (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 that supports 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 April 23, 2021, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Abigail Mathews, attorney, represented the Respondent.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.² A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable

¹ TEX. GOV'T CODE § 2001.051.

² TEX. OCC. CODE § 2301.603.

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.”³ 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.⁴ 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.⁵

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.”⁶

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

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

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.”⁷

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.⁸

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.⁹

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

[A] nonconformity still exists that substantially impairs the vehicle’s use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express

⁷ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [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.”).

⁸ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁹ TEX. OCC. CODE § 2301.605(a)(2).

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.¹⁰

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.¹¹

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.¹² 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.¹³

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;¹⁴ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁵ and (3) the Lemon Law complaint was filed within six months after the earliest

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(c).

¹² *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.’”).

¹³ *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.”).

¹⁴ 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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

¹⁵ TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy the opportunity to cure requirement when the respondent authorizes 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. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *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.¹⁶

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.¹⁷ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁸

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁹ 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.²⁰ Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.²¹ 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 for

¹⁶ TEX. OCC. CODE § 2301.606(d)(2).

¹⁷ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁸ TEX. OCC. CODE § 2301.603(a).

¹⁹ 43 TEX. ADMIN. CODE § 215.66(d).

²⁰ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²¹ “In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case.” TEX. GOV'T CODE § 2001.051; “Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.” 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.”).

relief under the lemon law.”²² However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²³ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁴ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²⁵

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.²⁶ 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).²⁷ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁸

B. Summary of Complainant’s Evidence and Arguments

On May 25, 2018, the Complainant, purchased a new 2018 Honda Accord Hybrid from Howdy Honda, a franchised dealer of the Respondent, in Austin, Texas. The vehicle had 10 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides coverage for three years or 36,000 miles, whichever occurs first.

²² 43 TEX. ADMIN. CODE § 215.202(a)(3).

²³ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁴ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁵ *See* TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

²⁶ TEX. OCC. CODE § 2301.604.

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

On November 23, 2020, the Complainant provided a written notice of defect to the Respondent. On November 25, 2020, the Complainant filed a complaint with the Department alleging that the air conditioning (A/C) malfunctioned, the windshield was separating from the frame, and the vehicle's miles per gallon (MPG) fell below the EPA fuel economy estimates. The Complainant testified that the windshield was replaced with no continuing issues. Accordingly, only the A/C and fuel economy issues remain to be addressed in this proceeding.

Regarding the A/C issue, the Complainant explained that when using all vents, the dashboard and floor, the A/C operated erratically and stopped cooling. The Complainant first took the vehicle in November 2020 for warm air blowing from the dash. The vehicle had the same issue when the dealer replaced the condenser in February 2020. The Complainant could not identify anything precipitating the A/C issue. In one instance, the temperature at the floor vents was 95 degrees and the dash vents at 50 degrees, with the climate control set at 67 degrees. The condenser replacement seemed to work for 10,000 miles but the leaking problem reoccurred and the condenser was replaced. The Complainant last noticed the A/C issue within a few days before the hearing. The Complainant believed the fuel economy issue related to the climate control. He noted that he never achieved 47 MPG on a full tank but instead reached 39.25 MPG over about 14,000 miles. He pointed out that Honda's information states that running the A/C hurts fuel efficiency. He conjectured that the vehicle's A/C issues hurt the fuel efficiency. He first noticed the fuel economy issue within a few months, as mentioned in the October 2018 repair order. Based on the Complainant's data, the MPG lowered over time. He found the mileage to be worse during the pandemic when he was making short trips without commuting. He noted that he used regenerative braking and economy mode vigilantly. Over the last 220 miles, the vehicle averaged 39.7 MPG.

Upon clarification questions about the A/C, the Complainant elaborated that he noticed hot air blowing on his legs but he did not consider the cabin temperature uncomfortable because the dash vents blew very cold—the floor vents were twice the temperature of the dash vents. He added that when sitting in traffic, without tinted windows, and the floor vents blowing 86-degree air and the outside temperature in the 80s, the car felt too hot inside at times.

On cross-examination, the Complainant affirmed taking the vehicle to the dealer on October 10, 2018, for the A/C not working and fuel economy. He acknowledged that the dealer replaced the discharge hose and leaking condenser and recorded 50.5 MPG when test driving the

vehicle. He also took the vehicle to the dealer on February 20, 2020, primarily for the A/C but also for the windshield. He affirmed that he took the vehicle to the dealer on November 18, 2020, for the A/C blowing warm but the dealer could not confirm the concern. He surmised that the A/C system was recharged. However, he did not know if the Freon was recovered and put back in. The Complainant responded that mixing of cold and warm air sounded like the operation of the automatic climate control. He believed that the A/C on light indicated that mixing of warm and cold air would be overridden. He affirmed that he would press the A/C ON/OFF button. The display may show no words, A/C on, or A/C off. He would operate the A/C with A/C on showing on the display. He believed that with the A/C on, the vents should not blow air hotter than the outside temperature. The Complainant knew of no diagnostic trouble codes found relating to the fuel system. The Complainant confirmed that he only brought the vehicle in for the fuel economy issue in October 2018, other than the inspection by the Respondent's representative. He stated that he almost always kept the ECON mode on. He understood that ECON mode would dampen acceleration and may cause the climate control system to not be as cool. He did not have an issue with the coldness of the cold air but believed the climate control system should not blow warm air in warm ambient temperatures.

C. Inspection

Upon inspection at the hearing before the tests drive, the subject vehicle's odometer displayed 15,472 miles. The vehicle's information display showed the estimated average fuel economy as 39.7 MPG over 228 miles, prior to the test drive. A thermometer in a dashboard vent showed the temperature as 52 degrees Fahrenheit. The temperature at the dashboard vent fell to 36 degrees on the Lo setting. The front floor vent felt cold but did not have the air temperature measured with a thermometer. The ambient air temperature at the time of the test drive was 69 degrees. The test drive ended with 15,492 miles on the odometer, for a total of 20 miles driven on a mix of local roads, freeways, and freeway frontage roads. The vehicle's information display showed the estimated average fuel economy as 44 MPG for the test drive.

D. Summary of Respondent's Evidence and Arguments

Doug Toler, Field Technical Specialist, testified that he inspected the subject vehicle for two issues: the A/C difference in temperature between vents and the MPG discrepancy. For A/C

complaints, he followed the service manual for checking the vents: turning the air on full low and full high, and taking the temperature at the vents. He did not check the vents under the seat because conditioned air did not come from there. He explained that the climate control is the entire system. Though AUTO mode can be turned off, the climate control system is not turned off. In the AUTO mode, the computer makes the adjustments, including air blend doors, mode doors, blower motor speed. The car has an interior temperature sensor, an outside temperature sensor, a sunlight sensor on the dash, and an evaporator temperature sensor that provide feedback to the climate control for the amount of air and air temperature entering the cabin. Mr. Toler confirmed that the Accord did not have rear vents but did have heater ducts under the driver and passenger seats. He elaborated that because heat rises, heated air is introduced into the cabin at the bottom. He described that the front floor vents could blow both cold and hot air but primarily a warmer mixture of air going through the heater unit, which houses the evaporator core and heater core, which cool or warm the air. On January 15, 2021, Mr. Toler measured the temperature of the air out of the dash vents and found them functioning correctly. He then measured the Freon by connecting lines from the access ports to a machine that measures the Freon. The A/C system had the proper amount of Freon. Afterwards, the Freon was reinstalled. The temperature at the (dashboard) vents ranged from 38 degrees on the right and center and 40 degrees on the left. He concluded that the A/C system operated as designed. To test the MPG, Mr. Toler reset the trip meter and averaged 46.6 MPG over a 10.5-mile test drive on highways and residential areas. He explained that steady throttle speeds were more fuel efficient than stop and go driving, when constantly making throttle adjustments. Many factors affect fuel economy, including: the condition of vehicle, area where driving, time of year (winter versus summer gasoline blends), vehicle weight/load, driving habits, etc. Mr. Toler stated that the 44 MPG recorded during the test drive at the hearing did not present a problem. He affirmed that fuel economy problem may be reflected in fuel trim codes. Mr. Toler explained that the A/C not functioning would improve mileage since the compressor would not be putting a load on the engine. He concluded that the climate control was operating as designed. Mr. Toler testified that the vehicle will always try to regulate the temperature. Consequently, the temperature of the air at the vent is not the temperature set on the climate control dial. Rather, the car calculates how much cold and warm air to mix in to reach the set temperature. The A/C was designed to mix air to a proper ratio. Rather than a one-time adjustment, the climate control constantly monitors the vehicle, for example, for sunlight and shade, and the adjustments may fluctuate. Mr. Toler

explained that the MPG shown on the Monroney label (window sticker) is measured by an independent laboratory in a controlled environment and not real-world conditions.

On cross-examination, Mr. Toler testified that the A/C system was designed to operate with a certain amount of Freon at a certain pressure. Without enough Freon, heat will not transfer properly. With too much pressure, heat will also not transfer properly. Mr. Toler found that the vehicle's Freon was within specifications. He acknowledged that an improperly functioning sensor may possibly result in too cold or too warm air added to the cabin. He pointed out that the ducts under the seats were designed for heat. He explained that a pressure sensor would turn the system off if the Freon pressure were too high or low. If the pressure were abnormally high, the air would still blow but the compressor would turn off. On redirect examination, Mr. Toler testified that if the Freon were just slightly low, a difference between the side vents and (other) dash vents could be noticeable but when the Freon gets lower, the vents would be consistent across the dash. On recross examination, Mr. Toler explained the Freon range was based on a machine that can be programmed to add the desired amount of Freon. A range is specified because the A/C will operate properly within a range. On re-redirect examination, Mr. Toler testified that an extra 0.07 kg of Freon would not cause a problem.

Jason Kelly, District Parts and Service Manager, explained that the A/C removed moisture from the air but the A/C could be on simultaneously with full heat. Further, the temperature (control dial) determined how hot or cold the air was regardless of whether the A/C button was pushed. He explained that pressing the A/C ON/OFF button would run the A/C compressor. During the test drive at the hearing, Mr. Kelly did not observe anything abnormal with the climate control. He stated that during the test drive, with the temperature set at 67 degrees, the air at the vent reached 52 degrees. With the temperature set to LO, the air temperature dropped below 40. He surmised that the climate control operated normally. He attested that he did not feel any heat indicating any abnormal operation. Mr. Kelly explained that the climate control temperature will fluctuate more with the ECON mode because of the engine speed. Mr. Kelly acknowledged the occurrence of occasional mistakes on repair orders. He concluded that the A/C system did not have a defect and the vehicle had no fuel economy issues.

E. Analysis

As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law (or Warranty Performance Law for repair relief) by a preponderance. In other words, the Complainant must prove that every required fact is more likely than not true. In this case, a preponderance of the evidence does not show that the subject vehicle has a defect covered under warranty (warrantable defect).

Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist (i.e., currently exist) after repairs.²⁹ The Lemon Law does not require that a respondent provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's 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."³⁰ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer's specifications, and is not identical to other same model vehicles.³² A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards,

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

³⁰ Complainant's Ex. 3, New Vehicle Limited Warranty.

³¹ Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *E.g.*, *Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

³² *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd* in part on other grounds, *rev'd* in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.").

causing that vehicle to differ from other vehicles of the same kind.³³ In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those vehicles not produced according to the manufacturer's specifications.³⁴ 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. Accordingly, manufacturing defects occur during manufacturing and exist when the vehicle leaves the manufacturing plant. In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.³⁵ Design characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.³⁶ Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁷ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or dealer representations and improper dealer repairs (which occur after manufacturing), are not warrantable defects. Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect. As detailed below, a preponderance of the evidence does not show the existence of a manufacturing defect.

³³ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004) (“A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.”).

³⁴ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“This distinction between ‘aberrational’ defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].”).

³⁵ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd in part on other grounds*, *rev'd in part on other grounds*, 715 S.W.2d 629 (Tex. 1986) (“Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product . . . even though not flawed in its manufacture.”).

³⁶ 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).

³⁷ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“This distinction between ‘aberrational’ defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].”).

1. Air Conditioning

The evidence does not show that the A/C more likely than not has a warrantable defect. The parties do not dispute that the climate control may blow warm air with the A/C on. Rather, the issue is whether the A/C's performance comports with its design. As an initial matter, the vehicle's documentation explains that: "The air conditioning system regulates the temperature by mixing cold and warm air in an appropriate ratio." Accordingly, the A/C by design, uses both heated and cooled air to achieve the desired interior temperature, i.e., the climate control blends colder air from the vents and warmer air from the ducts to reach the desired temperature. The owner's guide indicates that the AUTO function involves the climate control regulating the temperature by mixing heated or cooled air: "The automatic climate control system can maintain your preferred interior temperature by selecting the proper mix of heated or cooled air and fan speed." However, none of the vehicle's documentation states that turning off or overriding the AUTO function stops the climate control from mixing heated and cooled air to regulate the temperature. The "How to Use the Climate Control System" video and corresponding screenshots state: "Adjust fan speed to override the auto function" conversely indicating that the auto function controls the fan speed; "Press the MODE button to override the auto function" conversely indicating that the auto function controls which vents the air blows from: the dashboard, floor, and/or defroster.³⁸ Moreover, the owner's manual elaborates that: "If any buttons are pressed while using the climate control system in auto, the function of the button that was pressed will take priority. The AUTO indicator will go off, but functions unrelated to the button that was pressed will be controlled automatically."³⁹ This appears to indicate that overriding a function by manually pressing a button does not affect all functions, even though the AUTO function is ostensibly off or overridden. In any event, the record shows that mixing heated and cooled air is method the climate control system uses to regulate the temperature. Further, the vehicle's documentation contemplates that the temperature at the vent may not match the temperature set on the climate control.

The climate control unit can automatically control vent temperature (air mix position), blower motor speed, blower intake, and electric A/C compressor operation to raise or lower the vehicle's interior temperature to match the customer's temperature setting. The actual vent outlet temperature largely depends

³⁸ Complainant's Exhibit 7.

³⁹ Respondent's Ex. 4, Owner's Manual Excerpts, Climate Control System (emphasis added).

upon the difference between the in-car temperature sensor reading and the customer's temperature setting.⁴⁰

Though the climate control's use of warmed air in conjunction with cooled air to regulate the temperature may be undesirable or unwanted, the climate control system is nevertheless operating according to design.

2. Fuel Economy

The evidence shows that the vehicle's actual fuel economy will normally vary from the EPA rated mileage on the window sticker (Monroney label). As an initial matter, the vehicle's window sticker expressly states that: "Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle."⁴¹ Also, the Respondent published a product characteristic sheet (titled: "Actual Fuel Mileage Varies From EPA Ratings") that further clarifies this issue:

The "Monroney label" on the side window of new cars shows EPA ratings received as a result of specific testing processes. The MPG ratings are intended for comparison purposes only, and the city and highway miles per gallon (mpg) that you experience may vary from those shown on the label and in advertising.

The mileage ratings on the label reflect the results attained under controlled laboratory conditions and are not the result of an actual road test. Test vehicles are run by professional drivers on a treadmill-like device that measures exhaust emissions and fuel usage. During the test, the vehicle's headlights, air conditioning, heater, audio unit, and all accessories are turned off.

The city portion of the test, at an average speed of 20 miles per hour (mph), simulates a 7.5 mile stop-and-go trip that includes idling time to approximate rush hour traffic delays. The highway portion, at an average speed of 48 mph, simulates a 10-mile rural and interstate drive without idling time. To make the final fuel economy ratings better reflect real-world fuel consumption, the results of the city test are lowered 10 percent, and the highway test are lowered 22 percent.⁴²

As explained above, the EPA fuel economy rating essentially exists to allow a standard comparison between vehicles. However, the EPA fuel economy ratings do not reflect actual on-the-road driving. Instead, the EPA fuel economy is measured under controlled conditions in a laboratory,

⁴⁰ Respondent's Ex. 2, A/C System Description.

⁴¹ Complainant's Ex. 10 (emphasis added).

⁴² Respondent's Ex. 3.

on a treadmill-like device, when averaging 20 mph to simulate city driving and 48 mph to simulate highway driving, while “the vehicle’s headlights, air conditioning, heater, audio unit, and all accessories are turned off.” The EPA rated the subject vehicle at 47 MPG under the controlled conditions outlined above. In comparison, the subject vehicle managed a fuel efficiency of 44 MPG during the 20-mile test drive at the hearing, which included both highway and local miles at varying speeds, with the A/C on. Further, the evidence shows that mileage will vary due to a variety of factors, such as: the vehicle’s condition, terrain, fuel type, vehicle weight/load, and driving habits. Additionally, the record contains no evidence of any fuel-related trouble codes. In sum, the vehicle’s variance from the EPA’s fuel economy rating appears normal and not the result of any defect.

III. Findings of Fact

1. On May 25, 2018, the Complainant, purchased a new 2018 Honda Accord Hybrid from Howdy Honda, a franchised dealer of the Respondent, in Austin, Texas. The vehicle had 10 miles on the odometer at the time of purchase.
2. The vehicle’s limited warranty provides coverage for three years or 36,000 miles, whichever occurs first.
3. On November 23, 2020, the Complainant provided a written notice of defect to the Respondent.
4. On November 25, 2020, the Complainant filed a complaint with the Department alleging that the air conditioning (A/C) malfunctioned, the windshield was separating from the frame, and the vehicle’s miles per gallon (MPG) fell below the EPA fuel economy estimates.
5. On February 5, 2021, 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 April 23, 2021, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Abigail Mathews, attorney, represented the Respondent.
7. The vehicle's odometer displayed 15,472 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. Upon inspection at the hearing before the tests drive, the subject vehicle's odometer displayed 15,472 miles. The vehicle's information display showed the estimated average fuel economy as 39.7 MPG over 228 miles, prior to the test drive. A thermometer in a dashboard vent showed the temperature as 52 degrees Fahrenheit. The temperature at the dashboard vent fell to 36 degrees on the Lo setting. The front floor vent felt cold but did not have the air temperature measured with a thermometer. The ambient air temperature at the time of the test drive was 69 degrees. The test drive ended with 15,492 miles on the odometer, for a total of 20 miles driven on a mix of local roads, freeways, and freeway frontage roads. The vehicle's information display showed the estimated average fuel economy as 44 MPG for the test drive.
10. The climate control system, by design, may mix both heated and cooled air to reach the interior temperature set on the temperature control dial. Accordingly, the climate control system may blow heated air with the A/C on.
11. The vehicle's actual fuel economy may normally vary from the EPA fuel economy ratings. The EPA fuel economy is measured under controlled conditions in a laboratory, on a treadmill-like device, when averaging 20 mph to simulate city driving and 48 mph to simulate highway driving, with the headlights, air conditioning, heater, audio unit, and all accessories turned off. Actual mileage will vary due to a variety of factors, such as: the vehicle's condition, terrain, fuel type, vehicle weight/load, and driving habits.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.

2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
8. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
9. 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 July 1, 2021



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