

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 22-0015822 CAF**

**ALEXANDRIA WALL,
Complainant**

v.

**KIA MOTORS AMERICA, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Alexandria Wall (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 her vehicle distributed by Kia Motors America, Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for 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 November 10, 2022, in Lufkin, Texas, before Hearings Examiner Andrew Kang, and the record closed on January 13, 2023. The Complainant, represented himself herself. Danielle Gaynair, Escalated Case Administrator, represented the Respondent.

¹ Tex. Gov't Code § 2001.051.

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 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

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use. Under this standard, the factfinder considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle” from the perspective of a reasonable prospective purchaser. For instance, “while a vehicle with a non-functioning air

² Tex. Occ. Code § 2301.603.

³ Tex. Occ. Code § 2301.604(a).

⁴ Tex. Occ. Code § 2301.604(a).

⁵ Tex. Occ. Code § 2301.601(4).

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 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

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

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).

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 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

⁹ Tex. Occ. Code § 2301.605(a)(2).

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).

nonconformity;¹⁵ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁶

2. Warranty Repair Relief

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”; the vehicle owner provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty's expiration; and the owner filed a complaint with the Department specifying the defect.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.

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.

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 § 206.66(d); see *Vance v. My Apartment Steak House, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984) (“[A] civil litigant who asserts an affirmative claim for relief has the burden to persuade the finder of fact of the existence of each element of his cause of action.”).

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

4. The Complaint Identifies the Relevant Issues in this Case

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

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.”).

²² 43 Tex. Admin. Code § 215.202(a)(3).

²³ *See* Tex. Gov’t Code §§ 2001.141(b)-(c), 2001.051-2001.052; Tex. R. Civ. P. 301.

²⁴ 43 Tex. Admin. Code § 215.42; Tex. R. Civ. P. 67.

²⁵ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁶ Tex. Occ. Code § 2301.604.

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 January 18, 2021, the Complainant, purchased a new 2021 Kia Sorento from Clay Cooley Kia, a franchised dealer of the Respondent, in Irving, Texas. The vehicle had six miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 60 months or 60,000 miles, whichever occurs first; powertrain coverage for 120 months or 100,000 miles, whichever occurs first; emissions defect/performance coverage for 24 months or 24,000 miles, whichever occurs first; and emissions coverage of specified parts for 96 months or 96,000 miles, whichever occurs first. On or about May 18, 2022, the Complainant provided a written notice of defect to the Respondent. On June 6, 2022, the Complainant filed a complaint with the Department alleging that the check engine light comes on. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
11/02/21	14,547	Check engine light on (cap assembly ordered)
12/27/21	17,157	Check engine light on (replaced fuel cap)
01/05/22	17,403	Check engine light on (ordered parts)
04/04/22	22,352	Check engine light on (Complainant declined service)
05/12/22	25,922	Check engine light on (replaced purge control valve)

Complainant affirmed that the check engine light was on at the time of the hearing and had stayed on. She first noticed the check engine light in late October 2021 and took the vehicle to a dealer for service on November 2, 2021. She explained that the check engine light came on about 14,000 miles. She took the vehicle in for service and had the gas cap replaced. However, the check engine light came on again. She took the vehicle in for service in January 2022 and again in May 2022. She noticed an issue with the speed not going up. Testing showed an EVAP leak issue. Complainant testified that the check engine light would usually come on a day or so after leaving the dealership. She confirmed that she did not refuel with the engine on and that she would tighten the fuel cap until clicked.

²⁷ 43 Tex. Admin. Code § 215.209(a).

²⁸ 43 Tex. Admin. Code § 215.208(b)(1).

C. Inspection

Upon inspection at the hearing, the subject vehicle's odometer displayed 42,922 miles. The check engine light (malfunction indicator light) was illuminated.

D. Summary of Respondent's Evidence and Arguments

Ms. Gaynair testified that, she happened to be the representative handling this case. She pointed out that during the first 24 months and 24,000 miles, some of visits were for ordering parts and they counted diagnosis and replacement of parts as one repair attempt. Notably, Kia already offered to repurchase the vehicle in accordance with the sales contract with a (reasonable allowance for use) deduction for 29,000 miles. However, finding a replacement vehicle would be difficult because of the chip shortage. She added that in the event Complainant requests replacement, Respondent requests reasonable time to find a replacement.

E. Analysis

A preponderance of the evidence show that the subject vehicle only qualifies for repair relief. The parties do not dispute the existence of a defect here. In fact, Respondent already offered to repurchase the vehicle. In this case, the availability of repurchase or replacement depends on whether the vehicle had a reasonable number or repair attempts. Generally, the statutory presumption for reasonable repairs requires four repair attempts in the first 24,000 mile or 24 months, whichever occurs first, after delivery of the vehicle. Five of the repair invoices in evidence address the check engine light. The remaining invoices do not mention the check engine light. Further, the five relevant repair invoices appear to reflect only two repair attempts. The dealer ordered a fuel cap at the 11/02/21 service visit and replaced the fuel cap at the 12/27/21 visit. Likewise, the dealer ordered parts at the 01/05/22 visit and replaced purge control valve at the 05/12/22 visit. Complainant declined service at the 04/04/22 visit. Although the dealer may diagnose the problem and order parts in one visit and replace the parts in a later visit, these visits represent a single repair attempt for the same nonconformity. Accordingly, evidence only shows two repair attempts for the check engine light. As a result, the vehicle does not qualify for repurchase or replacement but does qualify for repair relief.

III. Findings of Fact

1. On January 18, 2021, the Complainant, purchased a new 2021 Kia Sorento from Clay Cooley Kia, a franchised dealer of the Respondent, in Irving, Texas. The vehicle had six miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for 60 months or 60,000 miles, whichever occurs first; powertrain coverage for 120 months or 100,000 miles, whichever occurs first; emissions defect/performance coverage for 24 months or 24,000 miles, whichever occurs first; and emissions coverage of specified parts for 96 months or 96,000 miles, whichever occurs first.
3. The warranty generally states: "Subject to the other terms and conditions of this limited warranty manual, Kia Motors America, Inc. ("Kia") warrants that it will arrange for an Authorized Kia dealer at locations of its choice to provide for the repair of your vehicle if it fails to function properly during normal use."

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

Date	Miles	Issue
11/02/21	14,547	Check engine light on (cap assembly ordered)
12/27/21	17,157	Check engine light on (replaced fuel cap)
01/05/22	17,403	Check engine light on (ordered parts)
04/04/22	22,352	Check engine light on (Complainant declined service)
05/12/22	25,922	Check engine light on (replaced purge control valve)

5. On or about May 18, 2022, the Complainant provided a written notice of defect to the Respondent.
6. On June 6, 2022, the Complainant filed a complaint with the Department alleging that the check engine light comes on.
7. On July 22, 2022, 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.

8. The hearing in this case convened on November 10, 2022, in Lufkin, Texas, before Hearings Examiner Andrew Kang, and the record closed on January 13, 2023. The Complainant, represented himself herself. Danielle Gaynair, Escalated Case Administrator, represented the Respondent.
9. The vehicle's odometer displayed 42,922 miles at the time of the hearing.
10. The vehicle's basic, powertrain, and designated emissions parts warranty coverages were in effect at the time of the hearing.
11. The check engine light (malfunction indicator light) was illuminated during the inspection at the hearing.

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 vehicle did not have a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).

7. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
8. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the following issues: check engine light (malfunction indicator light) and in particular, the underlying emissions issue. Upon this Order becoming final under Texas Government Code § 2001.144:²⁹ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

²⁹ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

SIGNED March 21, 2023

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