

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0007856 CAF**

JAHSALYN LANDRY, Complainant	§	BEFORE THE OFFICE
	§	
	§	
v.	§	OF
	§	
HYUNDAI MOTOR AMERICA, Respondent	§	ADMINISTRATIVE HEARINGS
	§	

DECISION AND ORDER

Jahsalyn Landry (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in her vehicle distributed by Hyundai Motor America (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 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 24, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on May 5, 2020. The Complainant, represented herself. Donna Bilardo, supervisor - customer service department, represented the Respondent.

¹ TEX. GOV’T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life-threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁷

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

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁸

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

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

⁸ TEX. OCC. CODE § 2301.605(a)(2).

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

[A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁹

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

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

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹³

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

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

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

¹³ TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” *Mail. Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

(2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the

¹⁴ TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV'T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short,

nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁴ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁵ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On April 4, 2018, the Complainant, purchased a used 2014 Hyundai Tucson from Philpott Toyota in Nederland, Texas. The vehicle had 43,661 miles on the odometer at the time of purchase. The vehicle’s powertrain warranty provides coverage for five years or 60,000 miles, whichever occurs first.

plain statement of the factual matters asserted.” TEX. GOV’T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

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

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

²³ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

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

On April 1, 2019, an attorney on behalf of the Complainant provided a written notice of defect to the Respondent. On February 11, 2020, the Complainant filed a complaint with the Department alleging the following issues: engine knocking; leaking camshaft seals; bad piston rings; black and white smoke from the tail pipe; rattling; engine oil leaking; transmission hesitating; and check engine light.

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

Date	Miles	Issue
04/18/2018	44,392	Black smoke from tail pipe, rattling from engine
07/26/2018	44,789	Oil leaking
08/31/2018	46,154	Transmission shift, white smoke from tail pipe
10/16/2019	57,730	Check engine light (catalytic converter, O2 sensors)
01/27/2020	59,547	Burning large amount of oil, does not want to accelerate, blue smoke from tail pipe
03/20/2020	59,722	Oil burning

The repair history also shows a repair visit on February 18, 2020, at 59,607 miles, for a tire issue, which does not relate to any complaint issues.

The Complainant testified that when trying to accelerate, the vehicle did not want to accelerate and emitted white smoke. She stated that the white smoke issue has been resolved but she did not know about the internal engine issues. She noted that the vehicle burned a quart of oil in about 1,000 miles. The Complainant did not consider the engine knocking to be bad since the engine replacement, but the vehicle continued to emit whitish blue cloud smoke when trying to pass. The Complainant stated that the vehicle did not rattle as much but she did not drive as much. However, in one instance at a stop sign while going slow, the vehicle did not want to go in gear. The Complainant had to shift into park and back into drive. She pointed out that the check engine light came on two days after getting the vehicle back from the dealership the last time. The check engine light was on for about 15 days but had turned off and was currently off. She did not notice any leaking oil. She still noticed transmission hesitating to shift when driving on the highway. With the check engine light on, the Complainant noticed that the vehicle felt like it wanted to die; the vehicle hesitated. She observed that the blue smoke appeared random, possibly more likely when cold, but certainly while accelerating and randomly while turning on the ignition.

C. Summary of Respondent's Evidence and Arguments

Chris Tenderich, customer service specialist - escalated case manager, testified that all issues were taken care of when the engine was replaced. The Complainant did not bring the vehicle back until October 2019. The dealer replaced the catalytic converter and the O2 sensor because they related to the engine replacement in 2018. The white smoke could not be duplicated. A technician drove with the Complainant and vehicle emitted a small puff of white smoke on hard acceleration. The vehicle is currently undergoing an oil consumption test, which involves changing the oil and checking every 1,000 miles. The Complainant brought the vehicle to the dealer on January 27, 2020, 59,563 and brought back in 100 miles later, which was too soon to check consumption. The warranty expired in December 2018. Any repairs thereafter would have been the customer's responsibility. The vehicle was taken to a dealership three times this year. The check engine light was not duplicated. Scanning with a scan tool showed no issues.

D. Analysis

To qualify for any relief, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect) that continues to exist after repairs.²⁷ The warranty generally states that it covers: "Repair or replacement of any component originally manufactured or installed by . . . Hyundai Motor America (HMA) that is found to be defective in material or workmanship under normal use and maintenance, except any item specifically referred to in the section 'What is not Covered.'"²⁸

As an initial matter, the subject vehicle can only qualify for warranty repair relief because it was purchased used. Additionally, warranty repair relief only applies to defects reported before the warranty expired. In this case, the subject vehicle's warranty provides powertrain coverage for five years or 60,000 miles because the Complainant is not the original owner.²⁹ Accordingly, the warranty expired on December 16, 2018, five years after the original retail sale. The vehicle's history shows three repair visits occurring before the warranty expired. These three repair visits concerned: (1) black smoke from the tail pipe, (2) rattling from the engine, (3) oil leaking, (4) the

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

²⁸ Complainant's Ex. 3.

²⁹ Complainant's Ex. 3; Respondent's Ex. 1.

transmission shifting, and (5) white smoke from tail pipe. Only these issues will be addressed since the other issues exceed the allowable scope of this case.³⁰

1. Black Smoke from the Tailpipe

The Complainant testified that the vehicle did not emit black smoke. Accordingly, the black smoke no longer appears to be an existing issue that supports relief.

2. Rattling from the Engine

The Complainant's testimony reflects that rattling is not presently an issue. Accordingly, this issue does not support any relief.

3. Oil Leak

The Complainant testified that she did not notice the vehicle leaking oil. Accordingly, this issue does not support any relief.

4. Transmission Shifting

The complaint simply identified the issue as "transmission shift". The Complainant elaborated that this referred to the transmission hesitating to shift. The Complainant recounted one instance, while moving slowly at a stop sign, the vehicle did not want to go into gear, so she shifted the transmission into park and back to drive. When asked if she still noticed the transmission hesitate or slow to shift, she answered that she noticed the transmission hesitate during highway driving. On the other hand, the dealership could not duplicate the transmission hesitation, indicating that the issue relates to a design characteristic as opposed to a manufacturing defect. In sum, a preponderance of the information does not show that the transmission shifting issue is a warrantable defect.

5. White Smoke from the Tailpipe

A preponderance of the evidence does not show that the white smoke from the tail pipe constitutes a currently existing warrantable defect. The Complainant described the current smoke as whitish-blue rather than white, suggesting a different problem. Additionally, on a recent test

³⁰ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3) ("A complaint may be filed with the department in accordance with this section if the defect in the motor vehicle subject to the warranty performance complaint was reported to the manufacturer, converter, distributor, or to an authorized agent prior to the expiration of the warranty period.").

drive with a technician, the white smoke emitted during the drive did not appear out of the ordinary. Because the evidence is inconclusive, the white smoke issue does not support any relief.

III. Findings of Fact

1. On April 4, 2018, the Complainant, purchased a used 2014 Hyundai Tucson from Philpott Toyota in Nederland, Texas. The vehicle had 43,661 miles on the odometer at the time of purchase.
2. The original retail sale occurred on December 16, 2013, with 25 miles on the odometer.
3. The vehicle's powertrain warranty provides coverage for five years or 60,000 miles, whichever occurs first.
4. On April 1, 2019, an attorney on behalf of the Complainant provided a written notice of defect to the Respondent. On February 11, 2020.
5. On February 11, 2020, the Complainant filed a complaint with the Department alleging the following issues: engine knocking; leaking camshaft seals; bad piston rings; black and white smoke from the tail pipe; rattling; engine oil leaking; transmission hesitating; and check engine light.
6. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
04/18/2018	44,392	Black smoke from tail pipe, rattling from engine
07/26/2018	44,789	Oil leaking
08/31/2018	46,154	Transmission shift, white smoke from tail pipe
10/16/2019	57,730	Check engine light (catalytic converter, O2 sensors)
01/27/2020	59,547	Burning large amount of oil, does not want to accelerate, blue smoke from tail pipe
03/20/2020	59,722	Oil burning

The repair history also shows a repair visit on February 18, 2020, at 59,607 miles, for a tire issue, which does not relate to any complaint issues.

7. On April 3, 2020, 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 April 24, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on May 5, 2020. The Complainant, represented herself. Donna Bilardo, supervisor - customer service department, represented the Respondent.
9. The vehicle's odometer displayed 60,133 miles at the time of the hearing.
10. The warranty expired on December 16, 2018, five years after the original retail sale.
11. The issues regarding: black smoke from the tail pipe, rattling from the engine, and oil leak were resolved.
12. The Complainant recounted one instance, while moving slowly at a stop sign, the vehicle did not want to go into gear, so she shifted the transmission into park and back to drive. However, when asked if she still noticed the transmission hesitate or slow to shift, she answered that she noticed the transmission hesitate during highway driving. On the other hand, the dealership could not duplicate the transmission hesitation, indicating that the issue relates to a design characteristic as opposed to a manufacturing defect.
13. The Complainant described the current smoke as whitish-blue rather than white, suggesting a different problem. Additionally, on a recent test drive with a technician, the white smoke emitted during the drive did not appear out of the ordinary.

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. Replacement and repurchase relief only apply to new vehicles. TEX. OCC. CODE § 2301.603.
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. 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).
9. 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.
10. 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 8, 2020

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

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