

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 20-0010956 CAF**

**DARYL REYNOLDS,  
Complainant**

**v.**

**GENERAL MOTORS LLC,  
Respondent**

§  
§  
§  
§  
§  
§  
§

**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Daryl Reynolds (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 manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> 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 4, 2020, telephone/videoconference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Clifton Green, Business Resource Manager, represented the Respondent.

---

<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

##### **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.”<sup>5</sup>

---

<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *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.”<sup>6</sup>

**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.<sup>7</sup>

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.<sup>8</sup>

---

<sup>6</sup> *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.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> 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, 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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

#### **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;<sup>13</sup> (2) the respondent was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the Lemon Law complaint was filed within six months after the earliest

---

<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *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.’”).

<sup>12</sup> *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.”).

<sup>13</sup> 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).

<sup>14</sup> 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 allows a dealer to attempt repair

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.<sup>15</sup>

## 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.<sup>16</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> The complaint must state “sufficient facts to enable the department and the party complained against to know the nature

---

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.

<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

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

<sup>20</sup> “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

of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”<sup>21</sup> However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup> Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.<sup>24</sup>

## **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.<sup>25</sup> 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).<sup>26</sup> However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”<sup>27</sup>

### **B. Summary of Complainant’s Evidence and Arguments**

On May 20, 2019, the Complainant, purchased a new 2019 Chevrolet Silverado from Atzenhoffer Chevrolet, a franchised dealer of the Respondent, in Victoria, Texas. The vehicle had

---

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.”).

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

<sup>24</sup> See TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

<sup>25</sup> TEX. OCC. CODE § 2301.604.

<sup>26</sup> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>27</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

11 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever comes first; and powertrain Coverage for five years or 60,000 miles, whichever comes first. On May 11, 2020, the Complainant provided a written notice of defect to the Respondent. On May 4, 2020, the Complainant filed a complaint with the Department alleging that the vehicle surged during acceleration, shifted erratically and exhibited noise in the drive train (together referred to as the "harsh shifting issue"). In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issue as follows:

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
October 22, 2019	8,916	Surging on acceleration and hesitating
November 19,2019	10,529	Surges during acceleration
March 10, 2020	17,146	Clunk/jerk in rear when stopping, hard/abrupt shift, transmission whine
April 13, 2020	18,101	Whine from transmission, shifting delay
May 26, 202	19,956	Surge when shifting, clunk when downshifting, whine noise from transmission
July 9, 2020	22,212	Harsh engagement when shifting gears

The Complainant testified that the repairs did not improve the harsh shifting issue. When asked when he firsts noticed the issue, he answered that the day after purchasing the vehicle, he took the vehicle to the dealer for service. The service department notified him that the shifting would improve after 1,000 miles but remained the same. The Complainant described that when pressing the accelerator, the vehicle (initially) would not respond but as it accelerated, it felt as if it were running out of gas. He characterized the issue as hard to describe. He explained that the vehicle would abruptly shift to second gear and surge during that transition. He last noticed this harsh shift the morning of the hearing along with the noise in the drivetrain. He noticed the surging every day at every start and stop. The issue appeared more prevalent shifting from 1st to 2nd gear and less noticeable from 2nd to 3rd and 3rd to 4th, depending on the rpms. He likewise noticed this shifting and noise daily. The Complainant testified that the vehicle currently had 29,436 miles on the odometer. He noted that the vehicle had six separate repair attempts. He elaborated that in the mornings, before the transmission warms up, the issue seemed more prevalent. After warming up, the shifts seemed less abrupt but still hard and surging the same way with the same noise.

On cross-examination, the Complainant affirmed that the vehicle never left him stranded or required towing. He had been using the vehicle since the last visit to the dealer on July 10, 2020.

He commuted mostly on highways. He explained that noise was prevalent all the time but the surging was somewhat better after warming up.

### **C. Summary of Respondent's Evidence and Arguments**

Mr. Green asserted that the vehicle did not have any substantial safety concerns or impairment of use or value and did not have a defect. Bobby Shreeve, Field Service Engineer, reviewed his inspection report (Respondent's Exhibit 7). He testified that the dealer never installed any parts because the technician could not duplicate the concern. He pointed out that, during a test drive, he could not feel the harsh shifting and could only feel the road surface. Later, when driving on a smooth surface, he could feel a slight bump between shifts. Mr. Shreeve had the dealer replace the valve body and TCM (transmission control module) to possibly improve the shift feel. Though the harsh shifting issue may be dissatisfying, it would not cause any damage. Mr. Shreeve explained that the transmission had the ability to adapt to give the user the best quality shifts, but this depended on the customer's driving habits. He pointed out the vehicle had a total of five dealer visits, including his inspection.

On cross-examination, Mr. Shreeve confirmed that the dealer replaced the TCM and he added that this module bolted into the transmission case internally. Though he was not present for the valve body repair, he directed the dealer to repair it. And he noted the transmission appeared to have been worked on given the "witness marks" on the bolts. The Complainant inquired about the Suburban with the same transmission having the same issue as the subject vehicle and Mr. Shreeve explained that the transmission would occasionally have a random shift feel, which was not a problem. However, if the issue developed an abnormal pattern then the issue should be examined.

### **D. Analysis**

The subject vehicle does not qualify for relief in this case. As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law by a preponderance. In other words, the Complainant must prove that every required fact is more likely than not true. One of the essential elements for relief is the current existence of a defect covered by warranty (warrantable defect). Here, the alleged issue appears as likely to be an



unwarranted condition as a warranted defect. Accordingly, a preponderance of the evidence does not show that the vehicle has a warrantable defect.

Lemon Law relief does not apply to all issues that may occur with a vehicle but only to warrantable defects that continue to exist after repairs.<sup>28</sup> The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty states that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts."<sup>29</sup> According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>30</sup>

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.<sup>31</sup> A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards, causing that vehicle to differ from other vehicles of the same kind.<sup>32</sup> In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those

---

<sup>28</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>29</sup> Respondent's Ex. 5, New Vehicle Limited Warranty.

<sup>30</sup> 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.").

<sup>31</sup> *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.").

<sup>32</sup> *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.).

vehicles not produced according to the manufacturer's specifications.<sup>33</sup> 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. In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.<sup>34</sup> Design characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.<sup>35</sup> Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.<sup>36</sup> Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before 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.

In this case, the repair orders do not reflect the existence of a manufacturing defect. The repair orders specify that the vehicle did not present any objective indications of a nonconformity, such as diagnostic trouble codes, misfires, or an abnormal fluid level/condition. With respect to subjective observations, the technicians found that the vehicle drove normally, except that at the March 10, 2020, visit the technician found the vehicle occasionally shifted abruptly. However, the technician addressed this occasional harsh shifting by resetting the transmission adaptive pressure system, as opposed to replacing any defective parts or otherwise performing a mechanical repair.

---

<sup>33</sup> *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].").

<sup>34</sup> *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.").

<sup>35</sup> 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).

<sup>36</sup> *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].").

After the reset, the technician found the transmission shifted as designed. In essence, the reset suggests that the issue relates to the programming/design of the vehicle and not a manufacturing defect. In contrast to the technicians' findings, the Complainant testified that none of the repairs improved the alleged issue and that he noticed surging at every start and stop, multiple times a day. Despite observing the performance of the same subject vehicle, the evidence reveals a disconnect between the impressions of the technicians and the Complainant. Unlike objectively observable conditions such as leaking transmission fluid or diagnostic trouble codes, subjective observation of a qualitative condition as proof is inherently problematic due to the variable nature of qualitative data and given that different people may have different impressions of the same facts. As the record in this case shows, the Complainant and technicians reached divergent conclusions based on their observations of the subject vehicle. At the same time, objective factors, e.g, the absence of diagnostic trouble codes, misfires, or an abnormal fluid level/condition, provides no indication of a defect. Further, as noted in testimony, the same transmission as that in the subject vehicle also exhibits the same characteristic shifts in other vehicles, indicating that the quality of the shifting results from the transmission's design and not a manufacturing defect. Given these considerations, the evidence does not show that the harsh shifting issue is more likely a warranted manufacturing defect rather than an unwarranted design characteristic. In conclusion, the vehicle does not qualify for repurchase/replacement or warranty repair.

### **III. Findings of Fact**

1. On May 20, 2019, the Complainant, purchased a new 2019 Chevrolet Silverado from Atzenhoffer Chevrolet, a franchised dealer of the Respondent, in Victoria, Texas. The vehicle had 11 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever comes first; and powertrain Coverage for five years or 60,000 miles, whichever comes first.

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

Date	Miles	Issue
October 22, 2019	8,916	Surging on acceleration and hesitating
November 19, 2019	10,529	Surges during acceleration
March 10, 2020	17,146	Clunk/jerk in rear when stopping, hard/abrupt shift, transmission whine
April 13, 2020	18,101	Whine from transmission, shifting delay
May 26, 2020	19,956	Surge when shifting, clunk when downshifting, whine noise from transmission
July 9, 2020	22,212	Harsh engagement when shifting gears

4. On May 11, 2020, the Complainant provided a written notice of defect to the Respondent.
5. On May 4, 2020, the Complainant filed a complaint with the Department alleging that the vehicle surged during acceleration, shifted erratically and exhibited noise in the drive train.
6. On August 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.
7. The hearing in this case convened on November 4, 2020, telephone/videoconference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Clifton Green, Business Resource Manager, represented the Respondent.
8. The vehicle's odometer displayed 29,436 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. In part, the warranty states that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts."
11. The vehicle did not exhibit any diagnostic trouble codes, misfires, or abnormal fluid levels/conditions.

12. The technicians found the vehicle to be operating as designed based on test drives of the vehicle.
13. The transmission in the subject vehicle exhibits the same shift quality as the same transmission in other vehicles.
14. The vehicle's shift quality results from the design of the vehicle, specifically, the design of the transmission, and not from any manufacturing defect.

#### **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 January 6, 2021**



---

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