

# Jury delivers \$25.5 million ‘statement’ to Aetna to change its ways

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Aetna denied her claim. Now it owes \$25.5M

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**(CNN)** — An Oklahoma jury has awarded \$25.5 million to the family of a cancer patient denied coverage by Aetna, with jurors saying that the insurer acted “recklessly” and that the verdict was meant as a message for Aetna to change its ways.

The award is believed to be the largest verdict in an individual “bad faith” insurance case in Oklahoma history, one court observer said, and could have major ramifications across the country for a form of cancer treatment called proton beam therapy.

The case revolved around the 2014 denial of coverage for Orrana Cunningham, who had stage 4

targeted form of radiation that could pinpoint her tumor without the potential for blindness or other side effects of standard radiation.

Aetna denied her coverage, calling the therapy investigational and experimental.



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Orrana and her husband, Ron Cunningham, a retired Oklahoma City firefighter, had been together since 1987. He was determined to do whatever it took to get the love of his life the treatment she needed. The couple mortgaged their dream home and set up a GoFundMe page to help pay the \$92,082.19 to get the therapy her doctors had prescribed at the MD Anderson Cancer Center in Texas.

However, Orrana died May 30, 2015, at the age of 54, in part from a viral infection that reached her brain.

Ron Cunningham said this week's verdict was vindication for the suffering his wife went through. She had filed the initial paperwork to sue Aetna, saying that if her case helped save the life of one person, it would be worth it.

"My wife started the case, and I'm just finishing the fight," he said. "We did her proud. My wife wanted to make sure that it got out. Her comment was 'if we could just save one person.'

"As far as the money, I'd give it all back to spend just one more day with her."

Aetna attorney John Shely said in closing arguments that the insurance giant was proud of the three medical directors who denied coverage, even turning to thank them as they sat in the front row of the courtroom, according to jurors and other witnesses in court.

It was a message that didn't sit well with the 12 jurors, who found that Aetna "recklessly disregarded its duty to deal fairly and act in good faith with the Cunninghams."

"I just felt like Orrana Cunningham was failed at every turn," forewoman Ann Schlotthauer said.



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She said the verdict "was definitely a message to Aetna. We discussed that in jury deliberations - that we wanted to make a statement. We wanted to make a point and get their attention."

## **'Aetna needed to pay'**

Schlotthauer said it was clear from expert testimony that proton beam therapy was not experimental at all. She said jurors were turned off by one Aetna medical director who acknowledged handling 80 cases a day and by the fact that all three medical directors acknowledged they spent more time preparing for the lawsuit than on Orrana's medical case.

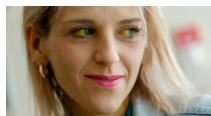
due diligence. “No one was looking at her specific case,” she said. “That’s where we decided that obviously they were in breach of contract and should’ve paid for that treatment. It was medically necessary in her situation.

“I hope [the verdict] does result in huge changes,” she said. “I hope it results in Aetna re-evaluating how they evaluate appeals and requests.”

Juror Ora Dale cried and hugged Cunningham after the trial. She was one of two jurors who believed the monetary award should’ve been much higher than the \$25.5 million handed down.

“I just wanted to let him know that I was on his side,” Dale said. “Those medical directors did not exhaust every measure like they said that they did. They did not spend enough time on her claim. It just kept getting denied and denied.

“Aetna needed to pay. They were in the wrong, and he deserved everything that he was asking for.”



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Cunningham had another encounter in court. He said Shely, Aetna’s lead attorney, walked up to him and congratulated him after the verdict before telling him he’d lose on appeals.

Cunningham was an Oklahoma City firefighter when the Alfred P. Murrah building was bombed on April 19, 1995, killing 168 people and wounding hundreds more in one of the deadliest terror attacks in American history. The day after the bombing, he was assigned to comb through the wreckage of the day-care center on the second floor to search for bodies of children. He said he would spray corpses with Lysol to prevent the spread of bacteria.

He’d seen the worst of the worst. But little could’ve prepared him for that encounter with Aetna’s attorney in the courtroom. He said he stood, stunned, trying to grasp what he’d just heard.

“That showed how callous these people are,” he said.

Shely did not respond to a request for comment.

Aetna, the nation’s third-largest insurer, declined to comment on the encounter but maintained that it acted appropriately in denying coverage in this case, saying there is a “lack of clinical data supporting proton therapy for treating nasopharyngeal tumors.”

“While we have no comment on the ruling, juror motives or a potential appeal, we do want to make it clear that the proper steps under the health plan were followed in this instance,” Aetna said in a written statement. “As our chief medical officer noted in a post earlier this year, it’s never easy to tell an individual or family that a treatment or procedure is not approved – it’s the hardest thing we have to do.

“However, our guiding principles will continue to be proven effectiveness and member safety, as determined by rigorous scientific studies.”

Doug Terry, the lead attorney for the Cunninghams, offered a much different take.

being denied,” Terry said. “The jury’s verdict delivered the message that the public will not stand for insurance companies putting profits before policyholders.”

## Defense attorney: Aetna did ‘nothing wrong’

It is not uncommon for people with cancer to be denied proton beam therapy by insurers, despite the recommendations of their treating physicians. Many radiation oncologists express frustrations about the denials, and websites exist offering tips and recommendations on how to try to get insurance companies to pay for coverage of proton therapy.

Other cancer patients often turn to sites like GoFundMe to raise money for their treatment. Some insurers eventually agree to cover therapy for adult patients after a lengthy appeals process.



Ron Cunningham said that his wife was his "rock" and that the verdict was justice. Courtesy Cunningham

Daniel E. Smith, executive director of the Alliance for Proton Therapy Access, applauded the verdict and called on insurance commissioners in all 50 states to make sure the treatment will now be covered by insurance companies when treating doctors believe that it is the best available treatment for their patients.

“We applaud Ron Cunningham for standing up to Aetna, and the jury for recognizing and holding Aetna to account for their broken system,” Smith said in a statement. “We’ve seen a similar pattern of betrayal across the industry, where insurers use outdated information and medical staff with little knowledge of proton therapy to ultimately deny as many as four in 10 patients seeking the treatment. It’s past time to hold insurers accountable.”

Some jurors said that one of the most convincing experts was radiation oncologist Dr. Andrew L. Chang, who explained why proton beam therapy was the best treatment for Orrana Cunningham. He was not involved in her care but was called as an independent expert by her attorneys.

“The thing I tried to illustrate to the jury is that proton therapy is not a new, experimental technique, like Aetna wants to claim,” Chang said. “Proton therapy is a well-established treatment for cancer and has been for decades. ... Nobody in the oncology community considers proton therapy experimental for the treatment of cancer.”

He said he told jurors that Medicare covers proton treatment and that insurance companies often cover it for an array of cancers for pediatric patients, typically up to the age of 21.

“One thing we pointed out is that as much as Aetna and these other insurance companies like to say proton therapy is experimental, they always put a caveat in there that it’s not experimental for pediatric patients,” Chang said. “We pointed out Medicare pays for it for 65 years or older. So, what is it about 22-year-olds to 64-year-olds that makes proton therapy experimental? There is no good answer for that; insurance companies call it that because they decided to deem it as such.”

Two top cancer specialists, not affiliated with the trial, told CNN they agreed with Chang’s assessment.

In Orrana’s case, Chang said, the tumor was right next to her brain stem and optic nerve, and it had been growing up toward the base of her skull. He said he told jurors that standard radiation could’ve been used, as Aetna wanted, but the “risks were severe.”

“She would be blind. She would lose a significant portion of her memory on the left side of her brain and still

not have a very good chance at a cure," Chang said. "For that particular tumor, [proton therapy] was extremely valuable."

Before Orrana died, he said, scans showed that the tumor was shrinking and the treatment was working.

Aetna attorney Shely told jurors that this was a case "of misplaced blame by Mr. Cunningham and his lawyers," according to the official court transcript.

"Aetna has full confidence in your ability to hear the evidence from that witness stand and then later compare it to the opening statement you just heard," Shely said during his opening statement. "In short, the evidence that you will see and hear will convince you that Aetna has done nothing wrong, nothing."

After considering the evidence, the jury did, in fact, find fault with Aetna's handling of the case, voting on Monday to award \$15.5 million in emotional distress damages and on Tuesday tacking on \$10 million in punitive damages.

Kent McGuire, a personal injury attorney in Oklahoma who watched parts of the trial, called the verdict the biggest bad faith insurance verdict for an individual case in Oklahoma history. "It was certainly a stunning verdict to award that much money, and it was a message, too," he said.

Ron Cunningham said his wife would be pleased with the verdict.

She used to comfort him on hard days – whether it was in the months after the 1995 bombing or after he'd find a child badly injured in a house fire. He'd come home, place his head in her lap and tell her everything on his mind.

"She was a rock for me, especially through my bad times," he said.

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The past two weeks at trial, he said, were especially hard because it brought back so many memories. Of his own battle with cancer in 1998, when she stuck by his side. Of washing her body as she weakened from cancer. Of simply missing the gal who stole his heart four decades ago.

Orrana was known to take in stray animals. Cats, dogs, you name it. Ron would tell her he was the biggest stray she ever took in. He laughed while recalling that moment.

He then talked about the three Aetna medical directors; he said each testified that "they wouldn't change anything they did."

When the jury said Aetna "recklessly disregarded" Orrana's case, Ron Cunningham said, he finally felt justice.

"When they said that, it was like, 'I think we did her proud,' " he said.

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