917/13

Den 27. maj 2013 blev i sag nr. 83.734:

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mod

Bupa Denmark Services A/S
Palægade 8
1261 København K

afsagt

k e n d e l s e :

_____

Forsikringstageren, der er født i 1968 og bosiddende i Polen, har tegnet en international årsrejseforsikring i Bupa Denmark Services A/S. Han klager ved sin advokat over, at selskabet har afvist at dække udgifterne til en knæoperation i forbindelse med hans tilskadekomst under en skiferie i Italien. Han klager desuden over selskabets afvisning af at yde retshjælpsdækning til sagen.

Efter det oplyste har selskabet dækket udgifterne til den indledende akutte behandling. Selskabet har derimod afvist at dække yderligere behandlingsudgifter med henvisning til, at klageren kunne have fået foretaget operationen efter hjemrejsen til Polen. Selskabet har desuden henvist til, at den omhandlede tvist ikke er omfattet af rejseforsikringens retshjælpsdækning.

Af klagen, som nævnet har modtaget den 12/12 2012, fremgår bl.a.:

"Klagers påstand er:

Pkt. 1.

Indklagede Ihi Bupa skal anerkende at klagers operation som følge af et fald under sin rejse, herunder forudgående undersøgelser er dækket af rejseforsikringen.

Pkt. 2.

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Indklagede tilpligtes at anerkende, at forløbet er omfattet af forsikringsbetingelsernes pkt. 19.2, retshjælpsforsikringsdækning.
...
Til støtte for klagers påstand gøres det gældende,

at skaden er opstået inden for dækningsområdet,
at skaden er omfattet af dækningen.

Ad påstand 2 gøres det gældende,

at det fremgår af forsikringsbetingelsernes pkt. 19.2, at udgifterne til retshjælp i forbindelse med en sag, hvor indklagede ikke antager en skade som dækningsberettiget er der retshjælpsforsikringsdækning.

Det gøres gældende,

at pkt. 19.5.4 ikke omfatter forholdet, idet formålet med pkt. 19.2 og retshjælpsforsikringsdækning er at sikre forsikringstager imod at forsikringsselskabet uberettiget afslår forsikringsdækning for en indtruffen skade, ligesom det nærmere gøres gældende,
at pkt. 19.5.4 efter sin ordlyd ikke finder anvendelse på spørgsmålet."

I en vedlagt beskrivelse af hændelsesforløbet har klageren anført:

"… - Family Skiing Vacations
…'s Family 5 (3+2) coming by plane on 1/13 leaving on 1/28
Staying at the Residence …
This is our 8th time visit … and ski in the dolomiti mountains.
We rented the good quality ski from Scuola Di … Rental

9.30 first run of the day, I slipped on the slope of Dantercepies and fall forward while
21-01-2012 starting to ski down, from the gondola
I was going very slow - however my left binding did not open, the ski made a levarage and my knee went toward inside abruptly
I heard a little pop, I was on the ground and could not stand up for couple of minutes - people helped me, there was a hut called Panorama ca. 100 meters down from me, I went there slowely.
At the hut, I felt my knee pulsating and my knee giving away toward inside, it was not stable, I could not stand straight. The Red Cross was called in after a while, they came and brought me down with the rescue sledge. They checked me and diagnosed there was a problem (there is a record of this event)

At the bottom of the slope, they called in taxi and it took me to the nearest doctor,
dr. … - helped me take off my boots and helped me to lie down, It was all very painful, he took an ex-ray and examined my knee. It was determined that it was a bruise and distortion no problem with the ligaments. I was given a brace to keep the knee streight shot to take away pain and additional prescribed medication against pain and swelling and was
21-01-2012 driven to the apartment to lie down and rest.
Sunday - I stayed in bed taking medication, no walking possible as it was painful, putting the
22-01-2012 brace on the leg was painful as well -it was even worse in the night.

The pain did not go away at home, I was driven back to the doctor who suggested that I

23-01-2012 should do an MRI to determine if there was no problem inside the knee.

I went back home and called my IHI/BUPA insurance to ask how to get it done, was told simply to call ask for service and send a bill after as a regular claim and to follow whatever 23-01-2012 clinics said is appropriate treatment (this call should have been recorded)

I was scheduled for 11.00 at … Sport Clinic in … to do the MRI. Before MRI was taken the Doctor … examined my leg and immediately determined that the
24-01-2012 ligament was broken, confirming that this was a reason why I was in pain,
13.00 - after the MRI was done, doctor confirmed his initial diagnosis and recommended course of action. Immediate Surgery, stating that if it was his leg, he would not wait one day more. Surgery was scheduled at 19.00 the same day at the clinic 40 KM away from the … Sport Clinic in …
13.30 I asked secretary to contact IHI/Bupa to arrange for the payment for the services rendered. I was driven back to the apartment in …
14.00 I got a call from DSC (… Sport Clinic) that IHI/BUPA requires me to prove that I am on vacations, copies of all my tickets, apartment reservations, passport, original id. Card - confirming that I was insured.
14.30 I emailed all the info to the clinic

15.30 I got a call from the DSC that my insurance declined the procedure and that they will be contacting me to explain.
16.00 I was on the way to the clinic, I got a first call that the Insurance discussed with doctor and that the doctor changed his view and said that I can wait and I need to be relocated with all my family to Poland. The person that called me did not ask me how I felt, if I needed anything or simply out of couresy to wish me a good recovery, it was simple - stop the surgery - we will not pay - surgery is not necessary - they only wanted to repatriate me to Poland. I responded that, they did not see me, they do not how I felt, and that I trust the doctor opinion. I agreed once I see the doctor to follow his advice - if this meant going back to Poland - I would go back to Poland.
17.00-18.30 I got two or three calls all stating that the best case is to come back to Poland not to do the surgery and re-confirming that doctor himself stated that and there is no need for me to speak with him. The IHI/BUPA assistant told me that my insurance was not health insurance rather repatriation insurance.

19.00 I met Dr. … at St. Maria Clinic in …, he was more than surprised when I quoted the insurance officer - about his opinion. He said clearly that the best option was to operate. I asked him to speak to Insurance (should also be recorded). During the conversation the Medical advisor at the Insurance talked about procedures and that the surgery was not acute enough - (by the way) I was taking painkillers for the three days already, I could not walk, as the knee was not stable and was moving inside, I could not sleep well due to the fact that my leg was hurting and the pain kept me awake.
19.10 doctor … asked the medical advisor if it was his leg what would he do - the advisor stated that he would also choose the best option available. Having heard that I decided for the surgery. The advisor asked the doctor to provide more description on the next day, (it was done) so maybe the insurance could consider something for me, instead of covering costs of repatriation

19.30 - ACL- Reconstruction surgery started. It was good surgery, lasted 90 minutes, results
24-01-2012 are good and the prognosis is that I will be able to walk in three to four weeks.
In the morning the email came that Insurance will not cover my procedure - that happened during my vacation - a skiing accident. I was extremely disappointed by the way IHI/BUPA

treated me, I had a very high opinion about them as they were recognized among the top insurance companies, and recognized customer not only as the part of balance sheet but 30/01/2010 mainly as human beings."

Selskabet har i brev af 3/1 2013 til nævnet redegjort for sagens faktiske omstændigheder og sin afgørelse således:

"**Sagsfremstilling:**

Selskabets alarmcentral modtog 24. januar et opkald fra ... Sportsclinic i ..., der ønskede garanti for dækning af knæoperation samme aften. Samme aften ringede Selskabet til Klageren og orienterede om, at operationen på baggrund af den modtagne medicinske information kunne afvente Klagerens hjemrejse med henhold til § 20.1.21

20.1: The Company shall not be liable to pay compensation for expenses which concern:
…
21): Medical treatment and examinations which can await the insured's arrival home,

Klageren var uenig i Selskabets beslutning om, at operationen kunne afvente hjemrejse og refererede til den behandlende læge, doktor ..., der mente, at operationen burde foretages så hurtigt som muligt, gerne samme aften. Der blev foretaget et læge til læge kald, hvor doktor ... gav Selskabets læge ret i, at operationen kunne vente, men han mente, at man så kunne risikere, at der ville gå en vis tid i hjemlandet, før man kunne operere pga. hævelsen, og at dette ville være til gene for kunden i perioden op til operationen. Selskabet svarede, at en evakuering kunne organiseres, således at Klageren muligvis allerede kunne transporteres hjem dagen efter. Dette ville i givet fald være dækket i henhold til §7 i forsikringsbetingelserne, hvoraf fremgår:

7.2: The insurance shall provide cover subject to the treating physician and the Company's medical consultant agreeing on the necessity of transferring the insured and agreeing on whether the insured should be transferred to his/her country of permanent residence or to another place of treatment. In case of disagreement, the decision of the Company's medical consultant shall prevail.

Hertil svarede doktor ..., at hævelsen så kunne være vokset så meget, at en operation ville være umuliggjort de næste 3-4 uger. Selskabets læge svarede, at ifølge lægens egne oplysninger, som vi tidligere havde modtaget, var hævelsen allerede faldet. Behandlende læge mente stadig, at en hurtig operation ville være den bedste løsning og påpegede, at en forsikring, burde dække den bedste og i denne sag hurtigste løsning. Til at underbygge sin påstand ville han sende en medicinsk rapport, der underbyggede, at hurtige operationer ved denne type sager, gav færre fremtidige komplikationer.

Selskabets læge åbnede derfor op for, at man ville læse denne dokumentation, men at man ikke med det samme ville kunne give et svar, da dette så skulle læses af selskabets ortopædkirurg.

Næste eftermiddag rykkede Selskabet Doktor ... for den lovede dokumentation, og denne blev modtaget senere på dagen og gennemgået af en anden af Selskabets læger. Efter gennemlæsning blev det igen vurderet, at operationen ikke var akut. Derfor blev en afvisning sendt til klinikken, hvori det dog blev nævnt, at når vores ortopædkirurg havde gennemgået

sagen, ville vi svare om vi vil ændre vores beslutning. På trods af dette får forsikringstageren foretaget indgrebet d. 25/1 i ...

Ortopædkirurgen gennemgik alligevel rapporten, men skulle bruge yderligere tid for at kunne sætte sig ind i litteraturen om præcist denne type indgreb, Conc ACL-tears. Efter gennemlæsning og sammenligning af 3 andre videnskabelige undersøgelser af dette indgreb, hvoraf de to konkluderer, at senere indgreb er bedre for den opererede, samt en der konkluderer, at der ingen forskel er, vurderede han d. 30/1, at der ikke er noget bevis for, at en hurtig operation var nødvendig eller gavnlig for Klageren og beslutningen blev derfor ikke ændret. Endnu en afvisning bliver derfor sendt til Klinikken og Klageren blev forsøgt kontaktet to gange, dog uden held.

Det skal nævnes, at forsikringen i henhold til § 6.1 kun dækker medicinske omkostninger ifm. akut sygdom og tilskadekomst, og at regningerne for den indledende akutte behandling er blevet dækket.

Ydermere angives som klagepunkt, at Selskabet har afvist at dække sagens omkostninger med henvisning til § 19.2 under dækningen Security and Legal assistance. Dette er blevet afvist af Selskabet på baggrund af §19.5.4)/§ 18.5.4 i 2011 betingelser. Heraf fremgår det tydeligt, at dækningen ikke gælder retstvister mellem forsikringsselskabet og forsikringstageren.

18.5. Exceptions to cover
The Company shall not be liable to pay reimbursement for expenses which concern are due to or are incurred as a result of:
…
4) legal issues arising between the insured and the company.

På baggrund af ovenstående argumenter fastholder Selskabet derfor sin afvisning af ovenstående punkter.

Konklusion:

Selskabet fastholder, at Klagerens udgifter til en operation på rejsedestinationen ikke er dækket, da Klageren kunne have fået foretaget operationen efter hjemrejse. Herudover afvises dækning af retshjælp med henvisning til ovenfornævnte undtagelse i betingelserne."

Nævnet har fået forelagt de bilag, parterne har fremlagt.

Af forsikringsbetingelserne fremgår bl.a.:

"Art 6
Medical expenses
6.1 : The insurance shall cover the medical expenses incurred by the insured in case of acute illness and injury.
…
Art. 7
Medical evacuation/repatriation
…

7.2: The insurance shall provide cover subject to the treating physician and the Company's medical consultant agreeing on the necessity of transferring the insured and agreeing on whether the insured should be transferred to his/her country of permanent residence or to another place of treatment. In case of disagreement, the decision of the Company's medical consultant shall prevail.
…
Art. 18
Security and legal assistance
…
18.2: The insurance shall cover legal assistance in connection with legal problems arising during the covered trip. If, during the covered trip, the insured is charged or indicted for a criminal offence, necessary and reasonable attorney. Tees shall be covered until the case has been decided by a court of the first instance.
…
18.5: Exceptions to cover

The Company shall not be liable to pay reimbursement for expenses which concern, are due to or are incurred as a result of:
…
4) legal issues arising between the insured and the Company,
…
Art. 20
Exceptions to cover
20.1: The Company shall not be liable to pay compensation for expenses which concern:
…
21) medical treatment, and examinations which can await the insured's arrival home.
…
Art. 26 Disputes, venue, etc.
26.1: Any disputes arising out of or in connection with the insurance contract shall be settled in accordance with Danish law, with Copenhagen as the agreed venue. The Company is affiliated to Ankenævnet for Forsikring."

Nævnet udtaler:

Efter sin gennemgang af parternes indlæg og de fremlagte bilag finder nævnet det ikke godtgjort, at klagerens knæoperation ikke kunne afvente hjemkomsten til Polen. På det foreliggende grundlag kan nævnet derfor ikke pålægge selskabet at dække yderligere behandlingsudgifter end allerede sket.

Forsikringen giver ifølge forsikringsbetingelsernes ordlyd ikke ret til retshjælpsdækning til tvister mellem forsikrede og selskabet. Allerede derfor kan nævnet ikke pålægge selskabet at yde retshjælpsdækning til den omhandlede sag.

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Det, som klagerens advokat i øvrigt har anført, findes ikke at kunne føre til et andet resultat.

Som følge heraf

b e s t e m m e s :

Klageren får ikke medhold.

Svend Bjerg Hansen
Udskriftens rigtighed bekræftes

Henning Jønsson