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REF: SHA/25767

**DISPUTE AGAINST NON-PAYMENT IN RESPECT OF
COVID-19 COSTS TO BLACKSTONE PHARMACY (“THE
APPELLANT”)**

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

1 Outcome:

- 1.3 I, as an authorised officer of NHS Resolution, dismiss the appeal and confirm the decision of the NHS Business Services Authority (“NHS BSA”) not to pay the amounts appealed by the Appellant.

A copy of this decision is being sent to:

Blackstone Pharmacy
NHS BSA

Advise / Resolve / Learn

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DISPUTE AGAINST NON-PAYMENT IN RESPECT OF COVID-19 COSTS TO BLACKSTONE PHARMACY (“THE APPELLANT”)

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1 INTRODUCTION

- 1.1 The Appellant appealed the non-payment of a claim for Covid-19 payments.
- 1.2 The Secretary of State for Health and Social Care, pursuant to the National Health Service Litigation Authority (Pharmaceutical Remuneration – Payment Disputes) (England) Directions 2022 (the “Payment Disputes Directions”), has directed that NHS Resolution determines this type of appeal on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 BACKGROUND

- 2.1 I provided a previous determination dated 20 January 2023, in which I finally determined certain matters and provided the opportunity for the parties to provide further representations on other matters. I indicated that on receipt of comments, I would make a final determination on any outstanding matters.
- 2.2 In relation to the discrepancies as to the amounts that relate to director costs, I provided the opportunity to both the Appellant and the NHS BSA to explain whether the £44,800 was part of the original claim and if so, why the deduction of the £29,539 from the outstanding £51,072.17 does not equate to the same amount as the director costs.
- 2.3 Additionally, I provided the NHS BSA with the opportunity to:
 - 2.3.1 provide its original decision;
 - 2.3.2 provide its view on recording director overtime costs in the company’s director loan account;
 - 2.3.3 provide its view on the conflicting nature of the overtime across the invoice and alarm log;
 - 2.3.4 indicate whether the hourly rate of £80 an hour for director overtime is appropriate and if not, why not.
- 2.4 Additionally, I provided the Appellant with the opportunity to:

Advise / Resolve / Learn

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- 2.4.1 indicate whether it is relying on the alarm log and if so, provide comments on the matters I raise in this determination in respect of the alarm log;
- 2.4.2 provide an explanation of the conflicting nature of the overtime across the invoice and alarm log.
- 2.5 Each party was provided with a copy of the other party's further representations and provided with the opportunity to make any final observations. All comments received have been shared with all parties.
- 2.6 I indicated in my previous determination that I would not consider comments made in relation to any matter that I have indicated were finally determined in the earlier determination.

3 FURTHER REPRESENTATIONS

- 3.1 In its further representations, the Appellant inserted its responses in the previous determination:
 - 3.1.1 "Please see my replies in red ink – thank you.
 - 3.1.2 *1.3 In relation to the discrepancies as to the amounts that relate to director costs, I am providing the opportunity to both the Appellant and the NHS BSA to explain whether the £44,800 was part of the original claim and if so, why the deduction of the £29,539 from the outstanding £51,072.17 does not equate to the same amount as the director costs.*
 - 3.1.3 I am not sure why the amounts do not equate. From my point of view, I have studied the correspondence from NHSBSA on 21/04/2022 which had an attached document named "Assessed evidence FRA82 (1)" in which NHSBSA states under 'unacceptable' [sic] tab that RP LOGS, LOCUM CLAIM FORMS (£8648) and numerous JPEG pictures of STAFF WAGE SLIPS (totaling [sic] circa £22k) were unacceptable [sic]. In other communications NHSBSA also repeatedly stated the Director costs of £44,800 were being reviewed as they required further guidance from DoH. I believe these figures could have been confused due to different amounts being used due to NHSBSA working off the wrong claim form initially (previously explained).
 - 3.1.4 *1.4 Additionally, I am providing the NHS BSA with the opportunity to: ... 1.4.2. provide its view on recording director overtime costs in the company's director loan account;*
 - 3.1.5 Please note, I have essentially followed all of NHSBSA's requests for evidence regarding the Director Costs, of which I must add, many other contractors got paid for providing less evidence than myself.
 - 3.1.6 *1.4.3 provide its view on the conflicting nature of the overtime across the invoice and alarm log;*
 - 3.1.7 After reviewing my evidences, I would like to add that the alarm logs were just an indication of opening and closing times, to support staff costs and locum costs, as well as superintendent overtime. The alarm logs do NOT add any evidence towards the Director Costs (as stated in the Director Costs invoice, the 2 hours per day worked by Director were "2 hours overlap MON to THURS, 2 hours on SUN from home").
 - 3.1.8 *1.4.4 indicate whether the hourly rate of £80 an hour for director overtime is appropriate and if not, why not.*

- 3.1.9 From my point of view, I have added evidence with detailed business turnover calculations to support my claim that £80 per hour was a fair if not low figure, and also during covid pandemic where locums were working at £60 to £70 per hour.
- 3.1.10 *1.5 Additionally, I am providing the Appellant with the opportunity to:
1.5.1 indicate whether it is relying on the alarm log and if so, provide comments on the matters I raise in this determination in respect of the alarm log;*
- 3.1.11 In terms of Director Costs, I am not relying on these logs for these as explained earlier.
- 3.1.12 *1.5.2 provide an explanation of the conflicting nature of the overtime across the invoice and alarm log.*
- 3.1.13 Alarm logs were originally added as evidence to support claims of locum costs and staff/superintendent costs and/or overtime in previous claims. Alarm logs here, do not add weight to Director Costs claim, as Director Costs were incurred during middle of working day or within normal opening hours MON to THURS and working from home on SUN only.
- 3.1.14 *8.29 It appears that the only element of additional staff costs that remains unresolved is director costs. The Appellant indicates that this amounts to £44,800. Although not specifically stated, I assume the NHS BSA agrees that director costs is the only unresolved element.*
- 3.1.15 I would agree on this point.
- 3.1.16 *8.34 The NHS BSA indicates that the following was provided to it by the Appellant:... 8.34.2 an alarm log;...*
- 3.1.17 Not related to Director Costs claim
- 3.1.18 *8.37 The Appellant, in its observations on the appeal, states that the invoice was produced after the work was carried out and this is usual practice. The Appellant indicates that this is supported by the reference to the dates worked in the actual invoice and also supported by the accountant's letter. The Appellant goes on to state that the amount of £44,800 remains outstanding and is owed to the director and that the non-payment was due to the company not having the funds and so is a debt on the companies accounts.*
- 3.1.19 This is normal practice to many companies who only receive an invoice AFTER work has been completed, im [sic] sure you must agree too. The NHSBSA also asked for an accountant letter to prove these funds are owed to the Director, but then rejected the evidence, which I found very strange.
- 3.1.20 *8.38 I agree with the Appellant that it is not unusual for work to be invoiced later. If there is evidence that the work was actually carried out during the relevant period then I consider that an invoice for that work dated after the end of the period should not be a reason not to pay.*
- 3.1.21 Thank you for this comment.
- 3.1.22 *8.39 While the invoice provides an explanation of how the invoiced amount has been calculated, I must highlight my comments later in this determination as to the conflicting evidence in relation to the overtime work.*
- 3.1.23 I am hoping this issue has now been settled in terms of the Alarm Log.

- 3.1.24 *8.41 My view is that the accountant's letter cannot be relied upon as evidence that the director actually worked the hours the Appellant contends. It is simply evidence that the Appellant has been invoiced for an amount for director costs. I note that the amount referred to aligns with the amount in the invoice.*
- 3.1.25 I must bring to your attention; these hours were worked and there is no fabrication here. Please appreciate the pressures on pharmacy during the depth of the pandemic, the nature of the front-line risks involved, it would be absolutely preposterous to think that a Director would not have been involved in the day to day running during this time at all. I would also like to add that many claimants also used the same procedure for their evidences to gather evidence of Director Costs, and have been paid in full. I am not sure if there is any other way to comprehensively prove that a Director did NOT work these hours.
- 3.1.26 *9.3 In relation to the discrepancies as to the amounts that relate to director costs, I am providing the opportunity to both the Appellant and the NHS BSA to explain whether the £44,800 was part of the original claim and if so, why the deduction of the £29,539 from the outstanding £51,072.17 does not equate to the same amount as the director costs.*
- 3.1.27 The Director Costs was definitely part of the original claim.
- 3.1.28 *9.5 Additionally, I am providing the Appellant with the opportunity to: 9.5.1 indicate whether it is relying on the alarm log and if so, provide comments on the matters I raise in this determination in respect of the alarm log;*
- 3.1.29 Not relying on alarm log for Director Costs as stated in invoice and explanations previously, Director worked 2 hours overlap and weekends from home.
- 3.1.30 *9.5.2 provide an explanation of the conflicting nature of the overtime across the invoice and alarm log.*
- 3.1.31 Done
- 3.1.32 I thank you [NHS Resolution] for combing through this appeal and would ask you to come to a wift [sic] and just decision regarding the amounts owed. I have been asked for evidences and explanations regarding this claim on numerous occasions spanning back almost 2 years – it has taken up too much of everyone's time, I am hoping we can settle this after today.”
- 3.1.33 The Appellant did not provide any further evidence to support its claim.
- 3.2 In its further representations, the NHS BSA stated:
- 3.2.1 “In regard to the above, please find further comment from the NHSBSA laid out in such a manner as to answer NHS Resolution's expectations:
- 3.2.2 1.4 Additionally, I am providing the NHS BSA with the opportunity to:
- 3.2.3 1.4.1 provide its original decision;
- 3.2.4 Please find attached the NHSBSA's original determination, **Reimbursement for Covid 19 Costs - NHSBSA Final Determination FRA82.msg**
- 3.2.5 As the Appellant has remarked, and the NHSBSA has acknowledged, the final determination table was based on the Appellant's original claim form and not an updated claim form which was sent at a later date.

3.2.6 The below is a determination table based on the updated claim form. This was the version shared with the independent review panel:

Category of claim	Claimed amount	Paid to date	Outstanding
Additional COVID-19 staff costs	£126,856.00	£75,783.73	£51,072.27
Costs for COVID-secure premises	£16,308.00	£16,308.00	£0.00
Additional COVID-19 IT and communication costs	£5,080.00	£5,080.00	£0.00
Closures for infection control purposes	N/A	N/A	N/A
Total	£148,244.00	£97,171.83	£51,072.27

3.2.7 1.4.2 provide its view on recording director overtime costs in the company's director loan account;

3.2.8 The NHSBSA has no concern regarding the use of a director loan account. Its understanding is that this is common practice. However, supporting evidence should be provided detailing the work that was carried out for which the payment(s) are attributable. The payments should also be detailed in an official capacity such as with account statements.

3.2.9 The accountant's letter (**ALG DLA letter.pdf**) confirms the allocation of the costs to the loan account but no further supporting evidence has been provided to the NHSBSA.

3.2.10 1.4.3 provide its view on the conflicting nature of the overtime across the invoice and alarm log;

3.2.11 The conflicting information has come about from the NHSBSA having received evidence quoting different values for director costs across multiple documents.

3.2.12 One document shows £40,594.40, found in **Blackstone Alarm Log PM.pdf**. This same value is also found in **director overtime.pdf**, albeit there is a difference of £0.40 for the dispensing technician. Both documents indicate that the director was working as a superintendent pharmacist alongside a dispensing technician. It is confusing to have the cost of the dispensing technician included in both pieces of evidence and totalled with the cost of the director/superintendent pharmacist. The NHSBSA has to assume that these are two different individuals and that the dispensing technician is not a director. However, it is not clear if this assumption is correct and would welcome clarity from the Appellant.

3.2.13 The second value, £44,800.00, can be found in **ALG DLA letter.pdf**, **COVID DIRECTOR COST INVOICE LARGE.pdf** and **director overtime.pdf**.

3.2.14 The document, **director overtime.pdf**, which includes both values, states that both are comprised of overtime. Again, this document does not make it clear if these are values owed to two different individuals, if it is for one individual carrying out two separate pieces of work, or one individual where the values overlap. The title of the document does state "overlap" but it is unclear what is meant by this.

3.2.15 The NHSBSA is unsure if the director's costs are a combined total of £81,045.00 and a separate £4,349.40 for the dispensing technician.

3.2.16 The NHSBSA does not disagree that invoices are usually produced after work has been carried out. However, the invoice is dated 30/09/2021, approximately

6 months after the timeframe quoted on the invoice. It would be more usual for an invoice, particularly an invoice of this value, to be produced much sooner after the work was completed. The date of the invoice is 3 days after the NHSBSA requested evidence from the Appellant for their claimed costs, see delivery and read receipts (*Delivered_Evidence Request for Covid-19 cost-FRA82.msg; Read_Evidence Request for Covid-19 cost- FRA82.msg*).

- 3.2.17 1.4.4 indicate whether the hourly rate of £80 an hour for director overtime is appropriate and if not, why not.
- 3.2.18 The NHSBSA has operated this service on the behalf of the Department of Health and Social Care. DHSC has not directed the NHSBSA to pass judgement on the appropriateness of what a private limited company chooses to pay an employee.
- 3.2.19 The NHSBSA's role, with regard to this service, was to provide assurance to DHSC that reimbursement has been made to the pharmacy for only those costs that have been genuinely incurred."
- 3.2.20 The NHS BSA provided supporting documents as listed within its comments.

4 FURTHER OBSERVATIONS

4.1 The Appellant stated:

4.1.1 In response to 3.2.8 - 3.2.9 the Appellant stated:

4.1.2 "The NHSBSA asked for numerous evidences regarding director costs, all of these were given to the NHSBSA. This is the first I am hearing that supporting work should have also been detailed, (although it was done so in the invoice for the director costs) and the fact that they say 'no supporting evidence has been provided to the NHSBSA', what further supporting evidence to they require?"

4.1.3 In response to 3.2.11-3.2.16 the Appellant stated:

4.1.4 "The alarm log shows when a director stayed behind to complete work alongside a technician. The invoice for the £44,800 which is being disputed is for separate work carried out. I have made this clear in my last response to NHS resolutions. The £44,800 included tasks which are stated on the invoice. The director that completed the work at 2 hours per day is separate to the director who is stated in the alarm logs. The company has 3 directors and one is Superintendent. The NHSBSA is missing the last line on the invoice which states "HOURS WORKED DURING 1ST MARCH 2020- 31ST MARCH 2021" and yes the invoice is dated 30/09/2021, I am glad NHSBSA agree that an invoice is dated after work is completed. At the time of the director's costs, we were unsure what evidence was required as the NHSBSA did not make it clear what was needed for director costs."

4.2 The NHS BSA stated:

4.2.1 "The NHSBSA wishes to make final comment on the following statement in the Appellant's further comments:

4.2.1.1 "8.41 My view is that the accountant's letter cannot be relied upon as evidence that the director actually worked the hours the Appellant contends. It is simply evidence that the Appellant has been invoiced for an amount for director costs. I note that the amount referred to aligns with the amount in the invoice. – I must bring to your attention; these hours were worked and there is no fabrication here. Please

appreciate the pressures on pharmacy during the depth of the pandemic, the nature of the front-line risks involved, it would be absolutely preposterous to think that a Director would not have been involved in the day to day running during this time at all. I would also like to add that many claimants also used the same procedure for their evidences to gather evidence of Director Costs, and have been paid in full. I am not sure if there is any other way to comprehensively prove that a Director did NOT work these hours.”

- 4.2.2 Owing to the above statement, and the Appellant’s further comments that the alarm log is not related to the director costs, there does not appear to be any evidence available to verify the number of hours worked and thus the claim of £44,800.00.
- 4.2.3 It is not for the NHSBSA to disprove that hours have been worked, rather it is for the claimant to prove that they have been worked. The Appellant submitted a payment claim to the NHSBSA for public funds under signed agreement on the claim form that “I will provide all evidence to support claims if required to the Department of Health and Social Care (DHSC), or their appointed officers, NHS Business Services Authority (NHSBSA)” ***Pharmacy COVID19 costs claim form - UPDATED CLAIM.xlsx***
- 4.2.4 The NHSBSA can confidently state that in no other cases where evidence has been requested from a pharmacy which has claimed director costs, have there been payments made where a contractor has not had some evidence of the hours having been worked and recorded.”
- 4.2.5 The NHSBSA provided further supporting documents as listed in its comments.

5 CONSIDERATION

- 5.1 This determination should be read alongside my previous determination which set out the relevant provisions of the Drug Tariff.
- 5.2 I note that this appeal relates only to the additional Covid-19 staff costs claimed by the Appellant. I also note that, in its further representations, the NHS BSA did not address the issue that, as provided in the table at paragraph 3.2.6, there was only £51,072.27 outstanding for additional staff costs (“director costs”), yet the amounts claimed by the Appellant totalled £74,339.00.
- 5.3 The Appellant has attempted to explain this at paragraph 3.1.3, above, however the costs that it has listed as being for locum cover and extra dispensing staff (£8,648 and £22,000, respectively) are different from the amounts listed in the previous determination (£7,100 and £22,439, respectively). Further, when either amounts are combined with the claimed director costs (£44,800) they far exceed the outstanding amounts for staff costs. I, therefore, consider that no additional clarity as to the amount owed compared to the amount outstanding has been provided by either party.
- 5.4 I note that the NHS BSA has had the opportunity to comment on this issue twice, as part of its further representations and further observations. The Appellant has helpfully confirmed that the £44,800 claimed for director costs did indeed form part of its initial claim. I also note that the NHS BSA has admitted that there were some mistakes made as part of the NHS BSA’s original determination. Since there has been no suggestion to the contrary, I determine that, should the director costs be determined to be payable to the Appellant, the amount payable should be the full £44,800.00 and not the outstanding £21,533.00 that remains unpaid under the category of additional staff costs.
- 5.5 The Appellant has stated that the evidence provided regarding the director costs is as follows:

- 5.5.1 *COVID DIRECTOR COST INVOICE LARGE.pdf* (the “invoice”);
- 5.5.2 *Director overtime.pdf* (the “overtime record”); and
- 5.5.3 *ALG DLA letter.pdf* (the “accountant’s letter”).
- 5.6 I note that in my previous determination I requested that the Appellant explain whether *Blackstone Alarm Log.pdf* (the “alarm logs”) were being relied on in order to further evidence the director costs. The Appellant has responded at paragraph 3.1.11 above that it is not wishing to do so. I therefore make no further determination regarding the alarm log. I will now turn to the other evidence provided.
- 5.7 I made comments in my previous determination on the need for evidence and that, as an overarching principle in relation to the claims for reimbursement of additional staff, if the evidence provided is of a form, type and nature that reasonably satisfies me that additional staffing costs of a kind and nature listed in Table 1 were incurred and the amount is reasonable taking into account the evidence, then I consider that the claim should be reimbursed.
- 5.8 I must reiterate that a pharmacy must accept that if additional staff are engaged and the pharmacy seeks reimbursement in respect of those additional staff, then the extent of reimbursement will depend on the form, type and nature of the evidence. The stronger and more cogent the evidence, the higher the likelihood that the reimbursement claim will be successful.
- 5.9 The Appellant has provided the overtime record which states:
- 5.9.1 *“Superintendent / director worked an extra 2 hours per day £80 per hour additional director cover as overlap [sic] mon to Thursday 2 hours per day, and 2 hour on Sunday from home for improvement of pharmacy SOPs, working conditions, updating knowledge, [sic] procurment of stock and missing orders.”*
- 5.10 This document lists the type of work carried out by the director. I consider that this document is an explanation by which the director costs were calculated, rather than being reasonably objective evidence of the work. I note that it does not provide the level of detail that one would expect in any form of formal time recording i.e. dates and times worked. Instead, this appears to be an average, or estimate, of time worked, I consider that it cannot be reasonably considered to be objective evidence of the work being carried out.
- 5.11 In relation to the invoice, in my previous determination, I indicated that the fact that the invoice is dated after the work occurred was not incompatible with the costs being incurred during the period specified in the Drug Tariff. Both parties have agreed this. The NHS BSA has raised the issue that the invoice is dated 3 days after the request for evidence, to which the Appellant has not commented. The NHS BSA does not express any comment as to the meaning of this and so I do not consider this any further.
- 5.12 In relation to the contents of the invoice, in my previous determination, I had assumed that the alarm logs had been provided by the Appellant to support the costs claimed. This is not the case.
- 5.13 It is my view that the Drug Tariff requires reasonable evidence to be provided to support a claim for costs. If clearly objective evidence such as payslips cannot be provided, a reasonable level of corroborating evidence is necessary.
- 5.14 I consider that there is no supporting evidence to corroborate the amounts claimed in the invoice. The invoice lacks details as to the days worked, the specific hours worked and has the same deficiencies as the overtime record.

- 5.15 I note that as part of my previous determination I considered that the accountant's letter was not evidence of the director having worked the hours claimed but instead that there had been an invoice for the amounts claimed in the director costs.
- 5.16 The Appellant has responded at paragraph 3.1.25 and stated that the hours were indeed worked and that it would be difficult to prove that the director had not worked these hours. The NHS BSA has responded that it is not for them to disprove the information provided but rather for the Appellant to evidence any claims made under the Drug Tariff.
- 5.17 I am sympathetic to the situation that the Appellant finds itself in and do not wish to in any way diminish the hard work and risks involved in keeping a pharmacy open during the pandemic.
- 5.18 Having due regard to the Drug Tariff, however, it does not make provision for me to ignore the need for evidence. I agree with the NHS BSA that the requirement is for the pharmacy claiming under the Drug Tariff to provide reasonably satisfactory evidence to support any amount claimed.
- 5.19 I note that in its further representations the Appellant explained why the alarm logs did not support the claimed director costs with reference to the director work being done during regular working hours during the middle of the day. It is explained that these hours are "overlap" but the meaning of this has not been explained during this appeal.
- 5.20 Given the lack of clearly objective evidence of the additional hours worked, I have considered the extent of corroborating evidence and for the reasons given in this determination concur with the NHS BSA's further observations that there does not appear to be any corroborating evidence to verify the claimed hours.
- 5.21 I am not reasonably satisfied that the necessary level of evidence has been provided and I therefore determine that the remaining £44,800.00 claimed by the Appellant for director costs need not be paid by the NHS BSA.

6 DECISION

- 6.1 I have had regard to the Payment Disputes Directions which provide me with three options:
- 6.1.1 dismiss the appeal and confirm the decision;
 - 6.1.2 substitute for the decision any decision could have been taken; or
 - 6.1.3 quash the decision, with or without remitting the matter for it to be taken again subject to such directions as NHS Resolution considers appropriate.
- 6.2 I, as an authorised officer of NHS Resolution, dismiss the appeal and confirm the decision of the NHS BSA not to pay the amounts appealed by the Appellant.

**Head of Appeals
NHS Resolution**