

232 EVIDENCE OF A TEST RESULT SHOWING AN ALCOHOL CONCENTRATION OF 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS: OFFENSES INVOLVING "UNDER THE INFLUENCE" — § 885.235(1g)(b)

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).¹

WHERE TEST RESULTS SHOWING 0.04 GRAMS OR MORE BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law provides that an analysis showing that there was [.04 grams or more but less than .08 grams of alcohol in 100 milliliters of the defendant's blood] [.04 grams or more but less than .08 grams of alcohol in 210 liters of the defendant's breath] at the time of the test may be considered by you in determining whether the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating). However, by itself it is not a sufficient basis for finding that a person was under the influence of an intoxicant at the time of the alleged (driving) (operating).

Therefore, you may consider this evidence regarding a blood-alcohol test along with all of the other credible evidence in the case, giving to it the weight you believe it is entitled to receive.²

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:³

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

COMMENT

Wis JI-Criminal 232 was originally published in 1962 and was revised in 1974, 1980, 1982, 1985, 1993, 1994, 1999, and 2004. This revision corrected a typographical error.

This instruction is cross-referenced in the instructions for operating while intoxicated offenses.

This revision reflects the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. Act 30 changed § 885.235(1g)(b) to refer to the range of 0.04 to 0.08. That section provides that results in this range are relevant evidence on the issue of being "under the influence" but are not to be given any prima facie effect. The change applies to all offenses committed on or after September 30, 2003.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of JI 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. As to alcohol test results generally, see Wis JI-Criminal 2600, Section VII.

1. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235. See Wis JI-Criminal 2600 Introductory Comment, Sec. VII., B.

2. Section 885.235(1g)(b) provides that test results in the 0.04-0.08 range are relevant evidence on the issue of being "under the influence" but are not to be given any prima facie effect.

3. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII., D.