In the Matter of:

ASHWIN ABHYANKAR, **ARB CASE NO. 11-043**

COMPLAINANT, **ALJ CASE NO. 2007-SOX-083**

v. **DATE: March 29, 2013**

COUNTRYWIDE FINANCIAL CORP.,[1]

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
I. Benjamin Blady, Esq.; *Blady Weinreb Law Group, LLP;* Los Angeles, California

For the Respondent:
Karen A. Rooney, Esq.; *Seyfarth Shaw LLP*; Los Angeles, California

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge.* Judge Royce concurring.

[1] In various submissions filed with the Administrative Review Board, counsel for the Respondent asserts that Countrywide Home Loans, Inc. is the proper party-respondent; that it has been erroneously sued as Countrywide Financial Corporation. The record does not reveal any motion or other pleading filed before the ALJ, before the ARB, or in related proceedings seeking to substitute parties or otherwise correct this asserted erroneous identification. Consequently, Countrywide Financial Corporation is maintained as the named party-respondent.

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002. 18 U.S.C.A § 1514A (Thomson Reuters 2012) (the Act or SOX), and its implementing regulations found at 29 C.F.R. Part 1980 (2012). Complainant Ashwin Abhyankar filed a complaint alleging that Countrywide Financial Corporation retaliated against him in violation of SOX's whistleblower protection provisions for complaining to his superiors about accounting inconsistencies and preferential treatment for financial consultants.

Abhyankar appeals from the Order Dismissing Complaint (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on March 21, 2011, dismissing Abhyankar's complaint. The ALJ held that Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act), which amended SOX Section 806, did not apply retroactively to this case to annul the results of a previously conducted arbitration between the parties or to entitle Abhyankar to a new hearing on the claim before the ALJ. For the following reasons, we affirm the ALJ's Decision and Order in part, reverse in part, and remand for further proceedings.

PROCEDURAL HISTORY

Abhyankar filed his SOX complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) in July 2006. D. & O. at 1. Pending completion of OSHA's investigation, Abhyankar entered into a stipulation with the Respondent to arbitrate his claims before the Judicial Arbitration & Mediation Services (JAMS) pursuant to an arbitration agreement executed between the parties in January of 2003 as part of Abhyankar's employment contract (Arbitration Agreement), and accordingly filed a demand for arbitration with JAMS, alleging various claims against the Respondent including his SOX claim. *Id.* at 2. The OSHA Regional Administrator issued findings and a preliminary order dismissing Abhyankar's complaint on July 24, 2007, whereupon Abhyankar requested a hearing before an ALJ. *Id.* Before the ALJ, the Respondent filed a Petition to Compel Arbitration and Stay DOL Administrative Proceedings Pending Arbitration (Motion to Compel) in light of the Arbitration Agreement and Abhyankar's submission of his SOX claim to JAMS. On January 22, 2008, the ALJ issued an Order granting the Respondent's motion to compel arbitration, and staying the OALJ proceedings pending completion of the arbitration (Order Compelling Arbitration), citing the requirements of the Federal Arbitration Act, 9 U.S.C.A. § 3. *Id.*

A JAMS Arbitrator held a hearing on Abhyankar's SOX claims in May and August of 2009. *Id.* On February 9, 2010, the Arbitrator issued an Interim Award finding that Abhyankar did not establish a violation of the SOX whistleblower protection provisions.[2] The Interim

[2] The interim award, which the Arbitrator finalized in November of 2009 but did not issue until February of 2010, while stating that it was "not intended to be subject to confirmation," only disposed of Abhyankar's SOX claims. Abhyankar's other claims, including a claim for monetary

Award, as the parties subsequently represented to the ALJ in several status reports pertaining to the arbitration proceedings, was nevertheless not the Arbitrator's final decision.[3]

On July 21, 2010, the Dodd-Frank Act was signed into law. Section 922 of the Act amended the SOX whistleblower protection provision, 18 U.S.C.A. § 1514A, and provided that under the SOX, pre-dispute arbitration agreements shall not be valid or enforceable.[4] *Id.* at 3. On September 10, 2010, the Arbitrator rendered, but did not formally issue, a Partial Final Award with regard to Abhyankar's SOX whistleblower claim. Subsequently, pursuant to the ALJ's order, the parties submitted briefs addressing the issue of whether Abhyankar was entitled to proceed on his SOX claim before the ALJ. Noting that the Arbitrator had not formally issued his Partial Final Award,[5] the ALJ nevertheless dismissed Abhyankar's complaint in light of the Arbitrator's decision disposing of Abhyankar's SOX claim on the grounds that it was rendered prior to enactment of the Dodd-Frank Act.

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sanctions against the Respondent, resolution of the class action portion of the case, and a determination of whether the interim award should take the form of a "Partial Final Award" were left for subsequent resolution by the Arbitrator. D. & O. at 2-3.

[3] In the ALJ orders regarding the status of the arbitration proceedings issued April 8, 2010, and August 18, 2010, the ALJ noted that the parties indicated "the decision issued by the Arbitrator in this case is not yet final." In the parties' Joint Report to the ALJ dated October 29, 2010, the parties noted that on August 18, 2010, the Respondent filed a request "that the Arbitrator make the interim partial award a Partial Final Award."

[4] On July 21, 2010, the Dodd-Frank Act was signed into law. Section 922 of the Act amended the employee protection provisions of Section 806 of Sarbanes-Oxley, 18 U.S.C.A. § 1514A, to provide the following additional subsection (e):

> (e) Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes. (1) Waiver of Rights and Remedies. The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. (2) Predispute Arbitration Agreements. No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

18 U.S.C.A. § 1514A(e), *as amended*, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010). The law went into effect on July 22, 2010, one day after the date of enactment of the Dodd-Frank Act. Pub. L. No. 111-203, § 4.

[5] The ALJ noted that the Arbitrator had not formally issued his Partial Final Award as of November 22, 2010, the date upon which the parties' respective briefs were submitted. D. & O. at 4 n.4. Before the Administrative Review Board on appeal, the Respondent has indicated in its brief in opposition to Abhyankar's petition for review that the Arbitrator's Partial Final Award "became final for purposes of judicial review on February 24, 2011." See RJN, Ex. C at 4:10-11.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to issue final agency decisions under the Sarbanes-Oxley Act (SOX) to the Administrative Review Board (ARB or Board). *See* Secretary's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 222 (Nov. 16, 2012). *See also* 29 C.F.R. § 1980.110. Pursuant to SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b). In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews an ALJ's conclusions of law de novo. *See Getman v. Sw. Sec., Inc*., ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005). The ARB will affirm an ALJ's order granting summary dismissal if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.

DISCUSSION

The issue before us is whether Section 922 of the Dodd-Frank Act, which became effective July 22, 2010, applies to this case, thereby permitting Abhyankar to proceed with his SOX whistleblower claim before the ALJ notwithstanding the arbitration proceedings, to which he had submitted his claim prior to enactment of Section 922.

The ALJ held that applying Section 922 of the Dodd-Frank Act to permit litigation of Abhyankar's SOX complaint before the ALJ would have impermissible retroactive effects. In reaching this conclusion, the ALJ first determined, pursuant to *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1944), that Congressional intent as to the retroactive application of Section 922 of the Dodd-Frank Act is unclear. The ALJ agreed with the court in *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011), that "Section 922 'principally concerns' jurisdiction, rather than substantive contractual rights," and therefore fell "into the category of 'jurisdictional statutes,' which the Supreme Court has ruled may be applied retroactively insofar as such statutes 'speak to the power of the court rather than to the rights or obligations of the parties,' and 'take[] away no substantive right but simply change[] the tribunal that is to hear the case.'" D. & O. at 7 (quoting *Pezza*, 767 F. Supp. 2d at 233). However, given the procedural posture of Abhyankar's arbitration, wherein his SOX claim had been litigated and ostensibly resolved, the ALJ concluded that Section 922 did not permit re-litigation of his arbitrated SOX complaint. Retroactively applying Section 922, the ALJ reasoned, would have impermissibly affected the Respondent's substantive rights that it had secured as a result of the arbitration. D. & O. at 8-11.

Prior to passage of the Dodd-Frank Act, complaints alleging a violation of SOX Section 806 could be subject to mandatory arbitration. *See, e.g., Guyden v. Aetna, Inc.*, 544 F.3d 376, 384 (2d Cir. 2008). However, after July 21, 2010, the enactment date for the Dodd-Frank Act,

SOX whistleblower claims are no longer arbitrable. Section 922 of Dodd-Frank amended SOX Section 806 to render unenforceable pre-dispute arbitration agreements requiring arbitration of whistleblower complaints. Section 806 now provides in pertinent part:

> No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under [the SOX whistleblower protection provision].

18 U.S.C.A. § 1514A(e)(2).

Here, the Respondent argues that the ALJ's ruling that Dodd-Frank Section 922 does not apply should be sustained because the events giving rise to Abhyankar's SOX complaint occurred prior to the passage of the Dodd-Frank Act, thus subjecting Abhyankar's complaint exclusively to the arbitration to which the parties had agreed in 2003. Applying Section 922's ban on arbitration, the Respondent argues, would have an impermissible retroactive consequence for the parties' substantive rights. For the following reasons we disagree with the ALJ, and hold that the Dodd-Frank amendment does apply.

As the ARB noted in *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (ARB Mar. 31, 2011), a balancing of two competing rules of statutory construction is required to determine whether to apply a statute to a pending case. The first rule of construction is that "a court is to apply the law in effect at the time it renders its decision." *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). Competing against this is the rule of construction that "[r]etroactivity is not favored in the law." *Landgraf*, 511 U.S. at 264. "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

As the District Court recently noted in *Wong v. CKX, Inc*., 890 F. Supp. 2d 411 (S.D.N.Y. 2012), in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), the Supreme Court articulated a three-step process for determining whether the retroactive application of a statute would affect vested rights that existed prior to the statute's enactment:

> First, a court must look to "whether Congress has expressly prescribed the statute's proper reach, and in the absence of language as helpful as that [a court should] try to draw a comparably firm conclusion about the temporal reach specifically intended by applying [the] normal rules of construction." *Id.* (quoting *Landgraf, supra*, 511 U.S. at 280, and *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)). If this first step fails to provide an answer, a court should then "ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment." *Id.* (quoting *Landgraf*, 511 U.S. at 278) (alterations in original).

> Finally, if the court finds that applying the statute would have a retroactive consequence, then a court should apply the presumption against retroactivity and construe "the statute as inapplicable to the event or act in question." *Id.* at 37-38.

Wong, 890 F. Supp. 2d at 421-422.

With regard to the first analytical step the Supreme Court identified, we find no express congressional intent either in the text of Section 922 of the Dodd-Frank Act nor in its legislative history regarding retroactivity or whether Section 922 is to apply to pending cases. *Accord Pezza*, 767 F. Supp. 2d at 232 (finding that "congressional intent regarding the temporal reach" of Section 922's ban on arbitration "to be far from clear"). Thus, we agree with the ALJ that the prescribed first step in analysis provides no clear answer to the question of retroactivity.

Consequently, per *Landgraf's* instruction, we turn to the task of determining whether Section 922, if applied to Abhyankar's SOX claim, would have an impermissible retroactive effect. In the second step of the analysis, as noted in *Wong*, "it is necessary to determine whether applying this statute to the current dispute would 'have a retroactive consequence in the disfavored sense of affecting substantive rights.'" 890 F. Supp. 2d at 422 (quoting *Fernandez-Vargas*, 548 U.S. at 37). In turning to this question, we are mindful of the Supreme Court's admonition that:

> [D]eciding when a statute operates "retroactively" is not always a simple or mechanical task. . . . A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. . . . [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 511 U.S. at 268, 269 (citations omitted).

The second step in the analysis requires careful scrutiny because Section 922 arguably falls "within the scope of two competing types of statutes referred to in *Landgraf*." *Pezza*, 767 F. Supp. 2d at 232. The first category of statutes, for which retroactive application is disfavored, are those that, when applied retroactively, affect "contractual or property rights." *Landgraf*, 511 U.S. at 271. Given that the arbitration agreement in this case arises out of an employment contract entered into prior to passage of Dodd-Frank, the Respondent's position that the statute should not be applied to this dispute has some merit.

The second category are "intervening statutes conferring or ousting jurisdiction." *Landgraf*, 511 U.S. at 274. Application of an intervening jurisdictional statute is generally considered proper because the legislation "takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). "Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Id.* (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992)). "Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997) (citations omitted).

"By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Consistent with *Mitsubishi*, the Second Circuit has held that substantive rights are "not in any way diminished" by a determination of whether or not a dispute should be heard in an arbitral or a judicial forum. *Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 205 (1999).[6]

We are of the opinion that Dodd-Frank Section 922 appropriately falls within the second category of jurisdictional statutes. We are in agreement with both *Pezza* and *Wong* that despite altering a provision of a contract, Section 922 principally concerns the type of jurisdictional statute envisioned in *Landgraf*. The ban on the arbitration of SOX whistleblower claims found within Section 922 primarily affects the jurisdiction to hear the substantive claim.[7]

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[6] *Accord Wong*, 890 F. Supp. 2d at 423 ("The right to have a dispute heard in an arbitral forum is a procedural right that affects the forum that will decide the substantive rights of the parties."); *St. Paul Fire & Marine Ins. Co. v. Emp'rs Reinsurance Corp.*, 919 F. Supp. 133, 139 (S.D.N.Y. 1996) (holding that arbitration clauses only affect "procedural right[s]" and "the parties' substantive rights remain amply protected).

[7] Indeed, to construe the arbitration agreement in this case as anything more than a jurisdictional substitution of forums for deciding Abhyankar's substantive rights would run afoul of Department of Labor case authority that has viewed settlement agreements in whistleblower cases that could be interpreted as waiving future statutory rights as void on their face. *See, e.g.*, *Smyth v. Regents Univ. of Calif., LANL*, ARB No. 98-068, ALJ No. 1998-ERA-003 (ARB Mar. 13, 1998); *McCoy v. Utah Power*, No. 1994-CAA-001 (Sec'y Aug. 1, 1994); *Doyle v. Hydro Nuclear Servs.*, No. 1989-ERA-022 (Sec'y Mar. 30, 1994); *Page v. Kirshenbaum Invs.*, No. 1992-CAA-008 (Sec'y Dec. 2, 1992); *Crider v. Holston Def. Corp.*, No. 1988-CAA-001 (Sec'y Mar. 1, 1989); *Johnson v. Transco Prods.*, Inc., No. 1985-ERA-007 (Sec'y Aug. 8, 1985). As the Secretary of Labor stated in *Ass't Sec. & Self v. Carolina Freight Carriers Corp.*, No. 1991-STA-025 (Sec'y Aug. 6, 1992), "[I]independent statutory rights 'cannot be abridged by contract or otherwise waived,' . . . 'labor contracts cannot operate to deprive employees of rights specifically protected by federal statutes.'"

Consequently, we agree with the ALJ that Dodd-Frank Section 922 constitutes a jurisdictional provision, and that it may be retroactively applied to conduct arising prior to its enactment in appropriate cases.

However, as the Supreme Court pointed out in *Hughes Aircraft*, merely because a statute is jurisdictional does not mean that it may not affect the substantive rights of the parties. 520 U.S. at 950-951. Statutes that are phrased in jurisdictional terms "[are] as much subject to [the] presumption against retroactivity as any other." *Id.* at 951. This is because, regardless of whether a statute is phrased as "jurisdictional" or "substantive," there is still "a general presumption against retroactivity" and statutes that are "jurisdictional" can affect "the underlying primary conduct of the parties" and their substantive rights, making them impermissibly retroactive. *Id*.

In this case, the ALJ reasoned that the Respondent possessed "settled expectations" and a "reasonable reliance" interest arising out of the transactions that had occurred in the arbitration proceedings prior to Dodd-Frank's enactment in July of 2010 that precluded application of Section 922. The ALJ cited the litigation practice that had occurred and the Arbitrator's February 2010 determination, and viewed the actions the Arbitrator subsequently took as "ministerial rather than substantive."[8] Ignored, however, was the legal significance of the evidence before the ALJ that the Arbitrator's final award with respect to Abhyankar's SOX claim was not issued prior to the effective date of the Dodd-Frank Act.[9] Under the JAMS Rules pursuant to which the arbitration was held, the Arbitrator's decision did not become final until formally issued on February 24, 2010, as a Partial Final Award.[10] Until the ALJ formally issued

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Slip op. at 4 (quoting, inter alia, *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1064 (5th Cir. 1991)). *See also Rys v. Spernak Airways, Inc.*, ALJ No. 2003-AIR-013 (ALJ Apr. 1, 2003).

[8] D. & O. at 10.

[9] As previously noted, at footnotes 4 and 5 *infra*, in status reports regarding the arbitration presented to the ALJ in April and August of 2010, the parties represented to the ALJ that the decision issued by the Arbitrator prior to July 2010 was "not yet final," (April 8, 2010 and August 18, 2010 ALJ orders) and that on August 18, 2010, the Respondent filed a request "that the Arbitrator make the interim partial award a Partial Final Award" (Joint Report to the ALJ dated October 29, 2010). See also, D. & O. at 4 n.4 (noting Abhyankar's representation that the Arbitrator had not formally issued the Partial Final Award as of November 22, 2010).

[10] JAMS Rule 24(k) states in relevant part: "The Award is considered final, for purposes of . . . a judicial proceeding to enforce, modify or vacate the Award . . . fourteen (14) calendar days after service is deemed effective if no request for a correction is made. . . ."

the Partial Final Award, neither party had any vested legal rights in the award, including the right to challenge the Arbitrator's decision in court.[11]

Relying upon *Landgraf* for the proposition that the retroactive application of a new rule or statute depends upon the procedural posture of a case,[12] a long line of federal decisions have focused upon whether a final decision had already been issued under the previous statute or rule prior to the new statute or rule's enactment. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 229 (1995) (citing *Landgraf* and noting that new rules of pleading and proof may be applied after the cause of action arises and after the old rules "have been applied in a case but before final judgment has been entered"); *S&D Trading Acad., LLC v. AAFIS Inc.*, 336 Fed. Appx. 443, 452 (5th Cir. 2009) (refusing to retroactively apply new deposition fee rules applicable at trial court level in case already decided by trial court when new rule was enacted); *U.S. v. Ballares*, 317 Fed. Appx. 36, 38 (2d Cir. 2008) (applying amended Federal Rule of Criminal Procedure 59 because the amendment became effective after the defendant pled guilty, but "before the matter was referred to the magistrate" for hearing and decision); *Cruse v. Comm'r of Soc. Sec.*, 502 F.3d 532, 541-42 (6th Cir. 2007) (refusing to apply new medical evidence rule to Social Security case where final administrative decision was issued two years prior to date new rule became effective); *Valerio v. Crawford*, 306 F.3d 742, 766 (9th Cir. 2002) (rejecting criminal defendant's request to apply expanded habeas certification rule where "the district court's order denying [certification] was entered before the effective date of the Rule"); *Shipes v. Trinity Indus.*, 31 F.3d 347, 347-48 (5th Cir. 1994) (applying *Landgraf* and refusing to retroactively apply new expert witness fee rules applicable at trial court level in case already decided by trial court when new law was enacted).

Based on this line of case authority, and given the fact that the Arbitrator did not formally issue the Partial Final Award until February of 2011, we conclude that application of Section 922 to this case does not affect the substantive rights of the parties. Therefore, applying Section 922 to this dispute would not have a disfavored retroactive consequence. Because the parties' substantive rights remain unaffected, we hold that Dodd-Frank Section 922 applies to Abhyankar's SOX whistleblower claim.

In closing, we address the Respondent's argument that Abhyankar waived his right to rely on the Dodd-Frank amendment before the ALJ (and on appeal to the ARB) because he did not raise the intervening legislation before the Arbitrator as a challenge to the Arbitrator's jurisdiction. We reject the Respondent's argument for several reasons. First and foremost, the ALJ's jurisdiction vis-à-vis the arbitration proceedings is not that of an appellate body presiding in review of the arbitration. Thus, there is no basis for holding that a party is barred from raising before an ALJ arguments or defenses not raised before an arbitration proceeding. In any event, it is fairly well established that a challenge to subject matter jurisdiction may be raised at any stage

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[11] The Respondent acknowledges as much. The Respondent indicated in its brief before the Board in opposition to Abhyankar's petition for review that the Arbitrator's Partial Final Award "became final for purposes of judicial review on February 24, 2011." See RJN, Ex. C at 4:10-11.

[12] *Landgraf*, 511 U.S. at 275 n.29.

of the proceedings. *See Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). Second, we note that Abhyankar's challenge before the ALJ to the Arbitrator's jurisdiction preceded the enactment of Dodd-Frank, beginning with his challenge to the Respondent's Motion to Compel Arbitration. Abhyankar's complaint was filed with the ALJ before the submission of his SOX claim to arbitration. Throughout the complaint's pendency before the ALJ, Abhyankar has repeatedly challenged the Arbitrator's subject matter jurisdiction of his SOX claim. The fact that he did not raise Section 922 of Dodd-Frank as a defense before the Arbitrator does not bar Abhyankar from raising it before the ALJ or before the ARB on appeal.

CONCLUSION

For the reasons set forth above, the ALJ's Order Dismissing Complaint is **VACATED.** The case is **REMANDED** to the ALJ for further proceedings consistent with this Decision and Order of Remand.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

Judge Royce, concurring:

I concur with the majority's decision to remand this matter to the Administrative Law Judge based upon the retroactive application of Dodd-Frank Section 922. In my view, however, Congress sought to clarify SOX Section 806 through enactment of Section 922 of the Dodd-Frank Act. As a consequence, Section 922 does not create retroactive effects and applies to Ahbyankar's case. *See Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. at 7-16 (ARB Mar. 31, 2011).

JOANNE ROYCE
Administrative Appeals Judge